

INDIAN CASES

11/16

CONTAINING FULL REPORTS OF DECISIONS OF

The Privy Council, the High Courts of **Allahabad**,
Bombay, **Calcutta** and **Madras**, the Chief Courts
of **Lower Burma** and the **Punjab**, the Courts
of the Judicial Commissioners of **Central**
Provinces, **Oudh**, **Sind** and
Upper Burma
REPORTED IN

The following 22 Legal Periodicals:

Allahabad (1) Indian Law Reports, (2) Law Journal; **Bombay** (1) Indian
Law Reports, (2) Law Reporter; **Burma** (1) Law Times, (2) Lower
Burma Rulings, (3) Upper Burma Rulings; **Calcutta**
(1) Indian Law Reports, (2) Law Journal, (3) Weekly
Notes; **Madras** (1) Indian Law Reports, (2) Law
Journal, (3) Law Times, (4) Law Weekly, (5) Weekly
Notes; **Nagpur** Law Reports; **Oudh** (1) Cases,
(2) Law Journal; **Punjab** (1) Law Re-
porter, (2) Record, (3) Weekly Re-
porter; **Sind** Law Reporter

WITH

A large number of extra Rulings not reported elsewhere.

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Srinagar.

CONSOLIDATED

Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports, for the months of November and December 1915, with the corresponding Volumes and Pages of Indian Cases.

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(B).—13 ALLAHABAD LAW JOURNAL, FOR NOVEMBER-DECEMBER, 1915.

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1058	Emperor v. Ram Dayal ...	31	828	1109	Jiban Kuar v. Gobind Das ...	31	404
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1067	Prag Das Bhargava v. Daulat Ram ...	31	1001	1115	Ram Ugrah Pande v. Acharaj Nath Pande ...	31	899
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568	Tribhovandas Narotamdas v. Ab- dulally Hakimji Paghdivala ...	28	506	625	Secretary of State for India in Council v. Bai Rajbai ...	30	303
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580	Suleman Haji Usman v. Shaikh Ismael Shaikh Oostman ...	30	17	682	Khimji Vassonji v. Narsi Dhanji ...	28	408
587	Ramachandra Venkaji Naik v. Kallo Devji Deshpande ...	30	306	715	Joharnal Ladhoooram v. Chetram Harising ...	28	538
593	Parvatibai v. Bhagwant Vishwa- nath Pathak ...	31	280	729	Virchand Vajikaranshet v. Konda Pranjivandas Shivalal v. Ichharam Vijbhokhandas ...	31	180
600	Municipality of Ratnagiri v. Vasu- deo Balkrishna Lotlikar ...	30	390	734		30	918

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		V.	P.			V.	P.
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985	W. T. Halai v. Chaturbhuj Gopalji	31	500	1085	Emperor v. Devendra Shivappa Limbhavar	31	1008
989	Mahomed Haji Essack v. Shaikh Abdul Rahman	31	507	1087	Karl Ettlinger & Co. v. Chazandas & Co.	33	205
998	Ganga Sahai v. Kesri	30	265	1097	Bai Arrani v. Deepsing Baria	33	358
1006	Musammal Bilas Kunwar v. Desraj Ranjit Singh	30	299	1106	Pakirchand Lallubhai v. Nagen chand Kalidas	33	423
1012	Thakurani Tara Kumari v. Chatur- bhuj Narayan Singh	30	833	1115	Manilal Gangadas Desai v. Secre- tary of State for India	33	428
1022	Buddha Singh v. Lattu Singh	30	529	1131	Javer Jijibhai v. Haribhai Hansji	33	426
1040	Bai Bhicaji v. Perojahaw Jivanji Kerawalla	33	192	1134	Balappa Dundappa Todkal v. Chanbasappa Shivlingappa Patil	33	444
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1072	Emperor v. Daji Yesaba	31	994	1146	Assistant Collector of Kaira v. Vithaldas Vallavadas	33	464
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		V.	P.			V.	P.
203	In re Ma Sein Ton v. Ma Son	30	588	242	Nga Shwe Kin v. Emperor	30	133
214	Maung Ma Tun v. U Kaing	29	941	243	Maung Tun Myaing v. Nga Kauk San	30	999
216	In re Hajee Mahomed Hady v. M. Joakim	32	492	244	N. M. Dey v. Emperor	31	364
217	In re Bank of Bengal v. R. M. M. L. Muthia Chetty	30	705	246	Emperor v. Nga Aw	32	654
220	Nga Mya v. Emperor	32	641	247	S. P. Ghosh v. Emperor	30	724
234	Maung Po Shin v. Mahomed Thumbi	30	753	259	A. K. A. M. Firm v. Ahmed Suleman Mapara	33	559
237	U Wilatha v. U Thiri	30	112	261	Maung San Bwin v. A. N. K. Nagamutu	30	710
238	Ramdayal v. Kumar Gangadhar Bogla	29	943	264	Annamaly Chetty v. Ma Shwe May	33	580
239	Mi Amina v. Karam Ali	32	488	266	Basant Singh v. Burma Railways Coy.	30	278
240	Ma Tun v. Ma Waing Tha	29	892				

8 BURMA LAW TIMES, 1915—concl'd.

Page of Vol. 8 Bur. L. T. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 8 Bur. L. T. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
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269	Lall Mahomed v. Mra Tha Aung	30	20	282	Maung Po Mya v. Maung Po Kyin	30	943
273	British India Steam Navigation Co., Ltd., v. Jiwoola	30	939	283	Maung Shwe Paw v. Mi Pan Zi	31	332
274	Yang Tsz Insurance Association, Ltd., v. British India Steam Navigation Co., Ltd.	30	974	286	Emperor v. Nga E Moung	30	654
278	A. J. Robertson v. H. V. Murray	30	930	288	Zeri Khan v. Emperor	30	446
				290	Mi Mi v. Sohan Singh	33	595
				292	Mi Kyan Me v. Mi Ein Chou	33	600

(B).—8 LOWER BURMA RULINGS, FROM JULY TO DECEMBER, 1915.

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		V.	P.			V.	P.
113	Po Hman v. Maung Tin	29	756	166	Shwe Kiu v. Emperor	30	133
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143	Emperor v. Po Ba	24	946	190	Pan Nyun v. Hla Sein	30	665
145	U Wisaya v. U Zaw Ta	27	112	197	Ma Ein v. Tin Nga	30	594
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149	Ebrahim Ahmed Mehter v. S. Abdul Huq	27	879	204	Nyein Hla v. Aung Gyi	29	21
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157	San Nyein v. Ma Kyaw	33	554	208	Saw Maung Gyi v. Thu Kha	30	715
159	Arunachellam Chetty v. Meenatchi Archi	29	27	211	Arunachallam Pillay v. Iyama	29	768
163	Collector of Rangoon v. Chandrama	28	260	213	Ma Gun alias Fuljan Bibi v. R. Moniandy Survey	33	664
164	Bamsilall Abeychand v. Mohamed Ebrahim Mulla	30	675	215	In re Maung Mra Tun v. U Kaing	29	941
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				219	Bank of Bengal v. R. M. M. L. Muthia Chetty	30	765

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		V.	P.			V.	P.
83	Nga San Choin v. So Okaram	32	674	92	Nga San Baw v. Nga Lu E	33	666
86	Nga Po Hmi v. Emperor	32	677	95	Jagga v. Pala	33	817
87	Mi Man v. Maung Gyi	32	539	98	Nga Nyo v. Mi Te	33	673
89	Mi Hla Yin v. Mi Hman	33	506	101	Nga Ba Sin v. Nga Po Han	33	659
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(A).—42 I. L. R., CALCUTTA SERIES, FOR NOVEMBER-DECEMBER, 1915.

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		V.	P.			V.	P.
957	Amrita Lal Hazra v. Emperor	29	513	1140	Chaitram Rambilas v. Bridhichand Kesrichand	30	681
1029	Ram Kanai Singh Deb Darpanaha v. Mathewson	30	55	1146	Prokash Chandra Ghose v. Hasan Banu Bibi	28	450
1043	Kedar Nath Mitra v. Dina-bandhu Saha	31	626	1153	Harsha Nath Chatterjee v. Emperor	26	313
1050	Patiram Banerjee v. Kanknarran Co., Ltd.	31	607	1169	Marshall v. Grandhi Venkata Ratnam	30	4
1066	Brijnandan Singh v. Bidya Prasad Singh	29	629	1179	Tara Kumari v. Chaturbhuj Narayan Singh	30	533
1094	Indar Chand v. Emperor	33	289				
1135	Ali Hafiz v. Abdur Rahaman	32	801				

(B).—22 CALCUTTA LAW JOURNAL, FROM OCTOBER 16TH TO DECEMBER, 1915.

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380	Narak Lal v. Magoo Lal	13	455	522	Ananda Kumari Debi Choudhary v. Durga Charan Chakravarty	32	1
383	Fateh Chaud v. Narsing Das	16	988	525	Mohunt Krishen Doyal Gir v. Irshad Ali Khan	31	965
390	Gangadhar Muradi v. Bambaishi Padlihari	24	208	546	Raj Mohan De v. Mati Lal Sahu Poddar	33	331
391	Ananga Mohan Chakraverty v. Bejoy Chandra Dutta	32	491	551	Moheswar Panda v. Sunder Narain Pattanaik	33	342
394	Abjal Majhi v. Intu Bepari	32	494	552	Madhusudan Sen v. Rakhal Chandra Das Basak	30	607
397	Akinannessa Bibi v. Bepin Behari Mitter	32	499	561	Prasanna Kumari Debi v. Sris Chandra Majumdar	33	344
400	Panit Narayan Singh v. Rajkumari Goshabari Koeri	32	580	564	Mohin Chunder Pal Chowdhry v. Mirza Ahmad Ali Khan	33	346
404	Kunjamani Das v. Nikunja Behari Das	32	523	566	Bhudar Chandra Goswami v. C. R. S. Betts	33	347
409	Satya Chandra Ghose v. Ramswari Das	31	804	569	Nawab Sir Salimullah Bahadur v. Kaliprosunno Parbat	33	349
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419	Hemendra Nath Roy v. Upendra Narain Roy	32	437	577	Atinannessa Bibi v. Abdul Sobhan	32	21
452	Upendra Nath Bose v. Bindeshri Prosad	32	468	589	Tarasankar Ghose v. Baziraddi	29	476
481	Buddha Singh v. Lattu Singh	30	529				
498	Thakurani Tara Kumari v. Chaturbhuj Narayan Singh	30	833				
508	Ganga Saha v. Kesri	30	265				

(C).—19 CALCUTTA WEEKLY NOTES, FROM AUGUST 16TH TO SEPTEMBER, 1915.

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1119	Thakurani Tara Kumari v. Chaturbhuj Narayan Singh	30	833	1143	Sasibhusan Dey v. Umakanta Dey	25	171
1125	Harai Saha v. Faizur Rahman	18	839	1148	Babu Gomez v. Idoo Mian	22	654
1127	Hari Mohon Pal v. Atul Krishna Bose	32	503	1151	Rajab Ali Choudhury v. Hadayet Ali Choudhury	29	699
1129	Meher Ali v. Kalai Khalasi	29	461	1159	Syed Mohiuddin v. Pirthichand Lal Choudhury	31	664
1132	Raja Peary Mohon Mukherji v. Chandra Sekhar	33	59	1167	Dino Nath Das v. Jogendra Nath Bhounik	26	890
1141	Musammat Hira Koer v. Lachman Gope	21	958				

(C).—19 CALCUTTA WEEKLY NOTES, 1915—concl'd.

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1182	Keshab Chandra Pramanik v. Ajahar Ali Biswas ...	28 837	1287	Mahendra Nath Maity v. Giris Chandra Maity ...	31 561
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1188	Gurai Kar v. Rani Kuarmoni Singha Mandhata ...	29 312	1291	Sheogobinda Singh v. Dhanuk-dhari Singh ...	21 774
1191	Jagdeep Narain Singh v. Jaibasi Koer ...	22 928	1295	Muktanath Roy Choudhury v. Jitendra Nath Roy Choudhury ...	29 677
1198	Rani Kuarmoni Singha Mandhata v. Wasif Ali Meerza ...	28 818	1297	Sabitri Thakurain v. P. A. Savi ...	29 743
1197	Akhoy Kumar Chatterjee v. Akman Molla ...	27 397	1303	Nabaghan Badhai v. Ragonath Babu ...	30 61
1200	Promotha Nath Chakravarti v. Mohini Mohan Sen ...	31 573	1305	Rajah Ali v. Dina Nath Saha ...	33 261
1202	Balmer Lawrie & Co. v. Jadunath Bannerjee ...	27 644	1307	Chandi Prasanno Sen v. Gour Chandra Dey ...	33 434
1205	Deb Nath Das Bairagi v. Ram Sundar Barman ...	31 579	1309	Musammal Rakmini Koeri v. Nilmani Bandyopadhyaya ...	32 170
1207	Musammal Bilas Kunwar v. Desraj Ranjit Singh ...	30 299	1311	Rohim Beksh Mandal v. Shajad Ahmad Chaudhury ...	26 463
1211	Madan Mohan Chakravarty v. Sashi Bhusan Mukherji ...	31 549	1319	Matookdhari Shukul v. Jugdip Narain Singh ...	28 743
1217	Abdul Rahman Chowdhuri v. Ahmadar Rahman ...	31 554	1322	Gurbuksh Proshad Tewari v. Kali Prosad Narain Singh ...	32 167
1226	Maharam Ali v. Ayosa Khatun ...	31 562	1326	Keshari Chand Surana v. Asharam Mahato ...	33 250
1228	Kusodhaj Bhakta v. Brojo Mohan Bhakta ...	31 13	1328	Akbar Ali Khan v. Syed Abbas ...	32 164
1231	Kshirode Sundari Dasi v. Nabin Chandra Saha ...	30 64	1330	Bhuban Mohini Dasi v. Gajalakshmi Debi ...	32 119
1236	Safer Ali Mondal v. Golam Mondal ...	31 177	1332	Shaik Galim v. Sadarjan Bibi ...	29 621
1239	Indra Chand v. King-Emporer ...	33 289			

(C).—20 CALCUTTA WEEKLY NOTES, FROM NOVEMBER 22ND TO DECEMBER, 1915.

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		V.	P.			V.	P.
1	Buddha Singh v. Lattu Singh	30	529	105	A. K. A. S. Jamal v. Moolia Dawood, Sons & Company	31	949
14	Ganpat Malton v. Bishal Singh	33	978				
19	Rerki v. Lak Pati Pajari	27	39	110	Kunja Lal Banerjee v. Narsamba Debi	31	6
25	Porneshwar Dubey v. Gobind Dubey	33	190	111	Thakur Madan Mohan Nath Sahi Deo v. Maharaja Pratap Udai Nath Sahi Deo	34	22
28	Sarat Chandra Pal v. Benode Kumari Dassi	33	143	113	Atimannessa Bibi v. Abdul Solan	32	21
31	Ananda Kumari Debi v. Durga Mohan Chuckerbutty	32	1	122	Achyutananda Das v. Jagannath Das	27	739
35	Rajwant Prasad v. Mahant Ram Ratan Gir	30	849	128	Deputy Legal Remembrancer, Behar and Orissa v. Matukdhari Singh	32	137
39	Ahmadulla Chowdry v. Prayag Sahu	27	176	137	Thakur Umed Singh v. Rai Bahadur Seth Sobhag Mal Dhadhu	32	161
40	Abdur Rahaman Sarkar v. Pro- mode Behary Dutt	28	182	140	<i>In re Goherdhone Seal; Lakhyria Dasi v. Rajkishori Dasi</i>	32	3
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48	Hiranmoy Kumar v. Ramjan Ali Dewan	29	694	147	Hanuman Persad Thakur v. Jatunandan Thakur	29	787
49	Nistarini Dasya v. Sarat Chandra Mazumdar	29	680	149	Khagendra Nath Chatterjee v. Sonatan Guha	31	987
51	Loke Nath Singh v. Dhakeshwar Prosad Narayan Singh	27	465	156	Nawab Sir Salimulla Bahadur v. Rahemddi	30	68
58	Kali Charan Nath v. Sukhoda Sundari Debi	30	824	159	Kali Kanta Shaha v. Ismail	27	7
62	Bhota Santal v. Dama Santal	33	304	163	Kali Kumar Chuckerbutty v. Aslam	33	139
63	Gangadhar Pradhan v. King-Em- peror	33	626	166	Samanta Dhupi v. King-Emperor	32	132
66	J. I. J. Hyam v. M. E. Gubbay	32	53				
103	Niras Purbe v. <i>Musammat Tetri</i> Pasin	32	82				

Table 6
MADRAS HIGH COURT.

(A).—38 I. L. R., MADRAS SERIES, FOR NOVEMBER-DECEMBER, 1915.

Page of Vol. 38 I. L. R., Mad. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 38 I. L. R., Mad. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
997	Kandalam Rajagopalacharyulu v. The Secretary of State for India in Council	22	107	1028 1026	<i>Re Sinna Goondan</i> Muthu Ramakrishna Naicken v. Marimuthu Goondan	23	188
						24	363

(A).—38 I. L. R., MADRAS SERIES, 1915—concl'd.

Page of Vol. 38 I. L. R., Mad. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 38 I. L. R., Mad. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
1042	S. Chidambaram Pillai v. Mutham- mal	23	524	1125	Thayammal v. Kuppanna Komandan	26	179
1044	Re Narayana Nadan	23	479	1128	Sri Meerja Raja Sri Poosapati Vijayaraja v. Collector of Vizagapatam	25	780
1052	Kunhambi v. Kalanthar	24	528	1134	P. Alwar Chetty v. P. Chidambaram Mudali	26	792
1064	C. Prasanna Venkatachella Red- diar v. Collector of Trichi- nopoly	33	45	1140	C. Baglumatha Row Sahib v. Vellancoonji Goundan	25	941
1071	Vaikuntarama Pillai v. Anthimoo- lam Chettiar	23	799	1144	Meenackshi v. Mudiandi Panikkan	25	957
1076	Pasumarti Payidanna v. Gadi Lakshminarasamma	29	314	1155	Kanti Venkanna v. Sri Raja Cheli- kani Rama Row Garu	26	510
1088	Re Karuthan Ambalam	33	308	1158	Muthukaruppan Samban v. Muthu Samban	25	772
1091	Venkatrama Aiyar v. Krishna Aiyar	27	192	1162	Gandha Pedda Naganna v. Siva- nappa	26	232
1096	Kunthalammal v. P. N. K. Surya- prakasaroja Mudaliar	31	494	1171	Arunachala Aiyar v. T. Ramasami Aiyar	25	618
1099	Mohideen Bee v. Syed Meer Sahib	32	1002	1176	A. Thiruvengadathaiyangar v. R. Ponnappiengar	25	965
1102	James Russel McLaren v. V. Veeriah Naidu	32	1003	1184	Rajagopala Naidu v. M. R. Vijayaraghavalu Naidu	25	683
1105	Sree Sree Sree Madana Mohana Ananga Bheema Deo Kesari v. Sree Sree Sree Purushothama Ananga	24	999	1187	Davur Subba Reddi v. Kakuturi Venkatrami Reddi	26	983
1120	Devaguptapu Kameswaramma v. Vaddadi Venkata Subba Row	24	474	1192	Venkatesha Malia v. B. Ramaya Hegade	26	202

(B).—29 MADRAS LAW JOURNAL, FOR NOVEMBER-DECEMBER 1915.

Page of Vol. 29 M. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 29 M. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
617	V. Muthukumara Chetty v. Anthony Udayan	24	120	645	Vyapuri v. Sonamma Boi Annami	31	412
629	Sivasamba Iyer v. Kuppan Samban	32	709	663	Ramakrishna Pillai v. Muthuperu- mal Pillai	31	924
632	Sultain Adi Raja Ahmad Ali, Raja of Arakal v. Churia Kunhi Kannan	31	482	667	Kuthaledath Narayana Moothod v. Dewan of Cochin	30	511
639	Sree Rajah Vatsavaya Venkata Simhadri Jagapatiraja Bahadur Garu v. Sree Rajah Thyada Pasupati Rudra Sri Lakshmi Nrusimha Roopa Sudrasan- namarad Dugaraju Dakshina Kavata Dugaraju Bahadur Garu	31	255	669	Rajam Aiyar v. Anantharatnam Aiyar	31	318
				671	J. Subbier v. M. Abboy Naidu	31	502
				680	Alamelammal v. Suryapraka- saroya Mudaliar	31	491
				682	Kunthalammal v. Suryapraka- saroya Mudaliar	31	494
				685	Muthu Gounden v. Anantha Gounden	31	528

(B).—29 MADRAS LAW JOURNAL, 1915—concl'd.

Page of Vol. 29 M. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 29 M. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
693	Sillu Pedda Yelligadu v. Sree Raja Ravi Venkata Kurnara Mahipati Surya Rao	31	542	746	C. V. C. T. Chidambaram Chetty v. Ayyavu	32	919
694	K. R. Manickam Mudaliar v. Kummalungottay Munusami Naidu	31	246	749	S. V. A. R. Vellayao Chetty v. K. L. S. T. Kulandaveluappa Chetty	31	783
698	Gnanambal Ammal v. Veerasami Chetty	31	920	755	Tiruvenkata Chariar v. Thangayi Ammal	29	294
704	Firm of K. E. P. T. V. Draviam Pillai v. Cruz Fernandez	31	322	758	In re G. G. Jeremiah	31	373
708	Dharmaraja Aiyar v. K. G. Srinivasa Mudaliar	31	249	760	Para Koothan v. Para Kulla Vandu	31	720
710	Karuturi Gopalan v. Karuturi Ven- kataraghavalu	31	574	763	Sheik Ibrahim Rowther v. Muhammad Ibrahim Rowther	30	806
717	A. Bharadwaja Mudaliar v. Kolundavelu Mudaliar	31	786	772	Nana Nair v. Kantan Asha Moorthi Nambudripad	29	386
721	Kathari Narasinha Ragu v. Bhopati Ragu Raghunatha Ragu	31	52	773	Saekaravolu Pillai v. Muthusawmi Pillai	31	260
724	Savanna Vena Ramachetty v. A. L. A. R. R. M. Arunachalam Chettiar	31	98	784	Keppilacheri Parkum Cheepothi Ammal v. Ambalathau Kandi Ayissa	31	74
728	M. Narayan Singh v. Aiyasami Reddi	31	188	786	Venkatarama Aiyar v. Rajagopala Iyer	31	704
730	Sri Sri Vikramadeva Maharajulu Garu, Maharaja of Jeypore v. Hari Krishna Patro	32	226	788	Kalianji Singji Bahai v. Bank of Madras	31	583
733	Alamunayakunigari Nubi Sub v. Murukuti Pappiah	29	439	793	Soundararajam v. Arumachalam Chetty	33	858
				816	Soundararajam, v. Arumachalam Chetty	33	858
				851	V. Venkatarayana Pillai v. V. Subbammal	29	298
				856	Subramanian Chettiar v. Rajah Rajeswara Dorn	32	258

(C).—18 MADRAS LAW TIMES, FOR NOVEMBER-DECEMBER, 1915.

Page of Vol. 18 M. L. T. 1915	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 18 M. L. T. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
409	Budha Singh v. Lattu Singh	30	529	434	Kuppusamy Reddy v. Venkata- lakshmi Ammal	31	855
424	Velayutham Pillai v. Subbaroya Pillai	31	398	436	Vynpuri v. Sonamma Bai Ammani	31	412
426	Narayanaswamy Aiyar v. D. Ven- kataramana Aiyar	31	326	450	Subramania Iyer v. Sellammal	31	296
				457	Marji Jeta v. Honnavar Puthu Hari Pai	31	234

(C).—18 MADRAS LAW TIMES, 1915—concl.

Page of Vol. 18 M. L. T. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 18 M. L. T. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
459	Tirumalanadham Sornaya v. Tirumalanadham Bapirazu ...	31	335	515	Anantha Desikachariar v. Viswanatha Mudaly ...	30	199
460	Indoor Subama Reddi v. Nelatur Sundarama Iyengar ...	31	312	517	Maha Patro v. Narayanapanigrahi ...	31	853
464	Rajah Venkata Simhadri Jagapathiraju v. Rajah Dugaraja ...	31	255	518	Draviam Pillai v. Cruz Fernandez ...	31	322
469	Subbier v. Abboy Naidu ...	31	552	521	Venkatasubbier v. Muthuswami Iyer ...	31	487
475	Rajam Iyer v. Anantharathnam Iyer ...	31	318	524	Narasimha v. Secretary of State ...	31	404
476	Muthu Goundan v. Anantha Goundan ...	31	528	525	Akbar Hussain Sahib v. Shonkhah Begam Sahiba ...	31	657
483	Govindasami Pillai v. Ramasami Aiyar ...	31	604	532	Narasimham v. Venkiah ...	31	796
486	Dharmaraj Iyer v. Sreenivasa Mudaliar ...	31	240	533	Venkatasubbiah Chetty v. Subba Naidu ...	31	152
488	In re Kallara Ramalingam ...	31	653	542	Krishnaswami Naidu v. Seetha Lakshmi Ammal ...	31	803
492	Chinnappa Thevan v. Pazhaniappa Pillai ...	31	630	543	Sitaramanujachari v. Vellamma ...	30	822
494	Silu Peda Yelligadu v. Sree Raja Surya Row ...	31	542	545	Subba Reddi v. Alagammal ...	31	674
495	Murugesu Mudaliar v. Ramaswami Chetty ...	31	200	549	District Judge of Kistna v. Hanumanulu ...	32	326
497	Sankaravelu Pillay v. Muthusami Pillai ...	31	260	552	Sounderarajan v. Arunachalam Chetty ...	33	858
500	Manicka Mudaliar v. Munuswami Naidu ...	31	246	568	Sounderarajan v. Arunachalam Chetty ...	33	858
504	Secretary of State v. Subraya Karantha ...	31	590	591	In re Karri Venkanna Patrudu ...	32	330
511	Whitton v. Mammad Maistry ...	31	377	596	Ranga Iyengar v. Narayanachariar ...	32	30
				601	Murugesu Chetty v. Arumuga Chetty ...	31	923
				602	Mahomed Kanni Rowther v. Pattani Inayathalla Sahib ...	31	819

(D).—2 LAW WEEKLY, FOR NOVEMBER-DECEMBER, 1915.

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		V.	P.			V.	P.
1037	Narayanaswamy Aiyar v. Venkatarama Aiyar ...	31	326	1066	Subhanadri Appa Row v. Secta Ramiah ...	31	305
1046	Jagapathiraju Bahadur Garu v. Dugaraja Bahadur Garu ...	31	255	1067	In re Chidipatu Somayya ...	31	307
1056	Periakaruppan Chettiar v. Manikka Vachaga ...	31	293	1069	Whitton v. Mammad Maistry ...	31	377
1057	Subramania Aiyar v. Sellammal ...	31	256	1074	Dharmaraja Aiyar v. Sreenivasa Mudaliar ...	31	240
				1078	In re Jeremiah ...	31	373

(D).—2 LAW WEEKLY, 1915—concl'd.

Page of Vol. 2 L. W. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 2 L. W. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
1080	Vyapuri v. Somanna Boi Ammani	31	412	1184	Ayyakutti Mankondan v. Peria- sam Koundan	31	615
1099	Subbier v. Abboy Naidu	31	502	1186	Govindagami Pillai v. Ramasami Aiyar	31	604
1107	Muthu Goundan v. Anantha Goundan	31	528	1191	Akbar Hussain Sahib v. Shoukhah Begam Saheba	31	657
1115	Ratnam alias Nanjunda Chetty v. Ramasamy Chetti	31	536	1200	Mahomed Kanni Rowther v. Pattani Inayathulla Sahib	31	819
1117	Arunachelum Chetty v. Syad Ahamed Ambalam	31	539	1205	Murugesu Chetti v. Arumuga Chetti	31	923
1120	In re Damodara Naidu	31	656	1207	Gopiseti Narayanaswami Naidu Garu v. Muthyala Venkata- ratnam	32	816
1122	Silu Pida Yelligadu v. Raja Rava Venkata Kumara Mahipati Surya	31	542	1208	Velayuda Kone v. Narayana Kone	31	645
1124	Narasammal v. Secretary of State	31	404	1210	Velayudham Pillai v. Perumal Naicker	31	811
1126	Basavana Gowd v. Krishna Rao Naidu	31	650	1212	Adaparka Bapanna v. Sri Raja Inuganti Rajagopala Rao	31	813
1129	Naina Pillai Maracayar v. Arumuga Mudaly	31	387	1214	Viewanathaswami Naiker v. Kannulu Ammal	31	833
1132	Chinnappa Thevan v. Pazhaniappa Pillai	31	630	1244	Bugtha Simhadri Naidu v. Behava Sitharama Patrudu	32	129
1135	Kalluru Ramalingam v. Thupili Subbaranayya	31	653	1247	Sundarajam v. Arunachalam Chetty	33	858
1140	Hussain Saib v. Hassan Saib	31	927				
1175	Secretary of State v. Subraya Karantha	31	510				

(E).—(1915) MADRAS WEEKLY NOTES, FROM SEPTEMBER TO DECEMBER.

Page of (1915) M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of (1915) M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
605	Sellam Iyengar v. Veerappa Chetty	30	522	626	Jagannada Raju v. Bulasurya Prasada Row	29	241
606	Karmali Abdulla Allarakhia v. Vora Karimji	26	915	631	Muddusami Siddappa v. Bhaskara Lakshmi Narasappa	30	853
614	Ayyamperumal Odayan v. Rama- sami Chettiar	30	983	633	Jehangir Dadabhoi v. Kaikushru Kavasha	27	53
621	Sengoda Goundan v. Emperor	30	435	636	Secretary of State v. Ramanujal Jeer Swanigal	30	605
621	Mahomed Musa v. Aghore Kumar Ganguli	28	930	637	Ratna Naidu v. Aiyana Chariar	29	991

(E).—(1915) MADRAS WEEKLY NOTES—contd.

Page of (1915) M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of (1915) M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
638	In re Para Thuringe ...	30	258	785	Bombay Cotton Manufacturing Co. v. Motilal Shiv Lal	29	229
639	Mailthi Hengsu v. Soma	30	484	790	Motilal Shiv Lal v. Bombay Cotton Manufacturing Co.	30	59
640	Kunhan Moothad v. A. R. Banerji	30	351	791	Nallaya Koundar v. Sadaya Koundar	32	809
642	Bagga v. Saleha ...	29	1005	792	Venkadu v. Receiver of Nidavole and Medlar Estates	30	812
643	Singaravelu Pillai v. Santhana-krishna Mudaliar	31	9	793	Veeraraghava Row v. Mallapara-gada Gurnnada Row	30	246
643	Lakshmi Amma v. Venkappa Ulluru	33	234	793	Raman Nayar v. Kannath	31	184
644	Venkatasubba Rao v. Asiatic Steam Navigation Co.	30	840	797	Parvathi Ammal v. Govindasami Pillai	30	827
650	Arunachellam Chetti v. Venkateshchellapathi	33	216	801	Rama Chetty v. Arunachalam Chettiar	31	98
371	Secretary of State v. Kannepalli Janakiramayya	30	609	805	Purnyil Seethi v. Ummayya	30	977
701	Muruga Chetty v. Rajaswamy	30	669	810	Bangarayudu v. Perayya Sastry	30	927
703	Padarath Helwai v. Ram Nain Upadhia	30	366	813	Raja of Pittapuram v. Venkata-subba Rao	31	93
713	Ganga Sahai v. Kesri	30	265	815	Chenna Reddi v. Buddha Reddy	31	55
717	Thakurani Tarakumari v. Chaturbhuj Narayan Singh	30	833	817	Patkum Cheepothi Ammal v. Ambalathau Kandy	31	74
722	Muthuswami Nandan v. Sankara-lingam Chetty	30	675	819	Narasimha Raju v. Ragunatha Raju	31	52
725	Srinivasa Mudaly v. Ramasami Mudaly	30	522	822	Venkata Subbiah Chetty v. Subba Naidu	31	152
726	Krishnacharya v. Anthaki	31	12	829	Suppa Bhattar v. Suppu Sakkaya Bhattar	30	932
728	Venkataramanjulu Naidu v. Ramasami Naidu	30	353	836	Thekkethil Mosa v. Pathummal	30	924
731	Sundaram Iyer v. Kulathu Aiyar	31	81	838	Ramayya v. Jaganadham	30	880
736	Rajwant Prasad Pande v. Ram Ratan Gir	30	849	841	Crown Prosecutor v. Govindarajulu	30	752
740	Chakkara Kannau v. Kunhi Pokker	30	755	842	Sitaramanuja Charri v. Vallamma	30	822
755	Subramaniam Chettiar v. Soma-sundaram Chettiar	30	777	844	Chinnakaruppan Chetty v. Meyyappa Chetty	30	753
757	Kunwar v. Ranjit Singh	30	299	845	Sivarama Aiyar v. Alagappa Chetty	31	211
761	Suppayya Pattar v. Haji Ahamed Sait	32	703	846	Subraya Acharya v. Kesava Upadhyaya	31	206
763	Vonkatesvaradu v. Bala Tripura-sundari	30	769	847	Vythinaatha Aiyar v. Vaithilinga Mudaliar	31	206
765	Augustus Brothers v. Fernandez	31	59	850	Arunachellam Chettiar v. Lakshmana Iyer	31	231
768	Rata Pathan v. Para Sundaram	30	634	852	Hakeem Patle Muhammad v. Shaik Davood	30	569
769	Varadaraja Mudali v. Murugesam Pillai	30	707	857	Appayya Chetty v. Mahammade Beari	30	596
772	Budha Singh v. Laltu Singh	30	529	864	Payidayya v. Venkata Reddi	31	913
784	Ramaya Gounden v. Sadagopa Chariar	32	759	864	Venkatarama v. Official Receiver	32	691
785	Ramaswami Iyar v. Madras Times Printing and Publishing Co., Ltd.	32	610	865	Narayanawami Naidu v. Gantayya	32	691
786	Kanakasabhai v. Emperor	30	745	866	Chinnappa Rowther v. Ibrahim Rowther	30	806
787	Shivalingappa Basappa v. Revappa	29	717	873	Velayutham Pillai v. Subbaraya Pillai	31	398

(E).—(1915) MADRAS WEEKLY NOTES—concl'd.

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876	Salfalla Sahib v. Vajibuahla Sahib	31	281	956	Sankaraveta Pillai v. Muthusami Pillai	31	260
880	Hussain Saib v. Hassan Saib	31	927	960	Kuppuswami Reddi v. Venkata-lakshmi Ammal	31	835
907	Nagoor Meera Sahib v. Sookulal Sowcar	30	488	962	Secretary of State v. Subraya Karantha	31	590
908	Surapa Raja v. Venkayya	32	802	968	Viswanathaswami Naiker v. Kaniulu Ammal	31	833
911	Manickam Mudaliar v. Muriswami Naidu	31	246	1021	Sabharani Reddi v. Sundararaja Aiyangar	31	312
914	Yegnanarayana v. Makayya	31	478	1023	Jermiah v. Emperor	31	373
915	Subbanna v. Secretary of State	31	267	1025	Secretary of State v. Maharajah of Bobbili	32	279
916	Thatha Chariar v. Thiruvankada Chariar	31	46	1043	Ramanathan Chetty v. Ramasami Chetty	32	5
921	Narayanadaswamy Aiyar v. Venkataramana Aiyar	31	326	1050	District Judge of Krishna v. Hanumanulu	32	326
927	Vyapuri v. Sonamma Bai Ammani	31	412				
941	Subramania Aiyar v. Sellammal	31	296				
947	Kasturamma v. Venkatasurayya	30	878				

Table 7

NAGPUR JUDICIAL COMMISSIONER'S COURT.

11 NAGPUR LAW REPORTS, FOR NOVEMBER-DECEMBER, 1915.

Page of Vol. 11 N. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 11 N. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
164	Dina v. Bishambhar Singh	31	464	177	Motilal v. Ganga Bai	31	867
170	Gopikisan v. Kulpat	31	470	180	Daolat Rai v. Sheikh Chand	31	869
174	Ali Mohamad v. The Great Indian Peninsula Railway Company	31	474	183	Goverdhan v. Maruti	31	872
				186	Pirbhu v. Musammat Wazirbi	31	877
				189	Meghraj v. Johnson	31	880

Table 8

OUDH JUDICIAL COMMISSIONER'S COURT.

(A).—18 OUDH CASES, FROM SEPTEMBER TO DECEMBER, 1915.

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		V.	P.			V.	P.
256	Raghunandan v. Jageshar Singh...	32	424	347	Sheo Indar Bahadur Singh v. Ghaz Zieuddin ...	33	243
263	Inayat Ali v. Jaitun Bibi ...	32	362	353	Nihal Singh v. Raja Raghuraj Bahadur Singh ...	32	202
268	Achambhit Lal v. Chhanga Mal ...	32	420	359	Dharam Raj Kuar v. Lachman Bhuj ...	33	557
272	Aijaz Husain v. Mirza Mohammad Sajjad ...	32	432	361	Lachman Singh v. Thakurnain Sarfaraz Kunwar ...	33	560
275	Raghubar Dayal v. Bank of Upper India ...	32	451	363	Nihal Singh v. Dular Singh ...	33	615
280	Musammal Husaini alias Hashmat v. Ram Charan ...	32	341	364	Etizad Hussin v. Beni Bahadur ...	33	619
282	Mohammad Hadi v. Saiyed Moham- mad Taki ...	32	465	367	Ram Prasad v. Rahat Bibi ...	33	622
289	Ghisa Singh v. Thakur Gajraj Singh ...	33	571	369	Mahesh Bakhsh Singh v. Manohar Lal ...	33	657
340	Jamshed Ali Khan v. Zahur-ul- Hassan Khan ...	33	357	372	Musammal Habibun-Nissa v. Musharruf Ali ...	33	661
341	Narain Dat v. Gopal Das ...	33	361	374	Gauri Shankar v. Musammal Lach- min Kunwar ...	33	663
343	Dhanesh Prasad v. Gaya Prasad...	33	365	377	Genda Singh v. Fateh Singh ...	33	258
345	Khanjan Singh v. Anup ...	33	367	380	Ram Jiawan v. Jadunath ...	33	555

(B).—2 OUDH LAW JOURNAL, FROM OCTOBER TO DECEMBER, 1915.

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		V.	P.			V.	P.
593	Raza Husain v. Amar Chand Pal ...	32	715	620	Raja Abdul Hasan Khan v. Musam- mat Jagwanta ...	32	729
595	Raghunandan v. Jageshar Singh ...	32	424	625	Sri Ram v. Ram Pargash ...	32	732
601	Chauharja Bakhsh v. Ram Harakh ...	32	740	629	Thakurdin Singh v. Musammal Bhagwant Kuar ...	32	734
607	Basdeo Singh v. Ram Phal Singh ...	32	748	634	Lal Muneshar Bakhsh Singh v. Gaya Bakhsh ...	33	729
610	Hon'ble Raja Syed Abu Jafar v. Sat Narain Goshain ...	32	769	636	Ghulam Abbas Khan v. Bibi Ummatul Fatima ...	31	748
611	Delhi and London Bank Limited v. Ram Ratan ...	32	754	707	Ram Adhin v. Maharaja Bhag- wati Prasad Singh ...	33	141
614	Syed Wasi Ali v. Jang Bahadur Singh ...	31	48				

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711	Ram Singh v. Bisheswar Dayal	33	166	739	Rai Krishna Prasad Singh v. Suraj Pal Singh	33	214
712	Suraj Bali v. Manager of Nanpara Estate	33	168	740	Channu Shah v. Ewaz Ali	33	214
714	Jagdeo Singh v. Karam Ali	33	170	741	Jaggiwan Bakhsh v. Ashbur Husain	33	260
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718	Shah Hayat Ahmad v. Hadri Pande	33	236	745	Jageshar Bakhsh Singh v. Han- wanta Singh	33	262
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722	Lal Tribhuvan Nath Singh v. Musammat Ganga Dei	33	232	748	Mir Buniyad Husain v. Ram Sahai Singh	33	266
723	Ram Raj v. Rameshar	33	205	750	Musammat Jagra v. Kalpi	33	270
724	Sahdeo v. Mahadeo	33	215	753	Kishan Dayal v. Chandhri Thakur Prasad	33	203
725	Raja Rameshar Bakhsh Singh v. Raghobar	33	163	754	Puloi Khan v. Raja Muhammad Mohd Ali Khan	33	203
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729	Mahabir Singh v. Manager, Court of Wards Ajodhya Estate	33	246	772	Thakur Gauri Shankar v. Abu Muhammad	33	147
730	Jagorohan Upadhyay v. Kanuta Shiroman Prasad Singh	33	247	774	Pitam Singh v. Debi Prasad	29	675
732	Pandit Buddhu Lal v. Ram Sarup	33	250	776	Raja Raghuraj Singh v. Ram Lotan Dube	33	186
733	Raja Oudh Indra Pratap Sahi v. Nakehhed Singh	33	254				
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238	Musammal Hayat Khatun v. Musammal Sharm Khatun ..	26	524	243	Rahim Bakhsh v. Umar Din ..	29	382
239	Shuja-ud-Din v. Musammal Aisha Bi ..	26	342	244	Muhammad Zaman v. Musammal Hasni ..	Not reportable.	
240	Musammal Sharaf Noor v. Ahmad	30	505	245	Aslam v. Emperor	Do.	
241	Fuzl Khan v. Musammal Karam Begam ..	27	113	246	Balmokand v. Emperor	28	738

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86	Bodhu Ram v. Muhammad Din ...	32 315	104	Bahadur Singh v. Bhagel Singh ..	32 11
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91	Robert Skinner v. Mrs. James Skinner ...	31 537	109	Kishen	32 33
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93	Padman v. Hanwanta ...	29 867		Raja v. Allah Ditta ...	29 802
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95	Natha Singh v. Ganda Singh ...	31 493		Criminal.	
96	Allah Din v. Salam Din ...	31 497	28	Daulat Rai v. Crown	29 105
97	Umar Bakhsh v. Baldeo Singh ...	32 35	29	Musammal Budho v. Crown ...	32 148
98	Skinner v. Badri Kishen ...	31 196	30	Crown v. Musammal Naurati ...	32 155
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150	Musammam Tara Devi v. Dhanpat Rai	31	797	170	Mahammad Bakhsh v. Muham- mad	31	533
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152	Ditta Ram v. Rup Chand	31	802	172	Gul Muhammad v. Tota Ram	31	221
153	Sham Sundar v. Abdul Ahad	31	808	173	Jowala Singh v. Palsa Ram	31	212
154	Ram Adin v. Munshi Ram	31	209	174	Lola v. Ram Chand	31	294
155	Buaditta v. Musammam Rattan Devi	28	12	175	Natha Singh v. Ganda Singh	31	493
156	Bhamba Ram v. Allah Bakhsh	31	191	176	Musammam Mahan Devi v. Madho	31	237
157	Pritbmi Chand v. Safa Chand	31	202	177	Musammam Maya Devi v. Ram Chand	31	186
158	Fazl Ahmadi v. Jiwan Mal	31	800	178	Sawan Mal v. Shih Dyal	31	254
159	Karam Chand v. Ghulam Hassan	31	199	179	R. H. Skinner v. Badri Krishen	31	196
160	Nihal Singh v. Mal Singh	31	862	180	Karim Bakhsh v. Altaf Ali	31	469
161	Musammam Sahib Zaili v. Allah Bakhsh	31	863	181	Gulab Shah v. Haveli Shah	31	463
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166	Chuni Lal v. Beli Ram	30	104	42	Raghubir Singh v. Crown	31	375
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137	Daulatram Valsabdas v. Ali Bhai Ibrahimji	33	668	171	Dhanibux v. Crown	32	671
141	Aludomal v. Crown	32	679	174	Mir Husseinbux Khan v. Kando	32	689
143	Bibi Saheb Zadi v. Mir Mohamed Shah	32	548	176	Nadirshah v. Crown	32	669
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263	Inayat Ali v. Jaitun Bibi	32	362	353	Nihal Singh v. Raja Raghuuaj Bahadur Singh	32	202
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282	Mohammad Hadi v. Saiyed Moham- mad Taki	32	465	367	Ram Prasad v. Rabat Bibi	33	622
289	Ghisa Singh v. Thakur Gajraj Singh	33	371	369	Mahesh Bakhsh Singh v. Manohar Lal	33	657
340	Jamshed Ali Khan v. Zahur-ul- Hassan Khan	33	357	372	Musammam Habibun-Nissa v. Musharraf Ali	33	661
341	Narain Dat v. Gopal Das	33	361	374	Gauri Shankar v. Musammam Lach- man Kunwar	33	663
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595	Raghuuandan v. Jageshar Singh	32	424	625	Sri Ram v. Ram Pargash	32	742
601	Chacharja Bakhsh v. Ram Harakh	32	740	629	Thakurdin Singh v. Musammam Bhagwant Kuar	32	734
607	Basdeo Singh v. Ram Phal Singh	32	748	634	Lal Muneshar Bakhsh Singh v. Gaya Bakhsh	33	729
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712	Suraj Bali v. Manager of Nanpara Estate	33	168	740	Channu Shah v. Ewaz Ali	33	214
714	Jagdeo Singh v. Karam Ali	33	170	741	Jaggiwan Bakhsh v. Ashfaq Husain	33	260
716	Dost Muhammad Khan v. Rahman Khan	33	180	742	Kandhaiya Lal v. Narain Das	33	262
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718	Shah Hayat Ahmad v. Badri Pande	33	236	745	Jageshar Bakhsh Singh v. Hanwanta Singh	33	252
720	Jamil-ud-din Ahmad v. Syed Tawakkul Husain	33	237	746	Tribhuvan Dat v. Raja Muhammad Abul Hasan Khan	33	264
722	Lal Tribhuvan Nath Singh v. Muhammad Ganga Dei	33	232	748	Mir Baniyad Husain v. Rani Sahai Singh	33	266
723	Ram Raj v. Rameshar	33	205	750	Muhammad Jagra v. Kalpi	33	270
724	Sahdeo v. Mahadeo	33	215	753	Kishan Dayal v. Chaudhri Thakur Prasad	33	203
725	Raja Rameshar Bakhsh Singh v. Raghobar	33	163	754	Pudai Khan v. Raja Muhammad Mehdi Ali Khan	33	203
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729	Mahabir Singh v. Manager, Court of Wards Ajodhya Estate	33	246	772	Thakur Gauri Shankar v. Abu Muhammad	33	147
730	Jagmohan Upadhyay v. Kaunda Shiromani Prasad-Singh	33	247	774	Pitani Singh v. Debi Prasad	29	675
732	Pandit Buddha Lal v. Ram Sarup	33	250	776	Raja Raghuraj Singh v. Ram Lotan Dube	33	186
733	Raja Oudh Indra Pratap Sahi v. Nakhsh Singh	33	254				
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239	Shuja-ud-Din v. Musammat Aisha Bi	26	342	244	Muhammad Zaman v. Musammat Hasni	Not report- able. Do.	
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86	Budhu Ram v. Muhammad Din ...	32 315	104	Bahadur Singh v. Bhagel Singh ...	32 11
87	Gulab Shah v. Haveli Shah ...	31 463	105	Pala Singh v. Musammat Lachhmi	32 16
88	Karim Bakhsh v. Altaf Ali ...	31 469	106	Bishen Das v. Ram Labhaya ...	32 18
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90	Muhammad Bakhsh v. Muhammad	31 533	108	Musammat Budhan v. Radha	
91	Robert Skinner v. Mrs. James Skinner ...	31 537	109	Kishen ...	32 33
92	Chandan Mal v. Musammat Wasiudi	31 541	110	Sultan Singh v. Hashmat Ullah ...	29 804
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94	Muhammad Hayat v. Muhammad Ali ...	31 489			
95	Natha Singh v. Ganda Singh ...	31 493		<i>Criminal.</i>	
96	Allah Din v. Salam Din ...	31 497	28	Daulat Rai v. Crown	29 105
97	Umar Bakhsh v. Baldeo Singh ...	32 35	29	Musammat Budho v. Crown ...	32 148
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99	Musammat Gulab Khatun v. Chaudhri ...	32 250		<i>Revenue.</i>	
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132	Re Application by Henry Robert Smith	32	575	167	Gehimal v. Manager Encumbered Estates in Sind	32	616
134	Hemandas Ramrakhiomal v. Chellaram Dhalumal	32	554	170	Ratansi Daya v. Crown	32	688
137	Daulatram Valabdas v. Ali Bhai Ibrahimji	33	668	171	Dhanibux v. Crown	32	671
141	Aludomal v. Crown	32	679	174	Mir Husseinbux Khan v. Kando	32	689
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— **S. 10—Sir, transfer of, by gift to one not a co-sharer, effect of.**

Sir does not cease to be sir when it is transferred by a gift, whether the transfer be in favour of a person who is a co-sharer or in favour of one who is not a co-sharer. **U. P. B. R. ELAHI BUX v. NAND KISHORE** 906

— **S. 11—Occupancy rights, acquisition of—Twelve years' continuous occupation—Land lying fallow.**

A tank land carried crops of *singhara* or paddy in years of heavy rainfall. No rent was paid in the years when there was no cultivation and rent varied largely from year to year. The tenant claimed continuous possession on the ground that he grazed cattle when cultivation was impossible:

Held, that this was not the case in which cultivated land was left fallow for a year or two without the period necessary for the acquisition of a right of occupancy being interrupted and that under the circumstances occupancy rights did not accrue as there was no continuous occupation for twelve years. **U. P. B. R. NAUNHAL SINGH v. CHABBI** 458

— **SS. 11, 34—Tenant holding without consent of landlord—Presumption—Occupancy rights, acquisition of.**

A person occupying land shall not be deemed to hold land within the meaning of section 11 of the Tenancy Act until he begins to pay rent therefor and in the absence of very strong evidence the presumption is that a tenant is holding without the consent of the landlord until he begins to pay rent. **U. P. B. R. GHANSHAM SINGH v. MOHAN SINGH** 486

— **SS. 13, 58—Ejectment of father—Land re-let to minor son—Joint family—Continuous possession—Occupancy right.**

When a father was ejected under section 58 of the Tenancy Act and immediately after the land was leased to his son aged sixteen who was joint with his father:

Held, that the re-letting was in fact a re-admission of the father to the holding within the meaning of section 13 of the Tenancy Act. **U. P. B. R. UDAI BHAWAN SINGH v. MANAGER, KATASTHA PATESHALA** 884

Agra Tenancy Act—contd.**ss. 13 (a), (b) and (c), 14****(1) (a), 168—Wrongful dispossession—Re-gaining of possession—Limitation.**

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ss. 13 (a) and (b), 14 (1)**(a), 168—Wrongful dispossession—Re-gaining of possession—Limitation Act (IX of 1908), s. 28.**

A mere attestation in a settlement *parcha* by a tenant that he is a non-occupancy tenant, does not mean that he gives up his claim to occupancy rights.

Quere.—Whether for the application of section 13 (a) of the Tenancy Act, it is not necessary that the tenant should have re-gained possession within a year from the wrongful dispossession? **U. P. B. R. RAM BHAROS V. NAZIR HUSAIN 815**

s. 14—Letting value, meaning of.

For the purposes of section 14 of the Tenancy Act, the letting value to be considered is the letting value at the time of the exchange, and not at the time of the suit for ejectment. **U. P. B. R. NAGESH PRASAD V. MOHAN 482**

s. 14 (1) (a) 815, 863**s. 22—Succession—Ex-proprietary rights acquired by two persons in full right—Death of one without heirs—Right of heirs of other to get entire holding—Survivorship.**

Where two persons acquire jointly ex-proprietary rights and one of them dies without leaving heirs entitled to inherit under the Tenancy Act, the other gets the entire holding. **U. P. B. R. HARI HAR PRASAD V. MATA PRASAD 864**

s. 31, applicability of—Mortgage of occupancy holding before Act—Suit for arrears of rent—Mortgager, if necessary party—Civil Procedure Code (Act V of 1908), O. I, r. 9.

Section 31 of the Tenancy Act will not apply to a mortgage of a holding entered into before the Tenancy Act came into force.

A mortgagor of an occupancy holding is not a necessary party to a suit for arrears of rent, as the occupancy tenant is the only person responsible for the rent of the holding. **U. P. B. R. BALWANT SINGH V. FAIZULLAH 456**

s. 34 486**s. 36—Sir—Ex-proprietary rights—Adverse possession—Sir, character of, if changes.**

Ex-proprietary rights can be claimed by any person who may be in possession of the *sir*, even if that person be a trespasser, specially when the adverse possession has ripened into ownership. *Sir* retains its character as such in the hands of an adverse owner. **U. P. B. R. BHAGWATI SARAN SINGH V. RABI SINGH 893**

s. 43—Enhancement of rent, suit for—Exemplar area—Prevailing rates—Procedure.

Where in a suit for enhancement there was nothing on the record to give information as to how the rates applied were obtained or what was

Agra Tenancy Act—contd.

the exemplar area accepted or how the rates were worked out:

Held, that there was no proper trial by the Court below, inasmuch as the tenants were entitled to demand that the enquiry should conclusively show that the rates applied were actually the rates prevalent. **U. P. B. R. HARI V. SRI THAKURJI MAHARAJ 889**

ss. 43, 49—Rent fixed by agreement in perpetuity—Suit for enhancement, if untenable—Remedy.

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s. 49 459**s. 58 884****s. 58—Ejectment—Grove—Holding.**

A suit for ejectment under section 58 of the Tenancy Act cannot lie in respect of a grove, as a grove does not come under the definition of the holding, not being land let or held for agricultural purposes. **U. P. B. R. NAWAB SINGH V. HUKUM SINGH 498**

ss. 58, 79—Ejectment—Grove—Possession by landlord—Grove-holder, possession of, nature of—Remedy of grove-holder.

A landlord took forcible possession of a grove in his *zemindari*. No contract to pay rent was entered into nor was there anything to show that the landlord was admitted as a sub-tenant. The grove-holder sued to eject the landlord as his sub-tenant. The Courts below gave a decree for ejectment. The landlord applied in revision:

Held, that if the grove-holder was to be treated as a tenant, his remedy was to sue for possession under section 79 of the Tenancy Act within six months; but if he was not a tenant, a suit under section 58 did not lie. **U. P. B. R. KUNJI MAL V. SUEO BALAK RAM 453**

s. 79 453**s. 79—Relinquishment—Surrender of possession—Contract of relinquishment, if enforceable—Dispossession—Remedy.**

A relinquishment of the holding, whether oral or written, unless coupled with the surrender of possession is no valid relinquishment under the law.

A contract of relinquishment cannot be specifically enforced.

Where, therefore, a tenant agreed in writing to relinquish but did not surrender possession and the *zemindar* let the land to other tenants who took up cultivation:

Held, that the action of the *zemindar* amounted to an illegal dispossession of the original tenant for which an action under section 79 would lie. **U. P. B. R. SHIVA TAJAL AHIR V. JAWAHIR LAL 794**

s. 158—"Muafi khairati", meaning of—Resumption—Revenue, assessment of.

An entry with respect to a grant in the Agra Province to the effect that the land is "*Muafi khairati*,"

Agra Tenancy Act—concl'd.

means that the grant is an absolute one for charitable purposes and is not resumable, and entries to the contrary in subsequent village administration papers, cannot affect the circumstances under which the grant was made.

Where such land has been held for 50 years and upwards by two successors to the original grantee, it should be assessed to revenue only. **U. P. B. R.**

JANKI PRASAD V. LOKENDER SHAH

S. 168

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863**

S. 176—Application for review,

rejection of, by Assistant Collector, 2nd Class—Appeal, if maintainable—Civil Procedure Code (Act V of 1908), O. XLVII, r. 7.

Although under Order XLVII, rule 7, of the Civil Procedure Code, an order rejecting an application for review is not appealable, such an order, if passed by an Assistant Collector of the Second Class, is appealable to the Collector under section 176 of the Tenancy Act. **U. P. B. R.** **PARAS RAM V. SHYAMARAN SINGH**

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S. 177—Question of proprietary

title—Acquiescence—Appeal.

In a suit for ejectment, the defendant pleaded that he was the proprietor of the fields in dispute or in the alternative that he had at least acquired occupancy rights. The Court of first instance held against the proprietary right but held that the defendant had got occupancy rights. The plaintiff appealed. The defendant raised an objection that no appeal lay to the Commissioner, who held that no question of proprietary title was in issue in appeal as the defendant appeared to have acquiesced in the Assistant Collector's finding, that the proprietary title could not be urged and that the appeal had been filed solely on the point of occupancy tenure.

Held, that as the defendant could not appeal he could not be said to have acquiesced in the finding of the Assistant Collector, and, therefore, a question of proprietary title was in issue and the appeal lay to the District Judge. **U. P. B. R.** **PARTAB BHADUR SINGH V. ABDUS SALAM**

857

SS. 177 (e), 198—Ejectment,

suit for—Defendant pleading proprietorship in third person, if question of proprietary title—Appeal—Jurisdiction.

In ejectment suits a question of proprietary title arises not only in cases in which the defendant pleads proprietorship in himself, but also in cases in which he alleges that a third person, and not the plaintiff, is the proprietor of the land in dispute and, therefore, an appeal from a decision of a Collector in such a case lies to the District Judge. **U. P. B. R.** **ADYA SARAN SINGH V. THAKUR**

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S. 193 (e)

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S. 198

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Allen enemy—License to trade—Suits, right to bring.

An alien enemy who has been licensed to trade in British India, has access to the Courts and may bring suits. **L. B.** **M. MEYER V. MRS. C. LEA**

886

Alienation. See CUSTOM; HINDU LAW; MORTGAGE.**Amendment of decree—Appellate Court, exercise of power of amendment by**

478

—Divergence between judgment and decree

13

Amendment of plaint. See CIVIL PROCEDURE CODE, 1908, O. 6, r. 17.

Discretion of Court to permit—New cause of action arising during pendency of suit—Amendment, if permitted

7

Service of notice after amendment

35

Appeal (Civil). See AGRA TENANCY ACT, s. 177; U. P. LAND REVENUE ACT, s. 111.

Appellant's failure to make necessary deposit for printing—Appeal, whether liable to be dismissed—Civil Procedure Code (Act V of 1908), O. XLI, rr. 11, 16

74

Appellate Court, interference by—Discretion of lower Court

579

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court, whether can reverse decree against non-appealing defendant

86

Application to set aside abatement of appeal—Sufficient cause—Limitation Act (IX of 1908), Sec. I, Art. 171

697

Arbitration—Award—Decree in accordance with award

700

Arbitration—Award, decree based on—Appeal not maintainable—Revision, when allowed

Civil Procedure Code (Act V of 1908), s. 115

458

Decree *ex parte*, order refusing to set aside, whether appealable—Order setting aside decree *ex parte*, appeal against, maintainability of—Error made in setting aside such decree, effect of

914

Decree against one set of defendants on contest, against another by consent—Appeal against whole decree by contesting defendant—Execution, limitation for—Limitation Act (IX of 1908), Sec. I, Art. 182, cl. (2)

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Difference of opinion on some points—Practice

965

Discretion—Appellate Court, power of, to interfere with lower Court's discretion.

The Court of Appeal should be slow to interfere with the exercise of a discretion by a lower Court. **C. AHMED MUSAJI SALEJI V. MAMOOJI MUSAJI, 22 O. L. J. 203**

315

Discretion of Court as to costs, extent of—Power of Appellate Court to interfere—Order as to costs incorporated in decree, whether appealable—Pleader's fees—Madras Civil Rules of Practice, rr. 278, 279, 284

312

Duty of Appellate Court to implead all necessary parties—Necessary party omitted—Decree for sale, whether operative.

814

Execution of decree against legal representative—Property attached—Property, if assets of deceased, decision as to

321

after failure of application for review—Time spent in review, if *bona fide* prosecution of civil litigation—Exclusion of time—Discretion, exercise of—Laches.

705

Letters Patent—order to furnish security

238

New defence inconsistent with the original, if allowed

875

New party, addition of—Remand to lower Court—Procedure

263

Order by District Judge allowing Hindu widow to take out compensation money deposited by Collector, if maintainable

677

Appeal (Civil)—concl.

- Order extending time for payment of money due under mortgage-decree, if appealable—Extension of time—Time limit under decree—Preliminary decree by Appellate Court—Determination of other questions—Suit, remitting of—"Court" in O. XXXIV, r. 8 proviso, meaning of **240**
- Order passed on one date, if treated as one against decree of another date **4**
- against orders made in winding up proceedings—Limitation—Extension of time **725**
- Party exonerated by first Court, if can be made party in appeal—Memorandum of objections **979**
- Presidency Towns Insolvency Act (111 of 1909), s. 8—Protection order **507**
- Printed copy of judgment not filed with memorandum of appeal—Appeal, whether time-barred **924**
- Privy Council appeal—Value of subject-matter in Court of first instance less than Rs. 10,000—Value of subject-matter in dispute on appeal to His Majesty in Council more than Rs. 10,000—Certificate, if can be granted—Involve, 'directly or indirectly, some claim or question to or respecting property of like amount or value', meaning of.
- Privy Council appeal—Leave to appeal—Case below appealable value—Test for certifying case fit for appeal—Civil Procedure Code (Act V of 1908), ss. 109 cl. (c), 110, O. XLV, r. 2, 3, 8.
- Where a case is admittedly below the appealable value a certificate declaring it a fit one for appeal to His Majesty in Council ought not to be granted unless there is some substantial question of law of general interest involved. **M. AYYA RAGHUNATHA v. THIRUMALAI ECHAMBAD**, 18 M. L. T. 366; 2 L. W. 992; (1915) M. W. N. 916 **46**
- Probate—Division Bench, difference of opinion in—Letters Patent, cl. 15, appeal under, if maintainable **319**
- right of—Substantive law—Act, retrospective, effect of—*Res judicata* **214**
- Separate, by two sets of defendants—Appeal by one set, dismissal of—Appeal, hearing of, by other set—Discretion of Court to dismiss suit as against all defendants **886**
- Suit originally valued at above Rs. 5,000—Decree for less than Rs. 5,000—Jurisdiction **496**
- Two suits with regard to same subject-matter tried together—Judgment in one following that in the other—Appeal against one, whether barred because no appeal against the other **216**
- (Criminal)** Criminal Procedure Code (Act V of 1898), ss. 380, 408, 562—Proceedings submitted to First Class Magistrate—Sentence by that Magistrate—Appeal, where lies **338**
- Criminal Procedure Code (Act V of 1898), ss. 423, 424, 367, 537 (a)—Appeal, dismissal of, after notice—Judgment, omission to write, effect of **1008**
- Appeal, second**—Custom, validity of, question of, propriety of—Certificate, necessity of—Punjab Courts Act (XVIII of 1884), s. 40 (3)—Punjab Courts (Amendment) Act (I of 1912), s. 2 **386**
- Finding of fact **800**
- No appeal from first Court's decision maintainable—Second appeal, if maintainable **812**

Appeal, second—concl.

- Suit of a Small Cause Court nature—Right of fishery **797**
- Arbitration.** See **CONTRACT.**
- Award—Decree in accordance with award—Appeal—Revision, when maintainable—Award, nullity, effect of—Arbitrators, Court if can advise—Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 16.
- An application for revision of a decree based on an award can be entertained on the ground of material irregularity committed by the Court when no appeal under the Civil Procedure Code is maintainable against that decree, but such jurisdiction will be used very sparingly.
- Obiter dictum.*—Where there is no legal appointment of arbitrators, the award is a nullity and an appeal against the decree is maintainable.
- There is nothing objectionable in the Court's helping the arbitrators with advice and orders when they come to it in a difficulty. **P. KANHA LAL v. NARAIN SINGH** **700**
- Award, decree based on—Appeal not maintainable—Revision, when allowed—Civil Procedure Code Act (V of 1908), s. 115.
- There is no appeal against a decree based upon an award but if it can be shown that the lower Court acted without jurisdiction or failed to exercise a jurisdiction or acted with material irregularity in dealing with the award, it would be open to the High Court on a proper case being made out to revise such an order. **M. ARAMANAI RAJAGOPALA v. ARAMANAI RANGASAMI** **458**
- Delegation of functions—Judicial misconduct—Material irregularity—Award—Dealing with matters not covered by submission—Illegal parts of award severable—Legal part, effect on.
- An arbitrator has no authority to delegate his functions, except possibly the performance of what are called 'ministerial acts', and if he does so, he is guilty of judicial misconduct and his award is invalid.
- It is permissible to an arbitrator to take assistance in technical matters, in so far as such assistance is necessary for the discharge of his duties. The decision, however, must ultimately be his own judgment in the matter, although in the process of formation of that conclusion he may take the assistance of experts.
- A Court acts with material irregularity in the exercise of its jurisdiction, if it overrules the objection of judicial misconduct on the part of the arbitrator, without inquiry and without reception of evidence material for the determination of the issue.
- A submission furnishes the source and prescribes the limits of the arbitrator's authority and the award both in substance and in form must conform to the submission, and if the award extends to matters not within the scope of the submission, it is void as regards the portion in excess of the submission.
- Where the different parts of an award are severable and not dependent on each other, the illegal portion may be cancelled and effect given to the remainder. **C. JUGGUBUNDHU v. CHAND MOHAN SHAH**, 22 C. L. J. 237 **33**
- Order of reference authorising arbitrator to extend time made by consent of parties—Arbitrator extending time after the

Arbitration—concl.

period originally fixed by Court had expired—Arbitrator after such time, if *functus officio*—Award submitted within such extended time, if must be set aside—Arbitrator's interest in subject-matter in suit, when insignificant and unknown to him, if would invalidate award

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Question of title referred to arbitration—Award—Trial *de novo*—Proceedings before Civil Court—Limitation Act (IX of 1908), ss. 5, 14, Sch. I, Art. 175

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Assam Labour and Emigration Act (VI of 1901)—Principal and agent—Liability of Government for tortious acts of its servants—Government servant acting under statutory powers, whether agent—Illegal order—Government, whether liable—Public policy—Government servant, when personally liable—Defamation—Defamatory words published in course of official duties—Reasonable and probable cause—Prohibition of illegal business—Action, right of.

The Government cannot be made liable for illegal orders passed by a Government servant purporting to act under a statutory power conferred upon him. The plaintiff sued the Secretary of State for India in Council to recover damages for loss of business on the grounds: (a) that the Collector and District Magistrate of Ganjam on the 2nd February 1910 closed a labour-recruiting depot at Berhampore, that recruiting depot having been intended for the accommodation of coolies recruited on behalf of certain Tea Planting Associations in Assam, of which Associations the plaintiff had been appointed an agent, (b) that the Governor-in-Council by a G. O. dated 12th October 1910, ratified and confirmed the Collector's order closing the depot till that date, (c) that the Government in the said order made certain defamatory remarks concerning the plaintiff, and (d) that on account of the Collector's order the plaintiff was prevented from recruiting coolies and earning commission.

Held, (per *Sadasiva Aiyar, J.*)—(1) that the Government could not be made liable for illegal orders made by the Collector and District Magistrate inasmuch as he could not be treated as the agent of the Government of Madras, nor could the Government ratify that act so as to make itself liable;

(2) that on the highest grounds of public policy the Government should not be made liable for the tortious acts of its agents or servants, except probably for acts done in the course of those kinds of transactions, which even an ordinary private mercantile firm can enter into;

(3) that the District Magistrate himself even in his personal capacity could not be made liable to the plaintiff for the order made by him, as there was no proof that he acted maliciously or that his object was to injure the plaintiff's legal right;

(4) that the Governor-in-Council was not liable for publishing words concerning the plaintiff in the course of the official duties of the Governor-in-Council since it was not alleged that the publication was made maliciously and without reasonable and probable cause.

Held also (per *Bakerwell, J.*) that the prohibition of an illegal business does not give a right of action.

M. ROSS v. SECRETARY OF STATE, 29 M. L. J. 280

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Assam Land and Revenue Regulation (I of 1886), ss. 35, 36

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ss. 39, 156 (1), 35, 36—Application for registration of name by purchaser of land dismissed—Suit for declaration and possession in Civil Court, if maintainable Jurisdiction—Renewal of Settlement by vendor after sale, effect of.

Where the plaintiffs purchased lands from the defendants and applied for the registration of their names under the Assam Land and Revenue Regulation, 1886, but their application was refused by reason of the opposition of the defendants, who repudiated the sale:

Held, that the Civil Court was competent not only to declare the title of the plaintiffs, but also to place them in possession of the disputed property by ejectment of the defendants.

Held, further, that the mere fact that the defendants obtained a renewal of the settlement from the Revenue Authorities after the sale, did not create in them a right which they did not possess.

Section 154, sub-section (1), of the Assam Land and Revenue Regulation must be read along with, and is controlled by, the concluding clause of section 39 of the same Act. *C. ASKAR MIAN v. SAHEDALI BARA*, 22 C. L. J. 328

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—s. 70

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—s. 154 (1)

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Attachment. See EXECUTION.

—before judgment, cash deposited as security for withdrawing—Defendant declared insolvent—Plaintiff, if acquires any right in security deposit—Receiver in insolvency, right of, to get the money.

573

—Subsistence of attachment, how determined—Order not withdrawn—Presumption—Right to subsistence of attachment acquired under old Code—Civil Procedure Code (Act V of 1908), O. XXI, r. 57, whether has retrospective effect

The question whether by reason of the disposal of a petition for execution, an attachment cease to subsist, should be determined with reference to the facts of each case.

Unless an order of attachment is withdrawn or dealt with on the merits, the presumption is that it is in force.

A right to subsistence of attachment acquired under the old Code of Civil Procedure cannot be taken away by giving retrospective operation to Order XXI, rule 57 of the new Code. *M. RAGHAVA-CHARIAR v. ANANTHA REDDI*

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Award. See ARBITRATION.

—Fraud—Decree based on award obtained by fraud—Suit to set aside such decree, whether competent—Decree, whether can be set aside on ground that it was obtained by perjured evidence—Review

196

—Objections filed in time—Refusal by Court to hear as being filed out of time—Revision, competency of—Jurisdiction

536

—Order filing private award in part—Second appeal, whether competent—Error of law, whether ground for revision

80

—suit barred on—Limitation

816

Ballor and bailee—Suit against wrong-doer, who can maintain

430

Bandhu. See HINDU LAW.

Benami purchase—Ownership—Source of money.

Where a property is alleged to have been purchased by one man in the name of another, the question of ownership must depend upon the answer to the question, with whose money was the property purchased.

A. BHARAT INDU V. MUHAMMAD MAHBUB ALI KHAN 586

Benamidar—Suit for partition of immoveable property by benamidar, if maintainable—Suits for land and suits for money claims, distinction between—Nature of partition.

A benamidar cannot maintain a suit for partition of joint immoveable property.

Semble:—A distinction has been recognised in the Calcutta High Court between suits for land and suits for money claims in the determination of the question of the competence of a benamidar to maintain a suit: in the former class of cases the right has been denied; in the latter class of cases the right has been sustained.

The essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property.

No analogy can be established between partition and the enforcement of a money claim, even when such claim is associated with land, as in the case of a benami mortgage or of a benami lease, though as regards leases and mortgages, there is apparently some divergence of judicial opinion. **C. ATRAHANAESS BIBI V. SAFATULLAH MIA**, 22 C. L. J. 259

Bengal Land Revenue Sales Act (XI of 1859), s. 14—Sale for arrears of revenue—Suit for annulment—Sale for arrears of kist not due, ultra vires—Duty of Collector.

Where in a suit for the annulment of a sale for arrears of revenue, it appeared that the estate consisted of two mauzas with revenue assessed proportionately on each payable by kists, and several accounts having been opened in respect of this estate, the June kist of one of the accounts fell in arrears and the Collector ordered the sale for the arrears of the March kist (none being found to be due for which):

Held, (1) that there being no arrears for the March kist, a sale held expressly for such arrears, was ultra vires, although the sale might legitimately have been held for the June kist and consequently the sale of the entire mahal under section 14 of the Bengal Land Revenue Sales Act was void;

(2) that it was the duty of the Collector to close all the separate accounts before ordering sale of the entire estate. **C. MUHAMMAD IDRIS V. MOTASADDI MIAN** 743

s. 37 Proviso—Bengal Tenancy Act (VIII of 1885)—Raiyats at fixed rates—Ordinary occupancy raiyats—Enhancement of rent—Protection, nature of.

Raiyats holding at fixed rates are primarily the persons referred to in the proviso to section 37 of Act XI of 1859, and the protection provided by the section is extended under the Bengal Tenancy Act to all classes of occupancy raiyats.

A person who takes the tenancy originally as a raiyat at fixed rates may not thereby acquire an

Bengal Land Revenue Sales Act—concl'd.

occupancy right but a man who has already obtained occupancy rights cannot, by obtaining a grant of fixed rent, lose that occupancy right.

Quære:—Whether, in view of the protection offered by section 37 of Act XI of 1859, a purchaser at a sale for arrears of revenue can enhance the rent of an occupancy raiyat? **C. ABDUL GANI V. MAHBUB ALI**, 22 C. L. J. 223; 42 C. 745; 20 C. W. N. 185 19

s. 33—Revenue sale of estate not in arrear, effect of—Suit for recovery—Limitation—Letters Patent, s. 15—Judgment, meaning of—Criminal Procedure Code (Act V of 1898), s. 145, order under, admissibility of—Evidence—Admission, value of—Limitation Act (IX of 1908), Sch. I, Art. 142—Civil Procedure Code (Act V of 1908), s. 98—Appeal—Difference of opinion on some points—Practice.

Where a share of an estate, being in arrear of revenue was sold by the Collector under Act XI of 1859 and was purchased by the defendant, who thereupon dispossessed the proprietor:

Held, (Per Curiam), that Article 142 of the Limitation Act, 1908, governed the proprietor's suit for recovery of its possession.

Per Jenkins, C. J.—The value in fact of that which is in form an admission must depend upon the surrounding circumstances.

Where there is no arrear of revenue in respect of an estate, there is no condition justifying its sale and a suit for setting aside the sale is not necessary.

Per Mookerjee, J.—The term 'judgment' as used in clause 15 of the Letters Patent signifies what is now understood by the term "decree" or "order."

Where in an appeal the Judges of the Appellate Court are agreed that the decree of the Court below is erroneous to a certain extent, but as to the rest they are equally divided in opinion, the decree appealed from is bound to be reversed to that extent only but as to the rest it is confirmed under section 98, Civil Procedure Code.

Section 33 of Act XI of 1859 applies not only where the sale has been irregularly conducted, but also where the sale has been illegal as held in contravention of an express provision for exemption, but the principle has no application where the property sold is not in arrear; the existence of an arrear is a condition precedent to the exercise of statutory authority by the Collector. A sale which is beyond the statutory authority vested in a Collector cannot prejudice the rights of the proprietor.

A finding in the order of a Criminal Court under section 145, Criminal Procedure Code, is not admissible in evidence, though the order itself is admissible for a limited purpose, namely, to show the parties in dispute, the land in dispute, and the person declared entitled to retain possession. **C. KRISHN DOYAL GIE V. IRSHAD ALI KHAN**, 22 C. L. J. 525 965

Bengal Medical Act (VI B. C. of 1914), s. 27—Rules framed under the Act by Local Government, ultra vires—Specific Relief Act (I of 1877), s. 45—Mandamus—Omission of qualified candidate's name from Election Roll—Mistake of Returning Officer—Jurisdiction of High Court to interfere.

The petitioner was a Licentiate in Medicine and

Bengal Medical Act—concl.

Surgery of the University of Calcutta and as such was admittedly entitled to be registered under section 4 of the Bengal Medical Act. The petitioner's name was omitted from the preliminary list of persons qualified to vote at the first elections under the Act published by the Returning Officer appointed by the Local Government. His name was also omitted from the final Election Roll. The petitioner's application to the Returning Officer to have his name entered was not considered by that officer. The petitioner applied to the High Court under section 45 of the Specific Relief Act for an order compelling the Returning Officer to include and publish his name in the final Election Roll.

Held, that the High Court had no jurisdiction to interfere.

Under rule 16 of the rules framed by the Local Government under the Bengal Medical Act, the decision of the Local Government on any question that may arise as to the intention, construction or application of the rules shall be final, and under section 27 of the Act no suit or other legal proceedings shall lie in respect of any act done in the exercise of any power conferred by the Act on the Local Government or the Council or the Registrar.

The act which is referred to in section 27 of the Bengal Medical Act is not one done by the Local Government, but done in exercise of any power conferred by the Act on the Local Government.

Per Woodroffe and Carr, JJ.—Even assuming that rules framed by the Local Government under section 33 of the Bengal Act are *ultra vires*, an application under section 45 of the Specific Relief Act for an order compelling the Returning Officer to include and publish the applicant's name in the final Election Roll based on the assumption that the rules are not *ultra vires* but that they are valid rules which have not been given effect to in one particular by the Returning Officer, cannot be entertained. **C. NARENDRA NATH v. STEPHENSON**, 19 C. W. N. 129 **618**
Bengal Municipal Act (III of 1884), ss. 321, 322 (4)—*Dwelling house defined.*

A dwelling house is a house with the superadded requirement that it is dwelt in.

Where a holding was ordinarily used as a place of business and was also occupied by the plaintiff while he was in a state of unsound mind and where there was also a cook-shed or cowshed on the property:

Held, that on these facts the holding could not be deemed a dwelling house within the meaning of the first proviso to section 321 of the Bengal Municipal Act.

The effect of amendments of section 322 Bengal Municipal Act considered. **C. RADHA GORINDA v. NABADWIP CHANDRA PAL**, 19 C. W. N. 1027 **10**
s. 322 (4) **10**

Bengal Public Demands Recovery Act (I of 1895), s. 9—Civil Procedure Code (Act V of 1908), s. 64, O. VI, rr. 14, 15—Attachment of property, effect of—Omission to frame issue, effect of—Remedy—Certificate sale—Certificate proceedings, irregular—Sale, validity of—Statute, non-compliance with, effect of—Appellate Court, power of, to dismiss suit—Plaint not duly verified and signed—Procedure—Practice—Certificate, when invalid—Presumption—Official Act, regularity of—Service of notice, proof of.**Bengal Public Demands Recovery Act—contd.**

An attachment creates no charge or lien upon the attached property, it merely prevents private alienation, but does not confer any title on the attaching creditor.

Where the parties have gone to trial knowing what the real question between them was, the evidence has been adduced and discussed and the Court has decided the point as if there was an issue framed on it, the decision will not be set aside in appeal simply on the ground that no issue was framed on the point, in other words, the mere omission to frame an issue is not fatal to the trial of the suit.

Where, however, the failure to frame the issue has led to an unfair trial or miscarriage of justice, the case will be remanded for re-trial.

In a suit for a declaration that a certificate sale held under the provisions of the Public Demands Recovery Act was invalid and of no effect and that the defendants-purchasers had acquired no title to the property, the title of the defendants was expressly attached in the plaint but the issue as framed did not directly and specifically raise the question of the legality of the certificate proceedings. It appeared that the defendants were not taken by surprise in the Courts below but had adduced a considerable body of evidence in support of their title. In appeal, the defendants-appellants urged that the legality of the proceedings under the Public Demands Recovery Act was not raised in the issues framed in the suit and should not be investigated.

Held, that the defendants were not prejudiced in any way and that the objection, as it was neither taken in the Court below nor in the memorandum of appeal, was wholly unsubstantial.

A non-compliance with every requirement of a Statute does not universally make the proceedings a nullity. No hard and fast line can be drawn between a nullity and an irregularity, and when the provision of a Statute has been contravened, if a question arises as to how far the proceedings are affected thereby, it must be determined with regard to the nature, scope and object of the particular provision violated.

An Appellate Court should not dismiss a suit on the ground only that the plaint was not duly signed and verified, such a defect does not affect the merits of the case or the jurisdiction of the Court.

Therefore, where a requisition under section 9 (1) of the Public Demands Recovery Act is not duly signed and verified under section 9 (c) of the Act, the certificate issued on the basis of such requisition is not void in law.

The obvious intention of section 9 (3) of the Public Demands Recovery Act is that a certificate officer shall use his discretion as to the issue of a certificate, to determine whether the case is a proper one for it, whether the money be due or not.

A certificate in which the amount was not specified and the space intended for the insertion of the figures was left blank and which the certificate officer appeared to have mechanically signed without perusal and consideration, is not duly made under the provisions of the Act and a sale held under such a certificate is not valid.

Bengal Public Demands Recovery Act—concl'd.

The mere entry in the order sheet of the certificate case that notice has been served is no proof that service was effected.

When the circumstances of the case show that the certificate proceedings have been carried on in a careless or slovenly manner, the Court will be slow to apply the maxim *Omnia presumuntur rite et solemniter esse acta donec probetur in contrarium*. **C. MOHIUDDIN v. PIRTHICHAND LAL**, 19 C. W. N. 1159

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Bengal Survey Act (V of 1875), ss. 41, 63**Bengal Tenancy Act (VIII of 1885) 19**

ss. 49 (b), 85—Under-
raiyat—Holding for a term—Devolution of interest
—Heirs, whether can be ejected without notice.

There is nothing in the Bengal Tenancy Act which expressly takes away the right of the heirs of an under-raiyat to succeed to the remainder of the term granted by the raiyat within the powers conferred on the latter by section 85, and apart from custom or express enactment there is no doubt that a lease for a term devolves upon the heirs of the original lessee. On the expiry of the term the heirs may be ejected without notice under section 49 (b) of the Bengal Tenancy Act. **C. ALEJAN BIBI v. RAHAM ALI**, 22 C. L. J. 232

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s. 85 26

s. 151—Landlord and
tenant—Suit for rent below Rs. 50—Conflicting
claim set up—Suit dismissed as no relation of landlord
and tenant found—Appeal, if maintainable—No
appeal from first Court's decision maintainable—
Second appeal, if maintainable—Revision—Jurisdiction—
Civil Procedure Code (Act V of 1908), s. 115.

Where in a suit for rent under the Bengal Tenancy Act for an amount less than Rs. 50, the defendant set up the title in himself, but the suit was dismissed on the ground that no relation of landlord and tenant existed between the parties as no rent had ever been collected by the plaintiff:

Held, that the decision was not appealable.

No second appeal lies to the High Court from the decision in appeal of the lower Appellate Court when no appeal lay to the latter Court from the decision of the First Court.

Where an appeal to the High Court is found to be incompetent, the High Court has jurisdiction in a proper case to deal with the matter under section 115, Civil Procedure Code of 1908, even without an application for that purpose. **C. GANGADHAR KARMAKAR v. SHEKHAR BASINI DASIA**

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s. 161—Putni tenure,
unregistered purchaser of, right of—Incumbrance.

Per *Jenkins, C. J.*, and *N. R. Chatterjee, J.*, (*Mullick J.*, dissenting).—An interest of an unregistered purchaser of a portion of a putni tenure is not an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. **C. ABDUL RAHMAN v. AHMADAR RAHMAN**, 19 C. W. N. 1217; 22 C. L. J. 356

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Bengal Tenancy Act—concl'd.

s. 182—Homestead, meaning
of—Land used for agricultural purposes—Land used
for the purpose of gathering and storing thereon the
crops raised on adjacent lands.

In order to make section 182 of the Bengal Tenancy Act applicable, it is not essential that the homestead should be in the same village or be held under the same landlord as the holding of the raiyat.

The expression 'homestead' as used in the section denotes land on which a raiyat has his homestead, that is, land used by him for residential purposes. The section is not applicable where it is established that the land is not used by the raiyat as his homestead; it is not sufficient to show that the character of the land is such as would justify its use as a homestead.

The provisions of the Bengal Tenancy Act are applicable to all lands used for agricultural purposes and are not restricted to such lands alone as are, actually under cultivation.

Where the defendants were raiyats in respect of lands in the vicinity of the land in dispute which they had taken with a view to gather and store thereon the crops raised on the adjacent lands actually cultivated by them:

Held, that the provisions of the Bengal Tenancy Act applied, and the defendants were raiyats also in respect of the disputed land. **C. DINA NATH NAG v. SASHI MOHAN DEY**, 22 C. L. J. 219

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Sch. III, Art. 6—Decree
for share of rent by one co-sharer without making
other co-sharers parties—Execution—Limitation.

An application for execution of a decree obtained by a co-sharer landlord for his share of the rent without making the other co-sharers parties, is governed by Article 6 of Schedule III of the Bengal Tenancy Act. **C. BYONKESH CHAKRABARTI v. HALADHAR MANDAL**, 19 C. W. N. 1271

700

Bombay High Court Criminal Circulars, Circular No. 37 352**Bombay High Court Rules, r. 519—
Taxation of costs—Interpretation of rule.**

Under the present wording of rule 515 of the rules of the Bombay High Court the words "as the Taxing Master shall in his discretion think proper to be settled by Counsel" only refer to special affidavits, and not to pleadings. **B. BAPUJI SOBABJI PATEL v. BHUKUBHAI VIRCHAND**, 17 Bom. L. R. 924

868

**Bombay Prevention of Gambling Act (Act IV of 1887), s. 3—Instrument
of gaming—"Means of gaming," meaning of—Book
recording bets, whether a means of gaming.**

The word 'means' as used in section 3 of the Bombay Prevention of Gambling Act, 1887, having regard to the inclusive character of the definition in which it has been used, includes a thing or article which has been specially contrived and used to promote and facilitate the wagering.

A green book used for making entries of the bets made by those engaged in the wagering which could not be conveniently conducted otherwise than with or by means of this green book, is a 'means' or 'instrument' of gaming within the definition in section 3 of the Act. **B. MANILAL MANGALJI v. EMPEROR**, 17 Bom. L. R. 1080; 16 Cr. L. J. 827

1003

Broker. See CONTRACT.

Buddhist Law—Inheritance—"Payin" and "lettetpwa" property, meaning of—Right of child claiming through both parents—"Auratha" son, definition of—Out-of-time grand-children, right of, to inherit—Verbal mortgage—Subsequent document—Oral evidence admissible to prove transaction.

"Payin" property means property already owned by a person when he or she marries, whether he or she actually obtained possession or not. Property inherited by a person during marriage is not "payin" but "lettetpwa."

A child who has a claim through both parents gets a double portion both of inherited and of other lettetpwa property of what a child, who claims through one only, gets.

Out-of-time grand-children, if they be the children of the "auratha" son, receive the same share as their youngest uncle or aunt.

The Auratha son is the son who in case his father dies or becomes incapacitated is competent to take his place in the family.

A married three wives in succession. His son by the 1st wife having predeceased him. His grandsons sued his daughters by the other wives for their share of the property left by A. The defendants contended (1) that all the lands were inherited by A during his 3rd wife's coverture; (2) that certain plots had been mortgaged by A and redeemed by the 1st defendant; (3) that the plaintiffs were not entitled to inherit as they had been guilty of unfilial conduct; (4) that, at any rate, they were liable for their share of A's funeral expenses and (5) that A had given certain plots of land to the 1st and 2nd defendants:

Held, (1) that the gift to the 1st and 2nd defendants, even if proved, was invalid as they were living with the father at the time;

(2) that the presumption was that the plaintiffs were entitled to inherit and the burden of proving unfilial conduct was on the defendants and that the mere fact that the plaintiffs took no part in maintaining A, though he was blind and lame for many years before his death, was not sufficient;

(3) that if the plaintiff's father had been alive he could have been entitled to inherit one-half of the property acquired during his mother's marriage, a quarter of the property inherited by A during either of the other two marriages and one-third of A's "payin" brought to the 1st marriage, and the plaintiffs were entitled to get their father's share between them;

(4) that the 1st defendant having re-deemed certain lands the plaintiffs must pay their share of the mortgage-money before getting their share of the inheritance;

(5) that, as two different plots of land were mortgaged and redeemed as one parcel, the plaintiffs being entitled to one third of one and one-fourth of the other and the areas and values of the two were also different, it was fair under the circumstances of the case to apportion the charge according to the value of the lands than according to the area.

Where a mortgage is effected verbally and possession is given, the transaction is complete and the fact that a document is subsequently executed does not bar oral evidence of the original transaction. **U. B. NGA LU DAW v. MI MO YI**, 4 U. B. R. 1915, 11 66

Buddhist Law—contd.

Share of children of first marriage—Keitima child adopted before second marriage, right of—Undutiful conduct—Burden of proof.

Under the Buddhist Law adoption, like marriage, is not a mere contract, nor is it a grant or other disposition of property, nor is an adoption required to be in writing and, therefore, the fact that a deed of adoption was drawn up, does not preclude other evidence of the adoption.

The object of the keitima adoption is generally to provide the adoptive parents with an heir. In the case of such an adoption there must be a distinct occasion on which it takes place, it must be public and there is very often, though not always, a ceremony.

According to the Buddhist Law of inheritance, the children of a first marriage are, on the death of their father, who has married again after the death of their mother, entitled to three-fourths of the property taken to the second marriage, and one-eighth of the lettetpwa of that marriage. The same rule applies to a keitima child adopted by a man and his first wife.

In the case of keitima child living apart from his adoptive parents, the real question for determination is whether the surrounding circumstances proved to exist establish an intentional severance of the family tie or not. The requirement of joint residence can be safely relaxed in the case of an adoptive child who is also a blood relation.

Where the keitima child was the niece of the adoptive father and a year after her marriage lived in a granary in his compound, except for one year when she lived in her father-in-law's house, and for certain months in every year during which she lived in a field but for the purpose of cultivating her adoptive father's field:

Held, that so far as a joint living was concerned, the requirements of the Dhammathats were sufficiently complied with and consequently the burden of proving that she was by undutiful conduct debarred from inheriting was on the adverse party. **U. B. MI CHAN MYA v. MI NGWE YON**, U. B. R. 1915, 11, 74

Partition during step-father's lifetime—Practice—Appeal—New defence in consistent with original, if allowed—Limitation.

A Court should not allow a new plea to be raised in appeal which is inconsistent with the original one in the lower Court.

It is for the Judge to decide questions of law arising in the course of trial and he should not accept a view suggested by Counsel unless satisfied as to its soundness, it being quite different from an admission of fact by Counsel or from his waiving or withdrawing any part of his client's claim under instructions.

Under Burmese Buddhist Law, partition can be claimed by a step-child during the step-father's lifetime.

When the parties are working lands in turns by mutual arrangement, there is no adverse possession. **L. B. MA MIN KYIN v. MAUNG WA** 875

Buddhist Law, Burmese—Joint property—
Partition—Pre-emption—Right of pre-emption, whether
exists after partition—Trees attached to land, effect on.

Per *Curiam* (*Hartnoll, J.* dissenting)—Under the Burmese Buddhist Law the co-heirs who take part in the partition of immoveable ancestral property have not a right of pre-emption as regards such property after the partition has been effected.

Per *Sir Charles Fox, C. J., Ormond J. and Towney J.*—The right of pre-emption amongst co-heirs must be recognised only to the extent laid down in section 97 of part 2 of *Spark's Code* which professes to be a Code of Burmese Law and of the *Lex Loci*, viz., if a person wishes to sell his share in an undivided ancestral estate he should first offer it to all the co-heirs. They may buy the share jointly or each his separate portion of the share, or one may buy it in trust for the whole according as the heirs may decide among themselves; the seller shall have no voice in the decision and shall not be at liberty to sell his share otherwise than they or a majority of them shall decide.

Per *Hartnoll, J.*—In the case of inherited land inclusive of trees permanently attached to the land, a joint inheritor of such property has a right of pre-emption in respect of such inherited property in the event of one of the joint inheritors desiring to sell his share of such property or such part of the inherited property as he has obtained possession of, in whole or in part, and whether it is joint, undivided or partitioned estate, but in the event of a sale having taken place such right must be asserted promptly and within a reasonable time or it is lost for ever. In asserting such right against a buyer the sum offered must be the sum which the land has cost him. **L. B. MAUNG YE NAN O V. AUNG MYAT SAN, 8 BUR. L. T. 167**

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"Out of time grandchildren,"
rule as to, applicability of—Children and step-children—Procedure to be followed by Court when plaintiff has no cause of action—Civil Procedure Code (Act V of 1908), O. I, r 10.

When there are no children surviving but only the grandchildren the latter succeed on the same footing as children and the rule as to "out of time" grandchildren comes in only when a distinction has to be made between different classes of heirs, e. g., children and grandchildren and has no application when all the nearest heirs stand in the same degree of relationship to the deceased.

Neither Order I, rule 10, nor any other provision of the Code of Civil Procedure authorises a Court, on finding that the plaintiff must fail, to import into the case as co-plaintiff a person who has a different cause of action inconsistent with that of the original plaintiff and who moreover has not paid Court-fees on the new claim.

In a non-administration suit by one member of the family against another in his own right, the Court should adjudicate his claim on its own merits. **L. B. MAUNG SHWE PAW V. MA PAN ZI**

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Widow's power of disposal

Buddhist Law, Burmese—concl.

Under the Burmese Buddhist Law, a widow has an absolute power of disposing of the whole property subject to the right of others. **L. B. MAUNG PO SAING V. MAUNG SAN MIN**

948

Burden of Proof—Alienation by widow—
Daughter, power of, to contest

794

Common object of gang

345

denial of—Mortgage—Consideration, receipt of,

212

Escheat—Crown, suit by

590

ation—Promissory note—Consider-

739

One trial—Two separate charges—

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Burmese Buddhist Law.—See **BURMIST LAW.**

Carrier—Railway Company—Negligence—Action for personal injuries—Condition relieving from liability—Special contract—Railway Act of Canada (Rev. Stat. 1906, c. 37), s. 340.

A carrier is liable for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability.

Under section 340 of the Canada Railway Act, no contract restricting liability for carriage is to be valid unless it is of a kind approved by the Railway Board.

If a passenger has entered a train on a mere invitation or permission from a Railway Company without more, and he receives injury in an accident caused by the negligence of its servants, the Company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law and in the latter case as in form a tort.

But in either view, this general duty may, subject to such statutory restrictions as may be, be superseded by a specific contract, which may either enlarge diminish, or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of Justice. The specific contract, with its incidents, either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and a party cannot by any device of form get more than the contract allows him.

If the contract is one which deprives the passenger of the benefit, of a duty of care which he is *prima facie* entitled to expect that the Railway Company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may be shown to have done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorized antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such a case, it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to.

Carrier—concl.

In such cases the Railway Company may infer his intention from his conduct. If he stands by under such circumstances that it will naturally conclude that he has left the negotiation to the person who is acting for him, and intends that the latter should arrange the terms on which he is to be conveyed, he will be precluded by so doing from afterwards alleging want of authority to make any such terms as the law allows.

Moreover, if the person acting on his behalf, has himself not taken the trouble to read the terms of the contract proposed by the Company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the Company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by the Company, be bound and his principal will be bound through him.

Under these principles, the only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The Company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approved that contract by travelling under it, he cannot afterwards reprobate it by claiming a right inconsistent with it.

Where, therefore, a passenger who is to be carried upon special conditions at a reduced fare, has allowed terms to be made for him by an agent, the presumption is that the passenger was content to accept the risk without enquiring what the terms agreed upon by his agent were. **P. C. GRAND TRUNK RY. CO. OF CANADA v. A. N. ROBINSON**, 19 C. W. N. 905; 84 L. J. (P. C.) 194 **684**

Caste Disabilities Removal Act (XXI of 1850), object of—Mortgage by Hindu father—Suit by minor son for declaration that it shall not affect his rights—Son meanwhile becoming Muhammadan—Suit, if maintainable—Alienation for immoral purposes—Burden of proof

Caste Disabilities Removal Act of 1850 secures to individuals the same right in property after apostasy as they enjoyed before apostasy. Therefore, the right of a minor son to sue for a declaration that a certain mortgage deed executed by his father should not affect his rights as member of the joint Hindu family after the death of his father is not taken away by the fact of the son having embraced Islam.

Where it is shown that an alienor at the time of a mortgage executed by him was living a licentious life beyond his means, was indulging in drinking, prostitution and debauchery and was without any business or occupation on which the money might legitimately have been spent, it is unnecessary to prove that each item of the consideration money was spent on immoral purposes. **P. KISHEN SINGH v. BHAGWAN DAS**, 89 P. R. 1915 **476**

Cattle Trespass Act (I of 1871), s. 10—Trespass—Watchman seizing cattle, legality of.

Under section 10 of the Cattle Trespass Act, a watchman watching crops on the land on behalf of the cultivator or occupier is entitled to seize cattle trespassing on the land under his charge, when he is given general instructions to seize them while so trespassing. **M. In re SUBBARAYA PILLAI**, 16 Cr. L. J. 772 **372**

Cause of action—Continuous account 626

—Declaratory Suit **297**

—Mortgage suit—Mortgage not proved—Simple money decree, if allowed **705**

Central Provinces Municipal Act (XVI of 1903), s. 71 62

Central Provinces Tenancy Act (X of 1859), s. 2 (5)—Village tank let for fishing and growing water-nuts, land let for agricultural purposes.

A village tank over which the landlord gives a right to fish and grow water-nuts is not "land let or occupied for agricultural purposes or for purposes subservient to agriculture" for purposes of Act X of 1859. **N. HARI P. WANU**, 11 N. L. R. 122 **294**

Central Provinces Tenancy Act (XI of 1898), ss. 69 (1) (c), 45 (5)—Transfer of proprietary rights—Sir land, acquisition of expropriary rights in—Tenant of sir land, liabilities of.

Where ex-proprietary occupancy rights accrue to a *malguzar* under sub-section 1 of section 69 of the Central Provinces Tenancy Act, the provisions of exception (c) of the section do not cease to have effect and an ordinary tenant is still liable to be evicted by the ex-proprietary occupancy tenant under the provisions of the Act. **N. GOPIKISAN v. KULPAT**, 11 N. L. R. 170 **470**

—s. 45 (5) **470**

Charter Act, 24 & 25 Vic, C. 104, s. 15 502

Cheating. See PENAL CODE, s. 415.

Chittas—Evidence—Observations of High Court as to probative value of chittas in another case, how far to be followed by lower Courts—Chittas, when private and public documents.

A Subordinate Court ought not to rely upon the observations of a High Court as to the probative value of *chittas* made in another case, the evidence in which was different from that adduced in the case before it.

Where the *chittas* are prepared for a public purpose such as the distribution of revenue on the shares, or assessment and settlement of revenue on the share belonging to the Government, they are public documents, but where they are prepared with the object of ascertaining the lands belonging to the Government without prejudice to the rights of the owners of the *bahali* shares they cannot be called public documents even though they might have been availed of subsequently for assessment of Government revenue. **C. NABENDRA KISHORE ROY v. RAHIMA BANU**, 19 C. W. N. 1015 **695**

Chota Nagpur Tenancy Act (VI of 1908), ss. 87, 258, 264 (VIII)—Judicial Commissioner specially appointed to deal with revenue cases, if Revenue Officer—Decision of Judicial Commissioner—Res judicata—Civil Court, jurisdiction of—Civil Procedure Code (Act V of 1908), s. 11.

The Judicial Commissioner specially appointed under section 264 (viii) of the Chota Nagpur Tenancy Act to deal with the Revenue question decided by the inferior Revenue Officers in appeal

Chota Nagpur Tenancy Act—contd.

is a Revenue Officer within the meaning of section 258.

Therefore, a decision of the Judicial Commissioner in appeal from a decision of a Revenue Officer in a suit or proceeding under section 87 of the Chota Nagpur Tenancy Act bars a subsequent suit for the same purpose in a Civil Court.

A party cannot by suit seek to vary or set aside an order of a Revenue Court made under section 87 of the Chota Nagpur Tenancy Act but if he is in possession, he can defend his title in a suit for resumption against him. **C. TEKAIT GANESH NARAIN v. PROTAP UDAI NATH**, 19 C. W. N. 998 691

—ss. 258, 261 (VIII) 691

Civil Procedure Code (Act XIV of 1892), s. 13, Expl. II—Res judicata—

First suit as purchasers—Second suit as reversioners—Purchase of ancestral property by reversioners, effect of—Waiver—Acquiescence.

After a land was sold to the defendants, it was sold again to the plaintiffs-reversioners, and when the latter sued their vendor for possession of the land as purchasers, the former, having been added as parties, set up their prior purchase as a defence and the plaintiffs' claim was dismissed. Upon this, the plaintiffs sued as reversioners for a declaration on the ground that the land was ancestral and the sale, being in favour of defendants, was without consideration and necessity.

Held, that the plaintiffs' suit was not barred by the rule of *res judicata*.

A reversioner by purchasing an ancestral property does not admit the alienor's unrestricted powers, nor does he thereby renounce his position and rights as reversioner. **P. KURA v. MADHO**, 68 P. R. 1915; 151 P. W. R. 1915 159

—s. 335—Order passed without inquiry, if order within section—Suit for possession—Limitation Act (XV of 1877), Sch. II, Art. 11.

Where a resistance is offered in an execution proceeding, an order passed without any inquiry at all is not an order under section 335 of the Civil Procedure Code, 1882, and a suit for the possession of the property brought one year after the order, is not barred by Article 11 of Schedule II to the Limitation Act, 1877. **C. RAGUNATH JHA v. BIRJANDON SINGH** 444

Civil Procedure Code (Act V of 1908), s. 2 (2)—Order of abatement, if decree 4

—ss. 2 (2), 47, 148, O. XXXIV, r. 8 p. ov.—Order extending time for payment of money due under mortgage-decree, if appealable—Extension of time—Time limit under decree—Preliminary decree by Appellate Court—Determination of other questions—Suit, remitting of—"Court" in O. XXXIV, r. 8 proviso, meaning of.

An order extending time for payment of money due under a mortgage decree is neither "a decree" within the meaning of section 2 (2) nor a determination of any question coming within section 47 of the Code of Civil Procedure and, therefore, no appeal lies against such an order.

Civil Procedure Code—(1908)—contd.

Section 148 of the Code of Civil Procedure does not apply to the extension of time for doing acts allowed by decrees.

It is the Court of first instance, to which a suit is remitted after the preliminary decree has been passed by an Appellate Court, which has the exclusive jurisdiction to deal with an application for extension of time presented under Order XXXIV, rule 8, proviso.

The word "Court" in Order XXXIV, rule 8, proviso does not in all cases mean "the Court which passed the decree." **M. DHARMARAJA IYER v. SRINIVASA MURALIAR**, 2 L. W. 1074 29 M. L. J. 733, 18 M. L. T. 486 240

—s. 2 (11) 920

—s. 2 (13) 796

—ss. 4, 6, O. II, r. 2

—Provisions of Code, whether applicable to Village Munsifs—Suit for recovery of portion of price of article sold instituted in Village Munsif's Court—Subsequent suit for balance of amount due on account of various purchases, whether barred.

Order II, rule 2 of the Civil Procedure Code prohibits only the splitting of claims arising out of the same cause of action.

Where a customer makes distinct purchases on distinct dates, the merchant has got a distinct cause of action in respect of each purchase or set of purchases unless there is an agreement or settlement of accounts between the parties consolidating all these separate causes of action into one.

Where, therefore, in a suit for the balance of the amount due from the defendant on account of small purchases made by him on different occasions from the plaintiff's shop, it appeared that the plaintiff had previously sued for one portion of the claim in the Village Munsif's Court:

Held, that Order II, rule 2, did not apply and the subsequent suit was not barred.

The provisions of the Civil Procedure Code, 1903 are inapplicable to Village Munsif's Courts. **M. AGUSTUS BROTHERS v. FERNANDEZ**, 2 L. W. 890; 29 M. L. J. 474 18 M. L. T. 377 (1915) M. W. N. 765 59

—s. 6 59

—s. 10, scope of—Later suit disposed of earlier—Parties in two suits claiming under different titles—Pleadings in later suit, if can be urged as bar to previous suit.

After the plaintiff had brought a suit against the defendant, both of them were made defendants in another suit which was decided while the plaintiff's suit against the defendant was still pending. In his defence in the first suit the defendant relied upon the plaintiff's pleadings as defendant in the second suit. The plaintiff contended that as the trial of the second suit was without jurisdiction by reason of section 10 of the Civil Procedure Code, his pleadings in that suit could not be relied upon by the defendant:

Held, that, as the later suit was not between the parties under whom the parties to the earlier suit claimed litigating under the same title, the plaintiff's contention was untenable. **M. SADAGOPACHARIAR v. RAMA TIRUNALA CHARIAR** 25

—s. 11 691

Civil Procedure Code—(1908)—contd.

S. 11—Res judicata—

Partition—Partition decree not executed—Second suit for partition, whether maintainable—Decree for possession conditional on payment of money—Decree not executed—Second suit, whether maintainable.

The rights of a joint owner of land who obtains a decree for possession by partition of the joint tenancy, are not extinguished by his neglect to execute the decree within limitation. The relationship of the parties *inter se* continues to be that of joint owners and a second suit by him to effect partition of the joint property of which he is undoubtedly a joint owner, is not affected by the previous non-executed decree.

Where a decree for possession of property is conditional on payment of a sum of money, the decree-holder is not by reason of non-execution of such decree debarred from instituting a fresh suit for possession. **P. GAMAN v. IMAM BAKSH, 77 P. R. 1915; 164 P. W. R. 1915**

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S. 11—Two suits with re-

gard to same subject-matter tried together—Judgment in one following that in the other—Appeal against one, whether barred because no appeal against the other—Principal and agent—Silence or acquiescence of principal, whether amounts to ratification—Agent obtaining pecuniary advantage for himself, duty of—Trusts Act (II of 1882), s. 85—Decree in favour of principal—Execution sale—Purchase by agent of immoveable property outside British India—Principal entitled to decree for mesne profits—Mandatory injunction directing reconveyance of property, whether allowed.

Where two suits with regard to the same subject-matter are tried together on the same evidence and disposed of by the same Judge and the judgment in one follows the judgment in the other though separate decrees are drawn up, the fact that no appeal has been filed against one of these decrees does not make it operate as *res judicata* and does not bar an appeal against the other decree.

In the case of an agent exceeding his authority, ratification may be implied from the mere silence or acquiescence of the principal.

An agent who purchases property under circumstances in which his own interests are adverse to those of his principal and thereby obtains a pecuniary advantage for himself, must hold the advantage so gained for the benefit of his principal under section 88 of the Indian Trusts Act.

Where an agent purchased some immoveable property outside British India at a sale in execution of a mortgage-decree passed in favour of his principal and the principal sued him for an account of the profits of the property and for a reconveyance of the property to him:

Held, that the principal was entitled to a decree for an account of the profits of the property, but that a mandatory injunction directing the agent to execute the conveyance of the property itself could not be granted. **M. RAMASAMY CHETTY v. KARUPPAN CHETTY, 29 M. L. J. 551**

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S. 11, Expl. II—Appeal,

*right of—Substantive law—Act, retrospective effect of—Res judicata—Grant of agra-haram—Payment of *meras* and *russums*, when can be enforced.*

A right to appeal to a superior Tribunal is a substantive right which belongs to a suitor and an Act

Civil Procedure Code—(1908)—contd.

which takes away a substantive right is not retrospective in effect except by express enactment or by necessary intendment.

Where, therefore, in a suit instituted before the passing of the new Civil Procedure Code, a decision on a previous suit of 1902 in which no second appeal lay, was pleaded as a bar:

Held, that Explanation II to section 11 of the Civil Procedure Code, 1908, did not have a retrospective effect and the earlier decision could not operate as a bar to the suit.

As between a *zamindar* and his tenants a fee payable for a particular purpose cannot be enforced when that purpose fails.

Where, therefore, it appears that a grant of an *agra-haram* was made conditional on the payment of certain *meras* and *russums* which, however, were to continue only so long as the purpose for which they were made continued:

Held, that the payment could not be enforced when that purpose failed. **M. RAJAH OF KAHASTI v. SWARNAM KAMAKSHAMMA, 29 M. L. J. 535**

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S. 11, Expl. V—Suit

for possession and mesne profits—Claim as to future mesne profits not adjudicated upon—Subsequent suit for such profits, whether barred.

In a previous suit for possession the plaintiff claimed mesne profits which had already accrued as well as future mesne profits. He was awarded mesne profits already accrued, and the decree was silent as to future profits. On his bringing a fresh suit for future mesne profits the plea of *res judicata* was raised:

Held, that the mere omission of the Court to adjudicate upon the claim for future profits did not operate as a bar to a subsequent suit for such profits. **U. B. M. SAW U v. NGU MEIK, U. B. R. (1915) 11, 81**

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S. 20 (c)—Suit on promissory-note executed outside jurisdiction of Court—

Payment to be made within jurisdiction of that Court—Forum.

When a pro-note in lieu of certain profits was executed outside the jurisdiction of a Court and the executant also resided out of the jurisdiction of that Court, but the pro-note was delivered to the payee within the jurisdiction of the Court and it was intended that the money should be paid within that jurisdiction:

Held, that the Court had jurisdiction to entertain a suit on the pro-note under section 20, clause (c), of the Civil Procedure Code, 1908. **P. MUHAMMAD ISHAQ KHAN v. MUHAMMAD ISLAM ULLAH KHAN, 2 P. R. 1916**

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S. 35. See Costs.**S. 35—Costs, general rule**

as to—Small Cause Court, not following facts on record—High Court, whether can interfere—Jurisdiction—Revision—Provincial Small Cause Courts Act (IX of 1887), s. 25—Promissory note—'On demand,' meaning of—Creditor, liability of, for bringing action without demand—Debtor, liability of—Contract Act (IX of 1872), s. 49.

A High Court has power to interfere under section 25 of the Provincial Small Cause Courts Act, 1887, where a Small Cause Court departs from the general rule as to costs that they shall follow the event for

Civil Procedure Code—(1908)—contd.

reasons which find no adequate support in the facts on record.

The words 'on demand' used in a promissory note payable on demand do not constitute a condition precedent, but merely import that the debt is due and payable immediately.

A creditor, however, who commences an action without having first demanded payment, may properly be saddled with the costs of the trial, if the debtor was all along willing to pay.

Under section 49 of the Contract Act, it is generally for the debtor to seek out the creditor for the discharge of his debts. **N. MEGHAJ V. JOHNSON, 11 N. L. R. 189**

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s. 35, O. XXIII, r.

1 (3)—Discretion of Court as to costs, extent of—Power of Appellate Court to interfere—Order as to costs incorporated in decree, whether appealable—Pleader's fees—Madras Civil Rules of Practice, rr. 278, 279, 284.

In a mortgage suit plaintiff withdrew his claim against some of the defendants, while it was decreed against the others. The trial Judge ordered those defendants against whom the claim had been withdrawn to bear their own costs. On appeal the District Judge ordered the plaintiff to pay the costs. In second appeal it was contended that no appeal lay against the order of the trial Judge as it was not a decree.

Held, that as a decree was passed in the case, the defendants were entitled to appeal.

Discretion as to award of costs vested in a Court under section 35 of the Code of Civil Procedure is not absolute, and can be interfered with by an Appellate Court if exercised wrongly and arbitrarily.

Clauses (a) and (b) of rule 279 of the Civil Rules of Practice, Madras, apply equally to the word "withdrawn" as to the word "compromised" and the rule, therefore, has no application to the question of Vakil's fees in cases where the plaintiff withdraws his suit.

Order XXIII, rule 1, of the Code of Civil Procedure fixes no time within which a plaintiff should withdraw his suit; he may do so at any time before judgment is pronounced. But where he withdraws the suit against some of the defendants after both parties have adduced evidence on a preliminary issue, he does so only "after contest" within the meaning of rule 278 (a) of the Civil Rules of Practice. Even if the case is not covered by rule 278 (a), the Court has under Order XXIII, rule 1 (3), of the Code of Civil Procedure power to award against the plaintiff such costs as it thinks fit.

Where there are several defendants raising various defences a Court has power to award different sets of costs. **M. INDOOR SUBBARAMI REDDI V. NELATUR SUNDARAJA AYYANGAR, 18 M. L. T. 460; (1915) M. W. N. 1021**

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s. 47

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s. 47, O. XXI, r. 58

—Execution of decree against legal representative of deceased judgment-debtor—Property attached—Property, if assets of deceased, decision as to—Appeal, maintainability of.

An appeal lies from a decision in execution of a decree against the legal representative of a deceased judgment-debtor as to whether the property attached

Civil Procedure Code—(1908)—contd.

in execution forms part of the assets of the deceased, as the proceedings come under section 47 of the Civil Procedure Code, 1908, and not under Order XXI, rule 58 of the Code. **C. FAKIR CHANDRA GAIN V. GIRIBALA DASSYA, 22 C. L. J. 304**

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s. 47, O. XXI, r. 58

—Judgment-debtor, death of—Legal representative—Title of third person set up—Order—Appeal

Where on the death of a judgment-debtor, his legal representative is brought on the record, and such legal representative sets up in execution proceedings title on behalf of a person not a party to the suit, the order on such a petition is not one coming within section 47 of the Code of Civil Procedure but is within the purview of Order XXI, rule 58, and is not appealable. **M. PEETIKAVILAKATH MAHAMMAD HAJI V. ALAM IBRAHIM HAJI**

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s. 47, O. XXI, r.

101—Petition by judgment-debtor objecting to sale in execution—Objections by third party as well—Order, whether appealable.

An order passed on an application by a judgment-debtor objecting to the sale of certain immovable property in execution of a decree is, as between the parties to the suit, an order passed under section 47 of the Civil Procedure Code and is appealable even though it also disposes of objections made by third parties to the delivery of possession. **M. MURUGESA MUDALI V. SAMA GOVINDAN**

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s. 65, O. XXI, rr.

92, 94—Auction sale—Passing of title to purchaser—Confirmation of sale—Sale certificate—Presumption.

An auction sale becomes absolute (i. e., title passes) only on its confirmation by the Court. But in the absence of such a certificate the Court's confirmation may sometimes be inferred from the nature of the action taken by it on receipt of report of sale. **P. SAWAN MAL V. SAHIB DIAL, 81 P. R. 1915; 178 P. W. R. 1915**

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s. 66—Sale in execution

of decree—Suit by heirs of certified purchaser—Defendant, if can set up title.

Section 66 of the Civil Procedure Code is confined to suits brought against certified purchasers.

Where the plaintiffs sued to eject the defendant from certain plots of land on the ground that the lands were bought by the plaintiffs' brother at an auction sale held in execution of a decree against the original owner:

Held, that it was open to the defendant to set up her own title and to show that the certified purchaser was a mere benamidar for her. **N. HIRALAL V. GOPIKA, 11 N. L. R. 180**

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s. 73 (1), (c)—Surplus

sale-proceeds, distribution of amongst attaching creditors—Money standing to credit of one suit, application for transfer to another suit, if to be made in former—Practice—Rateable distribution, application for, on Original Side—Certificates of Accountant-General and Registrar, necessity of.

Where money in Court stands to the credit of one suit and the plaintiff in another suit has, by reason of being an attaching creditor or mortgagee or

Civil Procedure Code—(1908)—contd.

otherwise, an interest in such money and desires the fund to be transferred to the credit of his suit in order to be dealt with therein, he could in all cases make the application in the suit to whose credit the money stands for the transfer.

In an application on the Original Side of the High Court for the transfer and rateable distribution of funds to which the provisions of section 73 (1), clause (c), of the Code of Civil Procedure (Act V of 1908) may possibly apply, the applicant should be required to produce, in addition to the certificate of the Accountant-General, a certificate of the Registrar. **C. KUMAR KRISHN v. AMULYA CHARAN**, 19 C. W. N. 345 **616**

s. 92—Court of original jurisdiction—Subordinate Judge empowered to try suits under s. 92—Transfer of case from District Court—Subsequent notification limiting jurisdiction of Subordinate Judge to specified area, effect of.

Where a suit instituted under section 92 of the Code of Civil Procedure in a District Court was transferred by the latter to the Court of a Subordinate Judge empowered by the Local Government to try suits under that section but where by a subsequent notification the Local Government confined the original jurisdiction of that Subordinate Judge to a specified local area:

Held, that the Subordinate Judge, having derived his power to try such a suit by an order of transfer, made by the District Judge and under the prior Notification of the Local Government, did not cease to be "a principal Civil Court of original jurisdiction" within the meaning of section 92 of the Code of Civil Procedure by the latter notification, and his power to try the suit was not taken away by it. **M. GANAPATHI ASARI v. SUNDARAM CHETTI** **397**

s. 92—Sanction given to more than two persons—Suit by only two, whether competent.

Where more than two persons interested in a trust have obtained the necessary sanction under section 92 of the Civil Procedure Code, any two of them cannot sue without the others. **M. MADHALA BHAGAVANNARAYANA v. VADAPALLI PERUMALLACHARYULU**, 29 M. L. J. 231 **236**

s. 98 **236**
s. 104 (1) (f), (2)— **965**

Order filing private award in part—Second appeal, whether competent—Error of law, whether ground for revision.

On an application for filing an award made without the intervention of the Court, it was decided that part of the award, being on a matter which could not be the subject-matter of arbitration, was void; but that the valid portion of the award being separable from the invalid one, the award could be filed so far as it was free from the objection of invalidity. On appeal the application for filing the award was rejected on the ground that a private award must be either affirmed in its entirety or rejected in toto.

Held, (1) that no second appeal lay in the case; (2) that the order was not open to revision as an error of law is not a material irregularity and did not constitute a ground for revision. **P. AHMAD DIN ANIS-UL-RAHMAN v. ATLAS TRADING CO.**, 66 P. R. 1915; 146 P. W. R. 1915 **80**

Civil Procedure Code—(1908)—contd.

s. 105 (1), O. XLIII, r. 1 (d)—Decree ex parte, order refusing to set aside, whether appealable—Order setting aside decree ex parte, appeal against, maintainability of—Error made in setting aside such decree, effect of.

While an appeal lies under Order XLIII, rule 1 (d), of the Civil Procedure Code against an order refusing to set aside a decree passed *ex parte*, no appeal lies against an order setting aside such a decree. Under section 105(1) of the Code, any error, etc., made by a Court in setting aside an *ex parte* decree is not an error, etc., "affecting the decision of the case" and, therefore, cannot be set forth as a ground of objection in the memorandum of appeal. **P. FAZAL v. HASHMATI** **914**

s. 107, cl. (2), O. I, r. 10—Duty of Appellate Court to implead all necessary parties—Necessary party omitted—Decree for sale, whether operative.

Before deciding an appeal, it is the duty of the Appellate Court to bring on the record all the necessary parties to the appeal.

Where, therefore, a decree for sale was passed in a suit in which a necessary party under Order XXXIV, rule 1, of the Civil Procedure Code was knowingly omitted from the array of parties in appeal:

Held, that the decree could not be allowed to stand. **M. VELAMMAL v. LAKSHMI AMMAL** **814**

ss. 109, 110—Value of subject-matter in Court of first instance less than Rs. 10,000—Value of subject-matter in dispute on appeal to His Majesty in Council more than Rs. 10,000—Certificate, if can be granted—Involve directly or indirectly, some claim or question to, or respecting property of like amount or value, meaning of.

To entitle a person to a certificate for appealing to His Majesty in Council, it is not enough that the decree or final order in the case involves, directly or indirectly some claim or question to or respecting property worth Rs. 10,000 or upwards; the value of the subject-matter of the suit in the Court of first instance must also be Rs. 10,000 or upwards.

Where, therefore, the value of the subject-matter of the suit in the Court of first instance was less than Rs. 10,000 but the value of the subject-matter in dispute on appeal to His Majesty in Council exceeded that amount owing to the claim for mesne profits for the period between the institution of the suit and the petition for the certificate:

Held, that the case did not satisfy the provisions of sections 109 and 110, Civil Procedure Code, and that the petitioner was not entitled to a certificate. **M. SUBRAMANIAM AIYAR v. SELLAMMAL**, 2 L. W. 1057; 18 M. L. T. 450; (1915) M. W. N. 941 **296**

s. 109 (c) **46**
s. 110 **46, 272**
s. 115 **458, 579, 700, 812**

s. 115—Limitation Act (IX of 1908), Sch. I, Art. 158—Award—Objections filed in time—Refusal by Court to hear as being filed out of time—Revision, competency of—Jurisdiction.

Where a District Munsif declined to hear certain objections to an award filed by the petitioner on the ground that they had been filed out of time, while as a matter of fact they had been filed in time

Civil Procedure Code—(1908)—contd.

Held, that the decision amounted to a declaration of a jurisdiction by the lower Court and that the same could be revised under section 115, Civil Procedure Code. **M. RATNAM v. KOLANDAI RAMASAMY CHETTY**, 2 L. W. 1115

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s. 115—Mistake of law

as to jurisdiction—Jurisdiction dependent upon finding of fact—Interference in revision, when allowed—Misconstruction of documentary evidence, whether good ground for interference.

If an Appellate Court by an error of law finds jurisdiction in the Civil Courts, or denies jurisdiction to the Civil Courts, a High Court has power to interfere in revision under section 115 of the Civil Procedure Code.

But where the jurisdiction depends on a finding of fact, unless that finding of fact rests on no evidence whatever, revision under section 115 is not legally permissible.

A High Court cannot interfere in revision where the lower Appellate Court has misconstrued a portion of the documentary evidence or ignored important evidence in the case. **M. KARRI NARASAYYA v. THAVALA NAGESWARA RAO**

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s. 115—Withdrawal of

suit with permission to re-file it—Omission to consider question of costs—Failure to exercise jurisdiction vested in Court—Revision.

A suit was withdrawn with permission to re-file it. The question of the terms on which the suit should be allowed to be withdrawn, especially as to costs, was not considered by the Court granting the permission.

Held, that the omission to consider the question of costs, which resulted in substantial injustice being caused to the defendant amounted to a failure to exercise the jurisdiction vested in the Court. **U. P. B. R. HORI v. THAKURJI MAHARAJ**, 13 A. L. J. 10; Rev.

617

s. 141

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s. 148

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s. 150—Probate and Ad-

ministration Act (V of 1881), ss. 56, 76, 98—Probate granted—Inventory, furnishing of—Property transferred by bifurcation of District to another District—Jurisdiction—Court granting Probate, if can demand inventory.

Apart from section 150 of the Code of Civil Procedure, it is the Court which has jurisdiction to grant the Probate under section 56 of the Probate and Administration Act that has also jurisdiction to demand an inventory to be furnished to it under section 98 of the Probate and Administration Act. That jurisdiction cannot be said to have been taken away because by bifurcation of the district, the properties dealt with by the Probate, lie within the jurisdiction of another district. **M. SUBRAMANIAN CHETTY v. RAMASWAMI CHETTY**

499

s. 151, O. XLI,

r. 23—Appeal—New party, addition of—Remand to lower Court—Procedure.

Where an Appellate Court adds a new party, it has inherent power to reverse the decrees of the Court of first instance and remand the case for

Civil Procedure Code—(1908)—contd.

re-trial. This power has not been taken away by Order XLI, rule 23, Civil Procedure Code. **M. ANTONI JUAN PRAHU v. RAMAKRISHNAYYA**, 2 L. W. 1034

263

s. 153, O. VI, r. 17

—Amendment of plaint—Discretion of Court to permit—New cause of action arising during pendency of suit—Amendment, if permitted.

The plaintiffs sued to recover a share of the estate of A alleging that they were his heirs, but it was found that they were excluded from the inheritance by a nearer cousin who was alive at the time of A's death.

During the pendency of the suit, B one of the defendants, a daughter of A, died and the plaintiffs applied for amendment of the plaint so as to include a claim to a share as heirs of B. The amendment was opposed on the ground of its being based on a new cause of action based on events which occurred subsequently to the suit.

Held, that although the amendment under which the plaintiffs claimed as heirs of B referred to an event which had occurred after the suit had been filed there was nothing in the Civil Procedure Code, 1908, forbidding such an amendment.

There is no absolute rule of law on the subject of amendments. The matter is merely one for the judicial discretion of the Court, which will allow or disallow amendments as the circumstances of the case dictate, only remembering that it should not cause prejudice to the other side and it should, if possible, avoid multiplicity of suits. **S. NUN KHATUN v. SUMAR SAWAYO**, 9 S. L. R. 61

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s. 157, O. XLI, r. 1

—"Rules made," meaning of—Interpretation of Statute—Rule abridging substantive right, if ultra vires—Civil Rules of Practice, rule 49, effect of—Printed copy of judgment not filed with memorandum of appeal—Appeal, whether time-barred.

Where a rule abridges a substantive right granted by a Statute, such a rule is *ultra vires*, unless the Statute itself empowers the rule-making authority to alter the provisions in the Statute.

Per *Sadasiva Aiyar, J.*—The expression "rules made" in section 157 of the Civil Procedure Code must mean rules properly and validly made, in other words, made with jurisdiction by the proper authority.

Rules which though purporting to be made under the old Code were beyond the powers given by the Code, do not become valid by reason of the fact that if they had been made under the new Code they would be valid.

Rule 49 of the Civil Rules of Practice seems to enact by implication that the production of a printed copy along with the memorandum of appeal is compulsory where the length of the judgment or order exceeds 700 words, and is *ultra vires*.

Per *Napier, J.*—(1) Rule 49 of the Civil Rules of Practice does not have the effect of making the presentation of a printed copy of a judgment compulsory when it is over 700 words.

(2) Filing a certified copy of a judgment with the memorandum of appeal, is a sufficient compliance with Order XLI, rule 1 of the Civil Procedure Code and is not forbidden by the Civil Rules of Practice.

Civil Procedure Code—(1908)—contd.

Where, therefore, an appeal is presented within the period of limitation and a certified copy of the judgment appealed against is filed along with the memorandum of appeal but a printed copy of the judgment is filed out of time, the appeal is not time-barred.

M. RAMAKRISHNA PILLAI v. MUTHUPERUMAL PILLAI.
29 M. L. J. 663

O. 1, r. 9 456

O. 1, r. 10 332, 814

O. 1, r. 10—Third

party, whether can be impleaded at final stage.

A person who has not been impleaded either as a plaintiff or a defendant in the Courts below cannot claim to be made a party at the final stage of the case. **P. SUNDAR SINGH v. Musammat GURDEVI.**
163 P. W. R. 1915

O. 2, r. 2 59

O. 2, r. 2—Suit dis-

missed for defect in form—Subsequent suit, whether barred—Joint ownership—Right to demand partition incidental.

Where the dismissal of a suit takes place for defect in the form of the suit, Order II, rule 2 of the Civil Procedure Code does not preclude a plaintiff, whose suit has been thus dismissed, from bringing a second suit.

Order II, rule 2, requires a plaintiff to include in a suit the whole of the claim which he is entitled to make in respect of the particular cause of action which forms the basis of the suit and does not compel him to include claims arising out of different causes of action.

The right to demand partition is one of the incidents of joint ownership and as long as the joint ownership subsists, any of the joint owners may demand partition.

Where, therefore, a plaintiff's suit for his share of two mortgage-debts realised by the defendants from the mortgagors was dismissed on the ground that the suit for partial partition did not lie, and he then brought a suit for partition of all joint properties.

Held, that, the causes of action in the two suits being different, the second suit was not barred by reason of Order II, rule 2. **P. GULAB SHAH v. HAYKEI SHAH,** 87 P. R. 1915; 180 P. W. R. 1915

O. 3, r. 1 859

O. 5, r. 19—Ejectment

—Insufficient notice—Ex parte decree—Examination of process-server, necessity of—Material irregularity—Revision

Before an *ex parte* decree can be passed, the process-server should be examined on oath as laid down under Order V, rule 19 of the Civil Procedure Code.

If an order of ejectment has been made in spite of insufficient service of notice under section 59 of the Agra Tenancy Act, it is such a material irregularity as to justify interference in revision by the Board. **U. P. B. R. KANHAIYA v. DURGA PRASAD** 479

O. 6—Pleading—Plaintiff

bound to state nature of deeds supporting his title—Parties to be restricted to their pleadings—Inconsistent pleadings.

Civil Procedure Code—(1908)—contd.

It is absolutely essential that a plaintiff, not to be embarrassing to the defendants, should state those facts which will put the defendant on his guard and tell him what he will have to meet when the case comes on for trial. It is not necessary to set out the evidence whereby the plaintiff proposes to prove the facts which give him the title.

A plaintiff is bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims and show the devolution of the estate to himself.

Parties should be held strictly to their pleadings and should not be allowed to prove at the trial any fact which is not stated in their pleadings.

A plaintiff may in certain circumstances rely upon several different rights alternatively though they may be inconsistent. But he cannot be permitted to allege two absolutely inconsistent statements of facts each of which is destructive of the other. **C. MATI LAL PODDAR v. JEDHISTER DAS,** 22 C. L. J. 254

O. 6, r. 14, O. 3,

r. 1—Plaint—Signature of authorised agent—Plaint, if valid—Agra Tenancy Act (II of 1901), s. 193 (c).

A plaint signed by the authorised agent of the plaintiff is valid in law unless it is shown that the suit has not been instituted with the approval of the plaintiff. **U. P. B. R. AMIR-UN-NISSA v. RAM CHARAN DAS** 859

O. 6, r. 17 1, 7

O. 7, r. 11 (c) 807

O. 17, r. 2—Failure

of one party to appear at an adjourned hearing—Judicial discretion—Dismissal for default.

Order XVII, rule 2, of the Civil Procedure Code, throws upon the Court the responsibility of exercising a judicial discretion before disposing of a case under Order IX, when at an adjourned hearing the parties or any of them fail to appear.

Where, therefore, a plaintiff has closed his case and there is evidence which if un rebutted would prove his case, it is not a judicial exercise of discretion to dismiss the suit for default, and the Court should record the defence evidence even though the plaintiff is absent and dispose of the case on its merits. **M. SUBRAMANIA OTHUVAR v. MUNSAMIYA PILLAI** 869

O. 17, r. 3—Decision

passed 'forthwith,' whether one on merit.

A decision passed 'forthwith' under Order XVII, rule 3, Civil Procedure Code, is a decision passed on the merits on the materials then before the Court. **M. In re CHIDIPATU SOMAYYA,** 2 L. W. 1067

O. 21, r. 2—Part

payment of decree debt by judgment-debtor—Payment not certified to Court within three years—Application for execution, whether barred—Limitation Act (IX of 1908), s. 20.

There is no period of limitation within which a decree-holder is bound to certify part payments to Court. Once the certificate is made, the Court is bound to recognize the payments previously made and section 20 of the Limitation Act comes in to save limitation.

Civil Procedure Code—(1908)—contd.

Where, therefore, in a petition for execution the decree-holder relied upon a part payment made by the judgment-debtor within three years of the last application for execution but certified to Court after three years:

Held, that the payment was effectual within the meaning of section 20 of the Limitation Act and the application was not barred. **M. RAJAM AIYAR v. ANANTHABATNAM AIYAR**, 29 M. L. J. 669; 18 M. L. J. 475

O. 21, rr. 10, 64—

Execution—Order for attachment—Application for execution not disposed of—Subsequent application for sale of property, whether barred.

Where an order for attachment was made on an execution application but the application was not disposed of in any way and another application was made for the sale of the property:

Held, (1) that there could be no bar of limitation in the case as the decree-holder was only asking that effect be given to the application which was already pending before the Court;

(2) that the decree-holder had not disabled himself by laches from seeking to enforce his remedies under the pending application. **M. BOMMARAJU VENKATA PERUMAL v. SUBRAMANYA NAYANI VARU**

O. 21, r. 16—Execution—

Injunction, decree for, in respect of easement—Transfer of dominant tenement—No application by transferee—Decree-holder, right of, to execute decree—Executing Court, competency of, to consider incapacity of decree-holder to enjoy easement owing to transfer of dominant tenement.

An injunction granted by a decree in respect of an easement does not cease to be executable by the decree-holder merely because, subsequent to the decree, he has transferred the dominant tenement to a third party. A decree-holder is *prima facie* entitled to execute the decree and it is no answer to his application for execution that he has transferred the decree to a third party, so long as the transferee has neither appeared nor applied for permission to execute the decree.

It is not competent to the executing Court to take into consideration the fact that by a transfer of the dominant tenement the decree-holder is not entitled to enjoy the easement right granted by a decree. **M. SILU PEDA YELLIGADU v. SURYA RAO BAHADUR ZAMINDAR GARU**, 29 M. L. J. 633; 2 L. W. 11 22; 18 M. L. J. 494

O. 21, rr. 23, 57

Execution—Notice, issue of—Attachment—Default on part of decree-holder—Dismissal of application—Order for execution, whether res judicata.

The dismissal of an execution application under Order XXI, rule 57, Civil Procedure Code, has the effect of vacating a prior order passed under Order XXI, rule 23, ordering execution to proceed. **M. PERIAKARUPPAN CHETTIAR v. MANICKA VACHAGA DESIKA**, 2 L. W. 1055

O. 21, r. 57**O. 21, r. 58****O. 21, r. 63—Decree**

below Rs. 5,000—Suit valued above Rs. 25,000—Jurisdiction.

Civil Procedure Code—(1908)—contd.

The plaintiff brought a suit for a declaration that the property in suit, which she claimed under a sale-deed, was not liable to attachment and sale in satisfaction of the decree held by defendant No. 1 against defendant No. 2. The decree was for Rs. 2,000. The suit was valued at Rs. 25,000. The suit was decreed. The defendant preferred an appeal to the High Court:

Held, that the proper valuation of the suit was Rs. 2,000 and, therefore, the appeal lay to the District Judge, and not to the High Court. **A. KHETRA PAL v. MUMTAZ BEGAM**, 13 A. L. J. 1104

O. 21, r. 63—Suit

to set aside attachment of immovable property, valuation of—Jurisdiction—Suits Valuation Act (VII of 1887), s. 4.

In a suit instituted under Order XXI, rule 63 of the Code of Civil Procedure (both against the judgment-debtor and the decree-holder) to cancel the attachment and also to declare that the judgment-debtor has no interest in the property attached, the market value of the land and not the amount due under the decree in execution of which the land was attached, determines the Court which should entertain the suit. **M. NARAYAN SINGH v. AIYASAMI REDDI**, 29 M. L. J. 725

O. 21, r. 64**O. 21, r. 89****O. 21, r. 89—**

Deposit by purchaser—Sale not confirmed—Person applying to set aside sale, if can take advantage of deposits.

Amounts paid by purchasers in Court auction whose purchases have not been confirmed and which amounts, therefore, cannot be withdrawn by the decree-holder at his pleasure, cannot be taken advantage of by any person who applies under Order XXI, rule 89, of the Code of Civil Procedure. **M. MUHIUDDIN ROWTHER v. RANGACHARIAR**

O. 21, r. 90—Sale

under rent-decree—Non-transferable occupancy holding, mortgagee of, right of, to set aside sale—"Whose interests are affected by the sale," meaning of.

A mortgagee of an entire non-transferable occupancy holding, who has purchased the holding in execution of his mortgage-decree, is a person "whose interests are affected by the sale" of the holding in execution of a rent-decree, within the meaning of Order XXI, rule 90 of the Civil Procedure Code, 1908, and as such has a *locus standi* to apply under that rule to set aside the sale.

The words of rule 90 "whose interests are affected by the sale" are very wide. **C. SAILABALA DEBI v. NRITYA GOPAL SEN PODDAR**

O. 21, r. 94**O. 21, rr. 98, 99—**

Court, when can direct possession.

Order XXI, rule 98, of the Civil Procedure Code gives jurisdiction to the Court to direct possession only if it is satisfied that the obstruction was by the judgment-debtor or by some other person at his instigation. **M. SECRETARY OF STATE v. CHERUKARA NARAYANANUNNI PISHARODI**

O. 21, r. 99**O. 21, r. 101****O. 22, rr. 3, 9**

Civil Procedure Code—(1908)—contd.**O. 22, r. 9, cl. (2).**

applicability of—Abatement of suit owing to cause of action not surviving—Plaintiff's legal representative, whether can apply to set aside abatement—Order of abatement a decree—Malicious prosecution of manager of undivided Hindu family—Cause of action, whether survives to remaining co-parceners.

Order XXII, rule 9, clause (2) applies only to cases where an abatement takes place in consequence of an application not having been made "within the time limited by law" to bring in the legal representatives.

Where, therefore, a Court treats a suit as having abated owing to the cause of action not surviving, there is no right in the plaintiff's legal representative to apply under rule 9, clause (2), to set aside that abatement.

An order of a Court declaring that a suit has abated owing to the cause of action not surviving is a decree as it determines that the right of the plaintiff ceased to exist on his death.

An appeal against an order passed on one date cannot be treated as one against a decree passed on a different and prior date.

The cause of action for a suit for damages caused by the malicious prosecution of the manager of a joint undivided Hindu family does not, on his death survive to the remaining co-parceners even as regards that portion of the claim which related to the loss incurred by the estate, because the surviving members of an undivided family are not representatives of the deceased member. **M. SUBRAMANIA IYER v. VENKATARAMIAH**, 4

O. 22, r. 9 (2) —

Application to set aside abatement of appeal—Sufficient cause—Limitation Act (IX of 1908), Sch. I, Art. 171

Where one of the necessary parties to an appeal was murdered on the 26th January 1914 and applications to substitute names were not made until the 15th April 1915, the excuse offered in the application being ignorance of the fact of the murder and it being further alleged on the hearing that both the plaintiffs-appellants were absent on pilgrimage at the time:

Held, (1) that the appeal having abated six months after the date of the murder, the application ought to have been made within 60 days after abatement;

(2) that the appellants had failed to show sufficient cause for delay in applying, seeing that they lived within 15 kos of the deceased's village, and that the excuse about absence on pilgrimage was not mentioned either in the applications or the affidavits. **P. BHANI RAM v. NABAIN SINGH** 697

O. 23, rr. 1, 2 234**O. 23, r. 3—Decree**

passed in accordance with agreement of parties not appealed against—Decree, if binding in subsequent suit.

In a suit brought to establish the plaintiff's title to the land which he had got by virtue of a decree passed in a prior suit for specific performance of a contract to sell, the defendants alleged that they were not bound by that decree on the ground that it was a decree upon a

Civil Procedure Code—(1908)—contd.

compromise to which they were not parties. It appeared that what had happened was that the 1st defendant had made a statement on oath that he and other defendants had agreed to execute a sale-deed in favour of the plaintiff who also had made a statement on oath confirming this, and the Court had, thereupon, directed a decree to be made in accordance with the agreement of the parties:

Held, that the order was apparently passed under Order XXIII, rule 3 of the Civil Procedure Code and no appeal having been preferred against it the decree passed therein became final and binding on the defendants. **M. KANNAY V. RAMANNA** 21

O. 23, r. 3—Petition

filed in mutation case as to adjustment of dispute—Registration, if necessary—Evidence—Petition, admissibility of—Registration Act (XVI of 1908), s. 17.

A petition filed in a mutation case in which the parties merely request the Revenue Court to effect mutation of names in accordance with an agreement come to between the parties out of Court, is not compulsorily registrable and is admissible in evidence in a subsequent civil suit to prove the adjustment of a dispute between the parties out of a Court. **A. SITAL PRASAD v. Lal Bahadur**, 13 A. L. J. 1122 902

O. 24, r. 8 200**O. 29, rr. 1, 2—Com-**

panies, suit against—Proper framing of suit—Amendment of plaint—Service of notice after amendment.

In a suit against the India General Navigation and Railway Company and the River Steam Navigation Company for the recovery of damages on account of short delivery of goods committed to their care for transmission by them as public carriers, the plaintiff described the defendants in the plaint as the India General Navigation and Railway Company and the River Steam Navigation Company by their joint agent Mr. A. E. Rogers. When the case came on for trial, it was represented to the Court on behalf of Mr. Rogers that he had retired from the service of the Companies mentioned and had in fact left the country. The plaintiff thereupon applied to the Court for leave to omit the name of Mr. Rogers from the plaint. This application was granted and the suit was decreed *ex parte* as if it had been instituted properly against the two Companies:

Held, (1) that the plaint as originally framed was in contravention of rule 1 of Order XXIX, as the suit should have been framed against the two Companies, described by their proper names;

(2) that, as no question of limitation arose, the amendment of the plaint might stand, but the plaintiffs were bound to serve notices of the suit in the manner provided in rule 2 of Order XXIX after the amendment had been made and the suit properly constituted. **C. INDIAN GENERAL S. N. & R. Co. v. LAL MOHAN SAHA**, 22 C. L. J. 241 35

O. 29, r. 2 35**O. 32, r. 3—Appoint-**

ment of guardian ad litem—Omission to make formal order, effect of—Manager of joint family, death of—Liability of sons for debts of the firm—Contract Act (IX of 1872), s. 247.

Where the plaintiffs duly made an application for

Civil Procedure Code—(1908)—contd.

the appointment of a guardian *ad litem* of the minor defendants and the Court issued notices as required by Order XXXII, rule 3, sub-rule 4, and the guardian took all proper steps to defend the case:

Held, that the mere omission to pass a formal order to appoint him as guardian *ad litem* was a mere irregularity which could be condoned and did not amount to a defect vitiating all proceedings.

Where the father of the minor defendants was a partner in a firm and as Manager of a joint Hindu family consisting of himself and his sons represented the whole family in the partnership:

Held, (1) that his death did not bring about a dissolution of the partnership and the family, which may be regarded as a *persona*, remained partners both before and after his death;

(2) that the liability of the minors for the debts of the firm was limited only to their share in the firm. **P. NARAIN DAS v. RALLI BROTHERS**, 61 P. R 1915; 136 P. W. R. 1915

45

————— **O. 34, r. 2** 320

————— **O. 34, rr. 3, 8—Extension of time fixed for payment of mortgage-money, grant of—Mortgagor, if entitled to redeem as of right after time fixed—Order made without jurisdiction—Revision**

In cases where the mortgagee sues for foreclosure, extension of time for payment is not given as a matter of course and the mortgagor is not entitled to redeem as of right after the time fixed for payment although no order for foreclosure absolute has been passed.

In suits by the mortgagor to redeem, the time for payment is not extended except in cases of accident or mistake.

Where a Court extends the time when it has no power to do so, a High Court has power to interfere with the order in revision as one passed without jurisdiction, but will not do so if it appears that the order was made in the interests of justice. **M. MURUGESA MUDALI v. RAMASAWMI CHETTY**, 18 M. L. T. 495

200

————— **O. 34, r. 8** 240

————— **O. 37—Order to furnish security—Letters Patent, cl. 15—Appeal.**

No appeal lies against the order of a single Judge on the original side of the High Court directing the defendant in a suit under Order XXXVII of the Civil Procedure Code to furnish security before granting him leave to defend the suit. **C. SUKHLAL CHUNDERMULL v. EASTERN BANK, LTD.**, 22 C. L. J. 41; 42 C. 735

238

————— **O. 40, r. 1—Receiver appointment of, to receive rents and profits—Simple money decree, execution of—Property not attachable—Execution, how effected.**

Under Order XL, rule 1, of the Civil Procedure Code, a Receiver can be appointed to receive the rents and profits of an estate which cannot itself be attached and consequently a simple decree for money may be executed by appointing a Receiver.

Where the interests of both the decree-holder and the judgment-debtor can be safeguarded and where there is no other way than the appointment of a Receiver in which the decree-holder can hope

Civil Procedure Code—(1908)—contd.

to recover any appreciable part of his claim, the appointment of a Receiver is neither unjust nor inconvenient. **N. LAHANU BAI v. HARAKCHAND**, 11 N. L. R. 113

285

————— **O. 40, r. 5—Receiver—Appointment of next friend of minor as Receiver of his estate, whether legal—Power to appoint Receiver, if includes also power to remove him—General Clauses Act (X of 1897), s. 16—Burden of proof.**

It is not illegal to appoint the next friend of a minor also as a Receiver to manage his estate on his behalf.

A power to appoint a Receiver does not of itself include a power to remove the person so appointed and section 16 of the General Clauses Act has no application to appointment of Receivers made by a Court.

Where it is sought to remove a Receiver already appointed the burden is upon the person applying for the removal to prove the circumstances which would justify it. **M. RUKMANI AMMAL v. ADVOCATE-GENERAL OF MADRAS**

908

————— **O. 41, r. 4—Appeals separate, by two sets of defendants—Appeal by one set, dismissal of—Appeal, hearing of, by other set—Discretion of Court to dismiss suit as against all defendants.**

The plaintiff filed a suit for possession against two sets of defendants and obtained a decree in the first Court. Both the sets of defendants filed separate appeals on different dates. The appeal filed by one set of defendants was heard and dismissed. Subsequently the appeal filed by the other set of defendants was taken up. The Additional District Judge who heard the latter appeal being of opinion that the plaintiff had no title to the property, dismissed the suit as against all the defendants.

Held, that the Judge had the discretion under Order XLI, rule 4, of the Civil Procedure Code to dismiss the suit as against both sets of defendants. **A. ISHAR DUTT v. MUSAI DUBEE**

886

————— **O. 41, rr. 11, 16** 74

————— **O. 41, r. 23** 263

————— **O. 41, r. 27—Admission of evidence in appeal—Discretion of Court.**

In admitting evidence in appeal the Court should strictly follow the procedure laid down by Order XLI, rule 27, Civil Procedure Code, and specially by the second clause of the rule. **A. GAURI RAI v. BHAGGINA**

873

————— **O. 41, r. 31—Judgment, contents of—Appellate Court, duty of.**

An Appellate Court should not dispose of appeals coming before it in a judgment which does not show the points raised and the reason for its decision. **L. B. MI NYIN THA ME v. MI NYO WUN ME**

856

————— **O. 41, r. 33—Appellate Court, whether can reverse decree against non-appealing defendant.**

In a suit on a mortgage-deed, separate decrees were passed against the 1st defendant and defendants Nos. 2 and 3. The plaintiff appealed against the decree in so far as it exonerated defendants Nos. 2

Civil Procedure Code—(1908)—contd.

and 3 from liability for a portion of the claim, and defendants Nos. 2 and 3 filed cross-objections, but the 1st defendant did not appeal. The Appellate Court, however, dismissed the suit as against all defendants. On second appeal by the plaintiff:

Held, that as the memorandum of cross-objections by defendants Nos. 2 and 3 did not proceed on any ground common to them and the 1st defendant and as the 1st defendant did not appeal, the District Judge was not justified in interfering with the decree against him. **M. MAYANDI CHETTIAR v. TIRUMALAI AIYANGAR** 986

O. 41, r. 33—Parties—

operated by first Court, if can be made party in appeal—Memorandum of objections.

An Appellate Court has power to add as party a person who was exonerated by the Court of first instance, but where there is already a memorandum of objections seeking to make him liable and the appeal is pending, the order making him a party is in its nature interlocutory, and a High Court will not interfere with the order in revision under section 115, Civil Procedure Code.

Quere—Whether under Order XLII, rule 22, sub-rules (3) and (4), an Appellate Court can make a defendant exonerated by the Court of first instance, a party to the memorandum of objections when not made a party to the appeal itself? **M. RENALA BAKU REDDI v. DODLA RAMI REDDI** 978

O. 43, r. (1) (b) 914**O. 45, rr. 2, 3, 8 46****O. 47, r. 7 912****Sch. II, paras. 1,**

15, 16 (2)—"Party interested," meaning of—*Reference to arbitration by contesting parties—Decree passed in accordance with award—Ex parte defendant, whether can appeal.*

A suit was brought for recovery of certain properties purchased by the plaintiff and trespassed upon by defendants Nos. 1, 2 and 3. The 1st defendant contended that the properties had been sold to the 4th defendant, who was thereupon impleaded and adopted the defence. The 1st defendant died and defendants Nos. 2 and 3, his legal representatives, remained *ex parte* throughout. The plaintiff and the 4th defendant then agreed to refer the suit to arbitration and a decree was passed in accordance with the award. On this the second defendant appealed, on the ground that the decree was not binding on him as he was not a party to the arbitration:

Held, (1) that the appellant was not a "party interested" within the meaning of paragraph 1 of the Second Schedule of the Code of Civil Procedure and had no right to appeal;

(2) that he did not even have any equitable claim to set aside the decree, for by remaining *ex parte* he left the conduct of the suit in the hands of the Court and it was immaterial to him how the suit was decreed.

Per Phillips, J.—An appeal will not lie against a decree passed in accordance with an award, even where the award is not valid in law, except as provided in paragraph 16 (2) of the Second Schedule of the Code of Civil Procedure.

Civil Procedure Code—(1908)—cont.

Per Tyabji, J.—(dissenting)—An appeal does lie from a decree passed in accordance with an award, purporting to bind a person who never submitted to arbitration or where there has been no agreement to refer at all. **M. VYTHINATHA AIYAR v. VAITHILINGA MUDALIAR**, 18 M. L. T. 374; 2 L. W. 900 206

Sch. II, paras. 3,

8 and 15.—*Arbitration Order of reference authorising arbitrator to extend time made by consent of parties—Arbitrator extending time after the period originally fixed by Court had expired—Arbitrator after such time, if functus officio—Award submitted within such extended time, if must be set aside—Arbitrator's interest in subject-matter in suit, when insignificant and unknown to him, if would invalidate award.*

Where an order of reference to an arbitrator under Schedule II of the Code of Civil Procedure (Act V of 1908) fixed three months' time for the submission of the award to Court and also empowered the arbitrator to extend the time for such submission from time to time by endorsement in the office copy of the order:

Held, that when the Court had made the order by consent of the parties, there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired.

But the arbitrator could only extend the time in such cases, before the time originally fixed for making the award had expired. If he did not do so, he was by reason of effluxion of time *functus officio* and had no further jurisdiction in the matter. As in this case, the arbitrator had extended the time after the three months originally fixed by Court had expired, the award must be set aside, although it was submitted within the time so extended by the arbitrator.

If an arbitrator, unknown to one of the parties, has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator. If, however, his interest is insignificant and unknown to himself so that it is impossible that it could have influenced his award in any way, the Court would not be disposed to set aside the award. **C. CO-OPERATIVE HINDUSTAN BANK, Ltd. v. BHOLA NATH**, 19 C. W. N. 165 597

Sch. II, paras. 8,

15 597

Sch. II, para. 15 206**Sch. II, para. 15—**

Fraud—Decree based on award obtained by fraud—Suit to set aside such decree, whether competent—Decree, whether can be set aside on ground that it was obtained by perjured evidence—Review.

A decree cannot be set aside in a subsequent action on the mere proof that such a decree was obtained by perjured evidence, on the principle that a matter cannot be re-agitated on the same materials or on materials which might have been laid before a Court in the first instance.

If evidence not originally available comes to the knowledge of a litigant at a later date, his remedy lies in seeking a review of the judgment if applied for without unreasonable delay.

Civil Procedure Code—(1908)—concl'd.

A decree based on an award was passed in 1905. In 1911, the plaintiff sued to set aside that decree on the ground that during the course of the arbitration, the defendant had filed a fraudulent account and supported its items by false evidence. The document upon which the plaintiff based his allegation of fraud was in his possession in 1902:

Held, that in this case the only remedy open to the plaintiff lay through a review, and not by a separate suit.

Quere:—Whether a decree based on an award could not be set aside by a separate suit under any circumstances whatsoever?

Obiter dictum.—Where one of the parties to arbitration proceedings has been personated or has received no notice of the proceedings, a suit to set aside the award on the ground of fraud might be maintainable. **P. SKINNER v. BADRI KRISHNAN**, 98 P. R. 1915; 179 P. W. R. 1915

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Sch. II, para. 16

700

Sch. II, para. 16

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(2)

Sch. II, paras. 17,

20—*Arbitration—Question of title referred to arbitration—Award—Trial de novo—Proceedings before Civil Court—Limitation Act (IX of 1908), ss. 5, 14, Sch. I, Art. 178.*

After the death of a certain Hindu, disputes arose among the various branches of his family as to their title. One branch alleged separation and the other branch alleged that the family was still joint. It appeared that the family was possessed of shares in a number of villages in two Tahsils, some of the villages standing in the names of some of the members and others in the names of other members. An application for mutation of names was made in regard to each village. In the case of one Tahsil application for mutation was made to the Tahsildar while in the case of the other to the Assistant Collector. The parties subsequent to the institution of proceedings executed agreements to refer their disputes as to the title to the land, to arbitration. These agreements were placed before the respective officers and all files were sent to the arbitrator. The arbitrator filed an award. At a subsequent stage of the case, he was directed to file another award which he did in exactly the same terms and bearing a later date. The respondents were not satisfied with the award and the matter went up to the Board of Revenue, which sent the cases back to be tried *de novo* without regard to arbitration. Upon this, the appellants filed applications under clauses 17 and 20 of Schedule II, Code of Civil Procedure.

Held, (1) that clause 17 of Schedule II, Civil Procedure Code, could not operate in the circumstances of the present case as the facts had gone beyond the stage contemplated by that clause;

(2) that the application under clause 20, of Schedule II, Civil Procedure Code, was barred under Article 178, Schedule I, Limitation Act, as it was made more than a year after the date of the award and as it was impossible either under section 5 or section 14 of the Limitation Act to extend the time so as to enable the present application to be treated as made within time. **A. RAM UGRAH PANDE v. ACHRAJ NATH PANDE**, 13 A. L. J. 1115

899

Common Carrier—See RAILWAY.**Companies Act (VI of 1882), s. 150—**

Contributory, liability of, to pay debt due by him Company—Procedure.

Under section 150 of the Companies Act, 1882, a contributory can be required, not only to meet calls which may be made on him, but also to pay any debt which he owes to the Company.

But the Court is not bound to proceed under section 150 for the recovery of debt due from a contributory and may, if so advised, direct the Liquidator to file a regular suit for the purpose. **P. KAMTA PERSHAD v. INDUSTRIAL BANK OF INDIA, LTD.**, 59 P. R. 1915; 139 P. W. R. 1915

54

S. 150—'Money due from him to the Company,' interpretation of—Winding-up—Contributory—Debt due on pro-note to Company—Summary jurisdiction of Court—Marginal notes to sections, reference to—Interpretation of Statute.

A debt due on a pro-note by a contributory is "money due from him to the Company" within the purview of section 150 of the Companies Act (VI of 1882).

Under section 150 of the Companies Act, the Court has, upon a summary application presented to it, the power to direct the contributory to pay not only all moneys due from him as a member, but also any debt due from him to the Company. The jurisdiction is permissive, but when a case is made out for the exercise thereof, it should not be declined unless very cogent reasons to the contrary are shown.

Seemle.—The marginal note to a section cannot be relied upon in clearing up the ambiguity in the text of the written law, but it may with advantage be referred to when it confirms the conclusion warranted by the language of the section. **P. LAHORE BANK, LTD. v. KIDAR NATH**

746

S. 169—Appeal against orders made in winding-up proceedings—Limitation—Extension of time—Principles—Special circumstances.

The general principles for extending time in winding-up appeal cases are as follows:

(i) The object of the Act (VI of 1882) being that matters should be settled speedily and that winding-up proceedings should not be protracted unduly, an extension of time will not be granted except under 'special' circumstances;

(ii) in the absence of 'special' circumstances, a litigant who has obtained a judgment which, by expiration of the time limited for appeal, has become absolute, ought not to be deprived of it;

(iii) a person who applies for an extension of time must show, not an equity properly so-called, but something which entitles him to ask for the indulgence of the Court to relieve him from the legal bar that is imposed by the Act of the Legislature.

Under section 169 of Act VI of 1882, the "special circumstances" which entitle a person to ask for extension of time require that he will not be granted the indulgence unless he can satisfy the Court that he himself has acted with reasonable diligence and that the delay in prosecuting his appeal, was due either to the respondents' conduct or to some action or inaction on the part of the Court below. **P. BISHEN DAS v. LIQUIDATOR, DOABA BANK, LTD.**

725

Companies Act (VII of 1913), s. 2—

Companies Act VI of 1882), s. 3—Transfer of shares after insolvency of Company—Informal transfer by Director of his shares, effect of—Liability as contributory.

Where a Company has become insolvent although no winding-up has commenced, the Directors may and ought to refuse registration of any transfer of shares.

Non-observance of the requisite formalities for transfer of shares is a fatal defect: such a transfer does not absolve the transferor from his liability as a contributory, particularly when he is himself one of the Directors of the Company.

Where a Bank stopped payment on 22nd September 1912 and on 2nd October of the same year one of the Directors transferred his shares to a man of straw without observing the rules on the subject: *Held*, that the transfer was both invalid and *ultra vires*. **P. HAKIM RAI V. PESHAWAR BANK LTD.**, 162 P. W. R. 1915 **865**

Company—Director acting as such for many years—Third person, if can question his power—Shareholder—Estoppel.

When a Company is shown to have accepted a certain person for many years as its Director and has never on any occasion repudiated any of his acts as such, it is not open to one who has no concern with the Company to challenge the appointment of such Director or to contest his authority to act on behalf of the Company.

When a share-holder of a Company takes part in nearly all the general meetings of the Company and joins in the annual appointment of its Director without taking exception to his appointment, he is under the circumstances debarred by his conduct from objecting to the validity of the Director's appointment or to his authority to act for and on behalf of the Company. **P. IMPERIAL OIL, SOAP AND GENERAL MILLS CO LTD. v. WAZIR SINGH**, 182 P. W. R. 1915 **595**

—, suit against—Proper framing of suit—Amendment of plaint—Service of notice after amendment **35**

Compromise. See CRIMINAL PROCEDURE CODE, s. 345; REGISTRATION ACT, s. 17.

—incorporated in decree, whether requires registration **260**

—decree, binding force of **902**

—, suit to set aside—Mistake, if valid ground—Remedy—Amendment of decree—Fresh suit, not maintainable—Fraud, suit to set aside decree on ground of, maintainability of.

A contract of the parties is nonetheless a contract because, there is superadded to it the command of a Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract.

A suit to set aside a decree obtained after contest and giving accurate expression to the Court's intention, is not maintainable.

Per Holmwood, J.—Where there is any divergence between the decree and the judgment, the matter is for amendment of the decree and not for a fresh suit to set aside the decree.

Compromise decree—concl.

Obiter dictum:—(Per Jenkins, C. J.)—A decree can be set aside on the ground of fraud, if of the required character. **C. KUSADHAR BHAKTA v. BROJA MOHAN BHAKTA**, 19 C. W. N. 1228. **13**

Confession. See CRIMINAL PROCEDURE CODE, s. 164.

Consideration. See CONTRACT ACT, s. 2 d).

Construction of deed—Property described as belonging to minor and registered in mother's name as guardian **811**

—Usufructuary mortgage created but no transfer of possession made **454**

—of document **473**

—Ancient document **543**

—Consent by reversioners to widow's applying estate to charity—Failure of one form of charity—Gift to other form, validity of.

Where the reversioners to a Hindu woman's estate, gave the widow authority to devote the property to any charity but the particular form of charity which she had selected having failed, she applied the property to another form of charity:

Held, that the reversioners were not entitled to impeach it, as a general intention to give to charity was agreed to by them. **P. BHUWANI ORPHANAGE ASSOCIATION v. PARMA NAND** **737**

—Mortgage **869**

—Sale-deed—Price treated as continuing debt—Property made security for the payment of debt—Agreement to reconvey—Mortgage or sale **308**

—Surrounding circumstances—Intention—All clauses to be given effect to—Assignment of debt—Debtor's assent communicated to assignee—Debtor, whether can subsequently plead any claim or charge—Transfer of Property Act (IV of 1882), s. 132—Actionable claim—Transfer prima facie subject to equities—Transferee, liability of, to ascertain extent of equities—Evidence Act (I of 1872), s. 23—"Without prejudice," meaning of, when used in a private document.

A Court is empowered to look to surrounding circumstances in deciding what the intention of the parties to a particular transaction was.

Parties are bound by the words they have used, however clear their intention may be.

In construing a document, a Court will not adopt such a construction as will reduce one important clause of it to a nullity. (*Ut res magis valeat quam pereat.*)

Where there is an assignment of moneys in the hands of a debtor and the debtor communicates to the assignee his assent to deliver the moneys in accordance with the terms of the assignment, he cannot afterwards assert, as against the assignee, any claim or charge in his own right, of which no notice had been given to the assignee.

Quere.—Whether this obligation is based on contract, estoppel, or waiver?

Under section 132 of the Transfer of Property Act, the assignee of an actionable claim *prima facie* takes it subject to all existing equities and it is his duty to ascertain their extent.

Construction of document—concl.

The onus of proving affirmatively that the assignment of an actionable claim is free from an existing right, is upon the assignee.

The words 'without prejudice' when used in private documents, have not the well-known meaning which they have when used in connection with an actual or impending litigation. **M. VENKATA SUBBIAH CHETTY v. SUBBA NAIDU**, 2 L. W. 977; 18 M. L. T. 533

152

— of Statute—Provincial Small Cause Courts Act, Sch. II, para. (8)

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— — — — —, retrospective effect

202

— — — — — Of Will. See WILL.

Contract—Bond, suit on—Contract in writing registered, not signed by both parties—Limitation Act (IX of 1908), Sch. I, Art. 116, applicability of—Interest—High rate—Court, power of, to grant relief—Contract, unenforceable—Party, if can set up other reasonable terms.

A contract in writing in India does not necessarily imply that the document must be signed by both the parties thereto.

Therefore, a bond executed by a party and delivered to the other party and accepted by him completes the agreement between the parties and in law this amounts to a contract in writing.

Article 116 of Schedule I to the Limitation Act, 1908, applies to cases of bonds not signed by both the parties.

A Court is competent to grant relief whenever the rate of interest appears to the Court to be penal. The fact that the rate of interest is excessive is sufficient by itself to justify the inference that the rate is penal and unenforceable.

Once a contract between the parties is deemed unenforceable, the plaintiff is entirely in the hands of the Court, he is not entitled to substitute for the original contract another contract which may appear to him to be reasonable.

Where the plaintiff was by contract entitled to interest on his loan at the rate of 5858 per cent. a year and sued to recover interest at the rate of 40 per cent. a year:

Held, that no Court of Justice will enforce such a contract and in the opinion of the Court the plaintiff was entitled to 12 per cent. per annum simple interest by way of damages for the detention of the money. **C. CHALLAPPROO v. BANGA BEHARY SEN**, 22 O. L. J. 311

394

— — — — — Broker—Undisclosed principal—Bought and sold notes—Contract—Construction by similarity—Contract Act (IX of 1872), ss. 222, 230—Arbitration.

The plaintiff was a broker who bought on behalf of the agents of the defendant mills a certain quantity of jute and he sent to the mill agents a bought note stating—"We have bought to your order and for your account from our principals, etc.", and at the same time he sent to the firm from whom the jute was bought, a sold note saying—"We have sold by your order and for your account to our principal, etc." The plaintiff disclosed to the mill agents the name of the firm of whom jute was bought about the time delivery was due, but more than three months after the contract was effected, whereupon the

Contract—concl.

mill agents refused to recognise this firm and sought to make the broker liable as seller.

Held, by *Jenkins, C. J.*—that the plaintiff here was no more than an intermediary, and was not an agent for sale to whom the provisions of section 230 of the Indian Contract Act would apply so as to make him liable as an agent who has not disclosed his principal's name.

Contracts should be interpreted by themselves and it is improper to interpret one contract by reference to another because they may seem to differ very little, as it may result in identifying contracts which are wholly different.

Woodroffe, J.—A broker is an agent to find a contracting party and as long as he adheres strictly to his position as broker, his contract is one of employment between him and the person who employs him, and not a contract of sale or purchase with the party whom he in the course of such employment finds. **C. PATILAM BAKERJEE v. KANKINARHA Co., Ltd.** 19 C. W. N. 623; 42 C. 1050

607

— — — — — executed under misrepresentation of fact—Liability of party misrepresenting—Misrepresentation of future intention

708

— — — — —, part performance of, equities arising from—Title, whether passes by mere admission or disclaimer of owner—Purchaser's right, whether relinquishable without registered conveyance.

Where a share in a certain taluk belonging to G was purchased by C in execution of a mortgage-deed, who after his purchase without taking possession or disturbing G's possession, gave up for a consideration his rights as purchaser in favour of G, without executing a registered conveyance:

Held, that the relinquishment thus made divested C of the rights he had acquired by his purchase, as any suit brought afterwards by C against G for recovery of the share, would have been successfully resisted by G.

A mere admission or disclaimer of the owner cannot operate to pass title to property where a conveyance is required under the law to transfer title, but a different result might follow from equitable principles of part performance of a contract.

Equities, arising from part performance and from acts done in execution of a contract discussed. **C. KHAGENDRA NATH v. SONATAN GUHA**, 20 C. W. N. 149

987

— — — — — Promise to perform on demand after certain date—Breach of contract—Suit for damages—Commencement of period of limitation—"On demand", meaning of—Limitation Act (IX of 1908), Sch. I, Arts. 49, 115, 120.

Where the contract between the parties was that to discharge the loan of 30,000 burnt tiles made to the defendants by the plaintiff in May 1905, the same number of properly burnt tiles should be returned to the plaintiff on demand after 20th January 1906, and if the tiles offered in satisfaction were not approved by the plaintiff and his four panchayatdars the identical tiles lent, though they had been used in covering a temple roof, should be brought down from that roof and returned to the plaintiff, and where the plaintiff demanded the return

Contract—concl.

of the tiles about six years after the loan and on their refusal, brought a suit for damages for breach of contract in 1913:

Held, that the contract was broken when the defendants failed to offer to deliver 30,000 properly burnt tiles on the 21st January 1906, on which date the right of the plaintiff to make a demand on the defendants arose, and not on the date on which performance was actually demanded by the plaintiff and refused by the defendants;

that Article 115 and not Article 49 of the Limitation Act, 1908, applied to the case.

An actual demand is not necessary to establish a starting point of limitation under Article 115 of the Limitation Act, even if the document makes the compensation payable on demand.

"On demand" is a technical expression meaning immediately or forthwith. **M. SURAYYA v. BAPIRAJU**, 15 M. L. T. 459 **335**

— to sell land—Specific performance—Contract set up different from that proved—Time not of the essence of the contract—Part performance of contract set up—Specific performance of contract proved—Contract with managing member of Hindu family—Sons, whether liable as legal representatives after his death **1**

—, stranger to, when can claim performance of **22**

Contract Act (IX of 1872), s. 2 (d)—*Consideration—Release of debtor and acceptance of another in his place.*

Where the creditor releases his debtor and accepts a new debtor in his place, the release of the original debtor furnishes good consideration for the new contract. **C. MOHES CHANDRA GUHA v. RAJANI KANTA DUTT**, 22 C. L. J. 235 **29**

— **s. 11** **792**

— **s. 23**—*Government Servants' Conduct Rules, rule 14—Debt contracted by father for trading purposes, whether lawful—Hindu Law—Liability of sons for father's debt.*

The plaintiff sued to enforce a mortgage effected in his favour by defendant No. 1. The mortgage security consisted of a piece of land, the property of the 1st defendant, and of land which was the property of the family of the 5th defendant and his sons, which was ostensibly burdened with a mortgage-debt created by the 5th defendant in respect of certain payments made or liability incurred by the 1st defendant at the 5th defendant's request in respect of dealings in a trade in fish instituted by the 5th defendant and carried on largely under the management of the 1st defendant. The 5th defendant's sons contended *inter alia* that they were not liable to pay the debts of their father contracted for illegal and immoral purposes in contravention of Government Servants' Conduct Rule No. 14:

Held, (1) that the rule was not based upon any statutory prohibition, but was merely a rule of conduct;

(2) that the debts contracted by the father could not be said to be attributable either to his failings, follies or caprices and a disregard of the Government injunctions did not taint his trade dealings with immorality or impropriety as between himself and those with whom he traded;

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(3) that the sons were, therefore, liable to pay their father's debts. **B. RAMKRISHNA TRIMBAK v. NARAYAN SHIVRAO ARAS**, 17 Bom. L. R. 933 **331**

— **s. 29**—*Partnership, written contract of—Terms uncertain—Construction of document—Contract, written, ambiguous—Parole evidence, whether admissible—Evidence Act (I of 1872), s. 93—Court, powers of—Partnership—Agency—Pleadings—Plea, raised for first time, whether allowable.*

A covenant of partnership giving one party the right of specifying the share of the profits to be assigned to the other and affording not the slightest indication as to the proportion of losses which one party is to bear in the partnership is void for uncertainty.

A Court cannot supply defects or ambiguities in a document according to its own notions of what is reasonable nor can it admit parole evidence to determine the intention of the executant of the document.

Where a partnership is contemplated, but the terms thereof cannot be ascertained, the covenant cannot be taken as creating the relationship of principal and agent between the parties.

A plea which was mentioned neither in the Court below nor in the memorandum of appeal cannot be raised for the first time in the Chief Court. **P. BARKAT RAM v. ANANT RAM** **632**

— **ss. 39, 205**—*Agent, responsibility of, for an error of judgment—Indemnity—Refusal to indemnify, whether sufficient cause for rescission of contract—Sufficient cause—Agent's due on termination of contract.*

An agent is not responsible to his principal for any loss caused on account of an error of judgment, provided he exercises reasonable skill and diligence.

The promise of indemnity is an implied term of the contract of agency: hence the refusal of the principal to indemnify the agent for any act done by him in the course of agency justifies him to rescind the contract.

Where an agent, who has entered into a contract in his own name for the purchase of goods deliverable at a future date, rescinds the contract of agency for sufficient cause before the period of termination, the principal is entitled to credit for the price of the goods on the date the business is terminated. **S. RAJARAM NANDLAL v. ABDUR RAHIM**, 9 S. L. R. 77 **450**

— **s. 43** **209**

— **s. 45** **904**

— **s. 49** **880**

— **s. 69**—*"Person interested in the payment of money," meaning of—Duty of registered holder to pay Government revenue—Co-sharers, whether personally liable—Revenue—Charge on estate—Suit to enforce charge—Jurisdiction.*

It is only the registered holder who is personally bound to pay the revenue to Government. Co-owners or co-sharers who are not also registered holders are not under any such obligation though the Government revenue may be a charge on the lands in their holding.

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The "person interested in the payment of money" in section 69 of the Contract Act must be a person who is not himself bound to pay the whole or any portion of the amount.

Where, therefore, a person who is himself under an obligation to pay a portion of the Government revenue pays the whole amount due, he is not entitled to a personal decree for the amount against all his co-sharers, but can only recover a share payable on account of the property in the hands of him who is also under a personal obligation to pay.

A suit to enforce such a charge should be brought only in that Court within whose jurisdiction the portion of the estate liable to pay the share is situate. **M. VENKATA SIMHADRI JAGAPATIRAJU v. SRI LAKSHMI NRUSIMHA ROOPA**, 29 M. L. J. 639; 2 L. W. 1046; 18 M. L. T. 464 **255**

ss. 73, 107, applicability of—
Contract for sale of negotiable securities—Breach of contract—Damages, measure of—Difference between contract price and market price at date of breach—Purchaser, right of.

In a contract for sale of negotiable securities, the measure of damages for breach is the difference between the contract price and the market price at the date of the breach. If the seller holds on to the securities after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

A plaintiff who sues for damages for breach of a contract for sale of negotiable securities owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect, but the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. But the fact that by reason of the loss of the contract which the defendant fails to perform the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract.

Sections 73 and 107 of the Contract Act do not apply to such a case. **P. C. JAMAL v. MOOLA DAWOOD SONS & Co.** **949**

s. 73—Breach of contract to make plaintiff a partner—Damages, measure of.

Where the defendant promised to admit the plaintiff to a partnership but broke the promise and, thereby, caused him loss:

Held, (1) that the plaintiff was entitled to damages to the extent of the loss caused by the breach;

(2) that the measure of damages in such cases is the difference between the value of the plaintiff's estate immediately after the defendant's breach of promise and the value it would have had if the defendant had performed his promise. **P. TANSEY v. RIVETT**, 64 P. R. 1915; 142 P. W. R. 1915 **73**

Contract Act—contd.

ss. 83, 91—Shipment of goods
—No letter of requisition to Captain—Liability in case of loss—Difference between Indian and English Law.

Where the plaintiff in pursuance of the instructions given by the 2nd defendant as agent of the 1st defendant, who carried on business at Honnavar, shipped 101 bags of Rangoon rice on board the "Machva" to Honnavar without indicating the consignee to the Captain but desiring that the rice should be delivered only on payment of the price, and owing to a storm in Mangalore harbour, the ship was stranded and the rice damaged; on the question as to who was to bear the loss representing the difference between the contract rate and the rate at which the damaged rice was sold, there being no evidence as to the intention of the parties:

Held, that the property passed to the purchaser as soon as the goods were shipped, and the purchaser was liable for the loss. **M. MARJI JETA v. HONNAVAR PUTHU HARI PAI**, 18 M. L. T. 457 **334**

ss. 88, 91 **334**
s. 107 **949**

s. 123—Sale by auction—Puffers, employment of—Commission for sale, outrageously high—Sale, whether voidable.

If, at an auction sale, puffers are employed by the auctioneer, who charges an outrageously high commission for the sale, the transaction is voidable at the instance of the buyer under section 123, Contract Act. **P. SRI RAM v. CHHABRU LAL** **689**

s. 180 **430**

s. 201—Bills sent with direction to collect and remit—Trust—Fiduciary relationship—Agency—Debtor and creditor.

When a person employs another to collect money and remit it to him, the latter stands in a fiduciary relation towards the former and may in respect of the money so collected be regarded as a trustee.

The money is held by him for a specific purpose and does not at his bankruptcy pass to the trustee in bankruptcy as the bankrupt's property.

Where the debtor is to collect and remit, there is confidence and trust. Where the debtor is to use and repay on demand there is no trust. The fact that the money so received has been mixed with other money of the agent is immaterial so long as there is a fund on which the *cestui que trust* can lay his hands.

The Alliance Bank of Simla, Delhi Branch, sent two bills for collection to the Gwalior Branch of the Amritsar Bank and distinctly asked the latter to send drafts on Delhi after realization. The Amritsar Bank realized the money and after deducting the usual charges remitted the balance by two drafts on the Delhi Branch of the People's Bank, Limited. But before the drafts could be cashed, both the People's Bank and the Amritsar Bank went into liquidation. On these facts, the Alliance Bank claimed payment in full of the amount due on the drafts contending that the Amritsar Bank was the trustee and not a debtor *qua* that money:

Held, that all the requirements which were essential to the creation of a fiduciary relationship were

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satisfied, but that as soon as the drafts on Delhi were despatched and in accordance with the instructions of the Alliance Bank of Simla, the special business, for which the agency had been created, was completed, the agency then terminated *ipso facto* (vide section 201, Indian Contract Act), the fiduciary relationship came to an end, and thenceforward, the Alliance Bank of Simla was simply a creditor of the Amritsar Bank and if the drafts were dishonoured, the Alliance Bank of Simla was only entitled to be registered as a creditor and receive payment *pari passu* along with other creditors. **P. ALLIANCE BANK OF SIMLA, LTD., v. AMRITSAR BANK**, 79 P. R. 1915; 171 P. W. R. 1915

_____	S. 205	215
_____	ss. 222, 230	450
_____	S. 241	607
_____	S. 247	927
_____	S. 263	45
		904

Contribution—Joint executors—Stamp duty and penalty **285**

Contributory. See COMPANIES ACT, s. 150.

Co-operative Societies Act (II of 1912)—Debt due to a Village Co-operative Bank by one of its members—Successor-in-interest, liability of—Village Co-operative Bank, construction of bye-laws of.

Three suits were brought for the recovery of moneys due to the plaintiff Bank on promissory notes executed by one M deceased, who at the time of his death was a member of the plaintiff Bank. The defendant No. 1, who was the son of M, became member of the society on the death of his father. One of the bye-laws of the plaintiff society laid down: "If the heir or successor-in-interest is elected, all rights and liabilities of the deceased member shall devolve on him."

Held, that the defendant No. 1, having accepted the bye-law in question by joining the society as a member, was bound to pay the liabilities of his father to the Bank irrespective of the assets which he had received from his father. **O. VILLAGE CO-OPERATIVE BANK v. KALI DIN**, 18 O. C. 157 **724**

Costs. See CIVIL PROCEDURE CODE, 1908, O. 35.

_____, discretion as to—Account, suit for, against manager—Costs against manager for default or dishonest conduct in accounting—Presidency Small Cause Courts Act (XV of 1882), s. 22.

A person who takes up the management of another's estate and collects and disburses moneys, has to be ready with his account. His failure to perform the obvious duty, necessitates a suit and he must pay the plaintiffs' costs.

This is all the more so when he makes a dishonest defence, submits a false account and keeps back books of account or documents.

Where the manager of an estate sued the principal for arrears of salary in the Presidency Court of Small Causes and the principal sued the manager in the High Court for accounts and the two suits were heard together in the High Court and an amount less than Rs. 1,000 was found due from the manager to the principal, costs were awarded against the manager on High Court scale No. II having regard to the circumstances above stated. **C. SUKUMARI GHOSH v. GORI MOHAN GHOSWAMI**, 19 C. W. N. 880 **662**

Court Fees Act (VII of 1870), s. 7, cl.

(iv) (c)—Suits Valuation Act (VII of 1887), s. 8—Court-fee payable, when relief sought not valued in plaint—Valuation for purposes of jurisdiction given—Civil Procedure Code (Act V of 1908), O. VII, r. 11, cl. (c).

Where in a suit under section 7, clause (iv) (c) of the Court Fees Act, 1870, the plaint contains no valuation of the relief sought but gives a valuation of the suit for the purposes of jurisdiction, the Court-fee is to be computed according to the valuation of the suit for the purposes of jurisdiction, though the actual value of the relief sought is less, unless the plaintiff with the Court's leave amends the plaint. **C. KRISHNA KUMAR RAY v. CHANDRA KANTA MITRA** **807**

_____ (as amended by Act VI of 1905), s. 7, cls. V (d), XI (cc)—Suit to recover possession of immovable property from tenant—Valuation for purposes of jurisdiction—Suits Valuation Act (VII of 1887), s. 8—Madras Civil Courts Act (III of 1873), s. 14, applicability of.

The Legislature by enacting Act VI of 1905 has not only amended the Court Fees Act, but has incidentally withdrawn a class of suits from the provisions of section 14 of the Madras Civil Courts Act and added it to those falling under section 8 of the Suits Valuation Act.

The valuation, therefore, for purposes of jurisdiction of a suit to recover possession of land from a tenant is not its market value under section 14 of the Madras Civil Courts Act or section 7, clause V (d) of the Court Fees Act, but one year's rental payable by the tenant, for the year next before the date of presenting the plaint under section 7, clause XI (cc), of the Court Fees Act. **M. NARAYANASWAMI NAIDU GARU v. VENNAVALI SESHAGIRI RAO**, 18 M. L. T. 398; 2 L. W. 1031; 29 M. L. J. 572 **104**

_____ **S. 19E**, object of—Penalty, imposition of—Order ultra vires—Suit to recover penalty imposed, maintainability of—Civil Court, jurisdiction of—Revenue Authority, power of—Penalty, nature of.

Unless there is a statutory bar, a suit is maintainable by the Secretary of State for India in Council for recovery of a penalty lawfully imposed.

Where a penalty has been imposed by a Revenue Authority, a Civil Court has no jurisdiction to review the decision on the ground that the valuation had been incorrectly made or that the discretion in the imposition of the penalty had been erroneously exercised, but if the action of the Revenue Authority is *ultra vires* there is no enforceable claim which a Civil Court is bound to recognize.

Section 19E of the Court Fees Act contemplates an application on the part of the person who had taken out Probate and produces the same to be duly stamped and applies where the estimated value of the estate is less than what the value has afterwards proved to be: and in the absence of any such application, it does not authorize a Revenue Authority to impose any penalty.

In a Probate case notice was issued to a Collector under sub-section 1 of section 19H of the Court Fees Act. As no reply was received from the Collector, Probate was issued to the petitioner on payment of the duty payable upon her valuation of the estate. The Collector, thereafter, held that the

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value of the estate was much more and directed a notice to the petitioner to amend the valuation, and to explain the cause of under-valuation. The petitioner did not accept the Collector's valuation but in order to avoid litigation deposited the additional fee. The Board, however, ordered that double the fee payable be levied as penalty and a suit was instituted to recover the amount:

Held, that the imposition of the penalty was *ultra vires* and, therefore, the suit was not maintainable.

Semle.—In a case where section 19E is properly applicable, the petitioner is entirely in the hands of the chief controlling Revenue Authority, who is at liberty to refuse to stamp the Probate till the penalty has been paid.

Quere.—Whether the penalty imposed in such a case is personal and not recoverable from the estate? **C. NIKUNJA RANI v. SECRETARY OF STATE, 22 C. L. J. 375**

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Criminal Law—Procedure—Notice to Police Inspector in charge of case, before disposing of it, necessity of.

A Magistrate is bound to give notice to the Police Inspector in charge of a case before disposing of it. **M. CHEMICKALA CHINNA REDDI v. EMPEROR, (1915) M. W. N. 554; 16 Cr. L. J. 736**

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Criminal Procedure Code (Act V of 1898), s. 107

789

S. 107—Security to keep the peace—Order, whether can be passed without evidence—Person proceeded against having no objection to give security, effect of.

An order for taking security under section 107 Criminal Procedure Code, without evidence to prove that the petitioner was likely to commit a breach of the peace or to do any other wrongful act that might occasion a breach of the peace, is illegal and should not be passed simply on the petitioner's own statement before the Magistrate that he had no objection to giving security. **P. EMPEROR v. SHEODAN, 24 P. R. 1915 CR.; 16 Cr. L. J. 784**

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S. 110—Witnesses of good character, evidence of, consideration of—Rule to be observed.

Where proceedings under section 110 are taken against a person and he is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention to such evidence. It should not necessarily be believed but the Court should find substantial reason for not believing the evidence before it makes an order. **A. HAKIM SINGH v. EMPEROR, 13 A. L. J. 1055; 16 Cr. L. J. 810**

826

S. 110—Zemindar not actively opposing gang of dacoits, if to be bound over—Witnesses, evidence of, weight of—High Court, power of—Duty of lower Courts.

A zemindar of a village cannot be bound over under section 110 of the Criminal Procedure Code merely because he did not actively oppose a gang of dacoits.

Where a zemindar, who is also a money-lender, is prosecuted under section 110 and in defence he

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produces a number of respectable witnesses besides his castemen and tenants, it is not proper for the Magistrate to disbelieve all the witnesses so produced merely on the ground that the accused could by the influence of his position in life produce any number of them.

A High Court is not a Court of appeal in cases under section 110 and the responsibility of administering that section does not rest with it. It is nevertheless, a section which Magistrates ought to administer with the most scrupulous care, both as the Court of first instance and the Appellate Court. A High Court ought not to take upon itself to weigh the evidence given on behalf of one side or the other. It ought only to see whether the Court below has approached the consideration of the appeal in a fair way having regard to the interest not only of the prosecution but also of the accused. **A. MIHARRAN SINGH v. EMPEROR, 13 A. L. J. 1046; 16 Cr. L. J. 805**

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ss. 144, 147, 439—

Revision—High Court, power of, to direct Subordinate Magistrate to take additional evidence—Jurisdiction—Order prohibiting use of public street, interference with—Sentimental caste objections, if to be considered.

Per Sadasiva Aiyar and Phillips, JJ.—A High Court acting as a Court of Revision either under section 439 of the Code of Criminal Procedure or under section 15 of the Charter Act has power to direct a Subordinate Magistrate to take additional evidence, but it must on that evidence come to an independent finding itself and not accept the one arrived at by the Magistrate.

It is undesirable that orders passed under section 147 of the Code of Criminal Procedure should be interfered with in revision under section 439 of the Code of Criminal Procedure or section 15 of the Charter Act, unless they are made without jurisdiction or are obviously unreasonable and unjust.

Per Sadasiva Aiyar, J.—A Magistrate has jurisdiction under section 147 of the Code of Criminal Procedure to pass orders even against the right of passage through a public street. But he ought not to pass such a prohibitory order, unless it is clearly proved that there is a right by custom or by grant or by Statute in one section of the public to prevent another section of the public from using the public street on particular occasions or for particular purposes, when such use is ordinarily and *prima facie* lawful.

Sentimental caste objections to the use of a public street should not be countenanced by Magistrates acting under section 147, Criminal Procedure Code, though they can in emergent cases pass temporary orders under section 144 when the preservation of the peace is required. Even in such cases, the temporary nature of the order cannot be attempted to be changed by continued renewals. **M. SUDALAINUTHU CHETTIAR v. ENAN SAMBAN, 16 Cr. L. J. 767**

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s. 145

965

S. 145—Possession, how to be determined—Delivery of symbolical possession by a Civil Court, bearing of, on Magistrate's enquiry. In proceedings under section 145, Criminal Procedure Code, the Magistrate will enquire into the fact

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of actual possession of the subject of dispute regardless of delivery of its symbolical possession to a party by a Civil Court under the provisions of rule 96, Order XXI, Civil Procedure Code. **M. RAMALINGAM PILLAI v. RAJA OF RAMNAD**, 16 Cr. L. J. 736. **176**

— **s. 145, cl. (4)**, order under—Police report—Breach of peace, likelihood of—Notice—Subsequent finding of no breach without inquiry, legality of.

When once on the perusal of a Police report, a Magistrate passes an order under section 145 of the Code of Criminal Procedure, that there is a likelihood of a breach of the peace, he cannot afterwards say that there is no likelihood of such breach without an enquiry and without taking the evidence which the parties are willing to offer. **M. VELUYIA KONE v. NARAYANA KONE**, 2 L. W. 1208; 16 Cr. L. J. 789.

— **s. 146** **645**
— **s. 147** **242**
— **s. 164** **367**
— **ss. 164 (3), 533** **359**

Magistrate recording confession certifying it to be not voluntary—Confession, whether admissible—Duty of Magistrate—Prosecution, whether can supply deficiencies by calling Magistrate—Evidence Act (1 of 1872), s. 24—Confession made to Police Patil, validity of.

Where an accused charged with murder made a confession before a Second Class Magistrate who in place of the certificate required by section 164 (3) of the Criminal Procedure Code remarked that the confession was not voluntary, and where the prosecution sought to remove this defect by calling the Magistrate and examining him as to the precise points which, in his opinion, were involuntarily made:

Held, (1) that the confessional statement was inadmissible in evidence being made under circumstances diametrically opposed to those which the law requires as a condition precedent to the admissibility of a confession;

(2) that the only course which the Magistrate could properly follow when he came to the conclusion that the accused was not speaking voluntarily before him was to refuse to continue to record the examining any further;

(3) that it was not competent for the prosecution to supply by calling the Magistrate the deficiencies which existed in the confession from the time it was recorded.

A confession must be read as a whole.

A confession made to a Police Patil is invalid. **B. EMPEROR v. RAMA DHAN POWAR**, 17 Bom. L. R. 898; 16 Cr. L. J. 740. **340**

— **s. 165**—Search without warrant—Specification of property to be searched—Illegal search—Resistance—Penal Code (Act XLV of 1860), s. 332.

Where a Police Officer authorizes another to make a search without a warrant from a Magistrate, he should give the authority in writing specifying the thing or things which are to be searched for. Section 165 of the Criminal Procedure Code does not authorize a general search on the chance that something may be found.

An accused offering resistance to the Police making

Criminal Procedure Code—contd.

an illegal search is not guilty of an offence under section 332 of the Penal Code. **A. EMPEROR v. BRIKHBHAN SINGH**, 13 A. L. J. 979; 16 Cr. L. J. 819; 38 A. 14. **995**

— **ss. 177, 179**—Offence committed at one place, discovery of, at another—Trial—Jurisdiction—Penal Code (Act XLV of 1860), ss. 420, 265.

The complainant was induced to part with his money at Meerut on the false representation that a certain barrel contained a certain amount of spirit. At Agra it was discovered that the barrel did not contain the amount of spirit that it had been represented to contain:

Held, that the Magistrate at Agra had no jurisdiction to try the accused under sections 420 and 265 of the Penal Code inasmuch as the discovery of the alleged fraud at Agra after the goods were delivered, could not be said to be a 'consequence which has ensued' within the meaning of section 179 of the Criminal Procedure Code. **A. PRAG DAS BHARGAVA v. DALPAT RAM**, 13 A. L. J. 1067; 16 Cr. L. J. 825.

— **s. 181, cl. (2)**—Criminal breach of trust—Place of trial—Jurisdiction **1001**

Where the complainant charged the accused under section 408, Indian Penal Code, alleging that the complainant had engaged the accused to manage a branch agency at Rurki, that accounts were sent by accused to Rawalpindi for some time but subsequently discontinued and that on inspection of the accounts it was found that the accused had made false entries in respect of certain items:

Held, that inasmuch as the allegations in the complaint referred distinctly to three or four specific items in respect of which the accused was charged with having committed the offence of criminal breach of trust at Rurki, the Rawalpindi Court had no jurisdiction to try the case. **P. EMPEROR v. RAGHUBIR SINGH**, 22 P. R. 1915 Cr.; 16 Cr. L. J. 775; 42 P. W. R. 1915 Cr. **375**

— **s. 195** **653**
— **s. 195**—Perjury committed in course of judicial enquiry—Sanction by High Court—Penal Code (Act XLV of 1860), s. 193.

Where on a petition being presented to the High Court for setting aside an *ex parte* decree on the ground that the petitioner was not served with notice of the appeal, an enquiry was ordered and the District Munsif's report showed that the petitioner had committed perjury while giving evidence before the Munsif:

Held, that the High Court had jurisdiction to sanction the prosecution of the petitioner on a charge under section 193, Indian Penal Code. **M. GUDALA SURIAN v. JAMAL BEG BEE**, 16 Cr. L. J. 740. **340**

— **ss. 195, 476**, scope of—Sanction to prosecute—Prima facie case.

All that a Court granting sanction to prosecute under sections 195 and 476 of the Criminal Procedure Code for offences made punishable thereby, has to see is that a *prima facie* case has been made out upon the evidence before it for inquiring further into the question whether or no any of the offences punishable as set out in section 195, has or has not been made out. **A. KIDHA SINGH v. EMPEROR**, 13 A. L. J. 1111; 16 Cr. L. J. 817. **993**

Criminal Procedure Code—contd.**Criminal Procedure Code—contd.**

s. 195 (1) (b)—False endorsement on promissory note with intent to use it as evidence—Suit on promissory note—Penal Code (Act XLV of 1860), s. 193, complaint under—Sanction for prosecution, if necessary.

essential to the institution of criminal proceedings under sections 465, 468 and 471, Indian Penal Code. **P. EMPEROR v. LEHNA SINGH**, 18 P. R. 1915 CR. 16 CR. L. J. 785 **641**

Section 195 (1) (b) of the Code of Criminal Procedure aims at providing that where, prior to the institution of a criminal prosecution, a properly constituted judicial tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the Criminal Court should decline cognizance unless that tribunal has, in effect, certified that in its opinion, the complaint is one worthy of investigation. That safeguard should not be limited to cases where the offence is committed *pendente lite* but should extend also to fabrication of false evidence in advance.

When an offence is of such a nature that at the time of committing it, the accused must have legal proceedings in mind and prior to his being charged with the commission of the offence, legal proceedings of the same nature have already commenced in any Court, it is most in consonance with the intention of the Legislature to require that the sanction of the Court should be obtained.

Where, therefore, the complaint set out that the accused wrote an endorsement on a promissory note executed in favour of the complainant, purporting to record a payment of Rs. 1,500 while no such payment was ever made and that the accused intended to use the endorsement as evidence in case the complainant brought a civil suit to recover the amount due:

Held, that the uncertainty at the time of writing the endorsement as to whether any suit could ever be brought, did not affect the completeness of the offence and that the Court could not take cognizance of the offence without the sanction of the Civil Court. **M. In re PARAMESWARA NAMUDRI**, 18 M. L. T. 322 16 CR. L. J. 161 **161**

s. 195 (1) (b)—"Such Court", interpretation of—Court abolished but re-established with curtailed territorial limits—Jurisdiction—Sanction for prosecution for offence committed before abolition.

A Court once abolished but re-established two years later with its territorial limits somewhat curtailed, is not "such Court" within the meaning of section 195 (1) (b) of the Code of Criminal Procedure, and the latter Court has no jurisdiction to grant sanction for prosecution in respect of an offence committed before the former. **M. In re APPU ATLA**, 16 CR. L. J. 767 **643**

s. 195, (1) (c) and (2)—Offence committed in course of proceedings before Revenue Officer—Sanction, whether necessary—Penal Code (Act XLV of 1860), ss. 465, 468, 471.

Where the offence of forgery was committed in the course of mutation proceedings held by a Naib-Tahsildar in his administrative capacity of a "Revenue Officer."

Held, that the proceedings were not those of a "Revenue Court" within the meaning of section 195 (2) of the Criminal Procedure Code and that the previous sanction of the Naib Tahsildar was not

s. 203—Order dismissing complaint not set aside—Subsequent complaint on same facts, whether can be entertained by another Magistrate.

The fact that an order dismissing a complaint under section 203 of the Criminal Procedure Code has not been set aside, is no bar to another Magistrate entertaining a subsequent complaint on the same facts. **M. PAMPALLI SUBBAREDDI v. CHADU. BOYIGARI KAMAL SAIB**, 16 CR. L. J. 814 **830**

s. 209—Inquiry preparatory to commitment—Prosecution evidence, unreliability of—Duty of Magistrate to discharge—Preliminary inquiry, necessity of, for commitment—Prosecution witnesses, cross-examination of, by Magistrate, if allowed.

If in an inquiry preparatory to commitment, the evidence tendered for the prosecution is totally unworthy of credit, it is not only within the power of the Magistrate but it is his duty to discharge the accused under section 209 of the Criminal Procedure Code.

Where, therefore, on a complaint being lodged against two persons under section 477, Indian Penal Code, the Magistrate did not issue any process against one but examined him as a witness in the course of the inquiry against the other and also cross-examined the complainant's witnesses and after recording the whole evidence discharged the accused on the ground that in his opinion the evidence was very interested and unreliable, but the Sessions Judge set aside the order of discharge and remanded the case to the Magistrate with instructions to commit both the accused:

Held, (1) that the Magistrate was well within his powers in cross-examining the prosecution witnesses and in considering whether the witnesses examined on behalf of the prosecution were credible;

(2) that in so far as no enquiry whatever was made against the second accused under Chapter XVIII of the Criminal Procedure Code, he was not liable to any order of committal by the Sessions Court. **B. EMPEROR v. BAI MAHALAXMI**, 17 BOM. L. R. 910; 16 CR. L. J. 747 **347**

ss. 222 (2), 233—Misjoinder of different charges at one trial, legality of—Penal Code (Act XLV of 1860), ss. 409, 477A.

The charge against the accused was that he, being the *tahsildar*, embezzled a certain sum of money and further that he omitted to enter 120 *arzisals* with intent to defraud, and wrote on three of such *arzisals* false numbers with like intent. He was tried at one trial, for all these counts and convicted under sections 409 and 477 A, Indian Penal Code:

Held, that there was misjoinder of the various charges amounting to an illegality which vitiated the trial. **A. KALKA PRASAD v. EMPEROR**, 13 A. L. J. 1059; 16 CR. L. J. 813 **829**

s. 227—Charge, addition of, in appeal—Added charge under section 143 Penal Code—Addition, whether valid—Penal Code (Act XLV of 1860), ss. 143, 426, 451.

Criminal Procedure Code—contd.

The addition by an Appellate Court to charges under sections 451 and 426 of a charge under section 143 of the Penal Code in appeal is not permissible inasmuch as the addition would have the effect of imposing a constructive responsibility for individual acts of all persons who were members at the time of the assembly.

The mere carrying of *savali kalis* will not be presumed to be unlawful, and in determining the object of an unlawful assembly, the Court must find that the accused had an intention to use criminal force or commit some other offence at all costs and were not acting in self-defence. **M. In re MUKKA MUTHIRIVAM**, 16 Cr. L. J. 737

337**ss. 235, 236, 239—**

Two separate charges—One trial—Misjoinder—Burden of proof—Penal Code (Act XLV of 1860), s. 403—To "appropriate", meaning of—"Mi-appropriate", meaning of.

Where an accused person is charged of having deceived a canal officer in obtaining certain papers from him and also of having misappropriated a certain sum of money, the prosecution is entitled to ask the Court to go into both the charges at a single trial, provided it takes upon itself the burden of proving that the facts alleged against the accused, are in fact so connected together as to form parts of the same transaction, or to be otherwise triable at a single trial under the provisions of sections 235 and 236 of the Code of Criminal Procedure.

In connection with section 403, Indian Penal Code, the verb "to appropriate" means setting apart for or assigning to a particular person or use and to "misappropriate" means to set apart for or assign to the wrong person or a wrong use, and this act must be done dishonestly. **A. SOHAN LAL v. EMPEROR**, 13 A. L. J. 1131; 16 Cr. L. J. 795

651**ss. 235 (1), 236,**

237, 403—Previous acquittal on a charge of abetment of forgery—Subsequent trial under s. 471, Penal Code, whether barred.

Where in a trial for an offence under section 471, Indian Penal Code, for using a promissory note as genuine knowing or having reason to believe that it was a forged document, it appeared that the accused had previously been tried for abetting the forgery of the same document under sections 467 and 109, Indian Penal Code, but had been acquitted:

Held, (1) that inasmuch as no doubt could have arisen in the first trial as to the offence constituted by the facts proved, the case did not fall within the scope of section 236 of the Criminal Procedure Code and, therefore, was not governed by sub-section (1) of section 403;

(2) that the series of acts beginning with the forgery and ending with the user of the forged document in a Civil Court to support a civil claim must be regarded as so connected together as to form the same transaction or carrying through of a single pre-determined plan, so that under section 235 (1) of the Code it would have been competent to try the accused for both offences at the same trial, and the case, therefore, fell under sub-section (2) of section 403;

(3) that the plea of *autrefois acquit* was bad also for the reason that the case fell under sub-section

Criminal Procedure Code—contd.

(4) of section 403 of the Code, since the Court which acquitted the accused on the charge of abetment of forgery was not competent to try the offence under section 471, Indian Penal Code, inasmuch as at the time of the earlier trial no sanction for prosecution under section 471 had been given under section 195 of the Criminal Procedure Code. **B. JIVRAM DANKARJI v. EMPEROR**, 17 Bom. L. R. 881; 16 Cr. L. J. 761

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— — — — — **s. 236** **361, 651**

— — — — — **s. 237** **361**

— — — — — **s. 239** **651**

— — — — — **ss. 256, 257—Cross-**

examination of prosecution witnesses—Accused, right of—Charges framed, reasonable opportunity after, to be given to get legal assistance.

Where the charges framed are complicated and the accused are ignorant persons, a reasonable time should be given to the accused to get proper legal advice and assistance before they are called upon to cross-examine the prosecution witnesses.

It is not giving an accused person reasonable opportunity to ask him immediately, after the charge is framed, to cross-examine witnesses. **M. RANGASAMI PADAVACHI, In re**, 16 Cr. L. J. 786

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— — — — — **s. 257** **642**

— — — — — **ss. 260, 530—District**

Magistrate not empowered to try European British subjects—Summary trial by such Magistrate, whether valid.

Where a European British subject was convicted by the District Magistrate of Bangalore, who was also a Justice of the Peace, of an offence under section 8 of the Municipal By-law 3 after a summary trial under section 260 of the Criminal Procedure Code:

Held, that inasmuch as the District Magistrate was not empowered to try a European British subject summarily, his proceedings were void under section 530 of the Criminal Procedure Code. **M. G. G. JERRIAH, In re**, 2 L. W. 1078; 29 M. L. J. 758; (1915) M. W. N. 1023; 16 Cr. L. J. 773

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— — — — — **ss. 309, 537, cl. (a)**

Irregularity—Trial before Sessions Judge—Conclusion of case—Second trial, legality of.

Section 537 clause (a), Criminal Procedure Code, cannot avail to cure the disobedience to an express provision as to a mode of trial.

Where a Sessions Judge held the trial of an accused up to the point of recording the Assessor's opinion but at the time of writing the judgment, finding that a charge had been improperly joined, ordered and held a new trial and convicted the accused:

Held, that the second trial was invalid as the Judge had no authority to cancel or set aside the trial which had originally been held and that the Judge had no option but to give the judgment in accordance with the Criminal Procedure Code. **B. NATHU REWA v. EMPEROR**, 17 Bom. L. R. 1074; 16 Cr. L. J. 824

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— — — — — **s. 339 (2)** **831**

— — — — — **s. 342—Written statement by accused, practice of filing, illegality of**

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Criminal Procedure Code—contd.

s. 342 (1) — Duty of Court to question accused—Omission to do so, effect of—Procedure

The provisions of section 342 of the Criminal Procedure Code are imperative and must be strictly complied with. A failure to give the accused an opportunity of explaining the points against him is an illegality vitiating the whole trial.

Semle—In all criminal matters, the utmost strictness must be observed and forms must be clearly complied with where the liberty of the subject is at stake, when from the statute prescribing those forms it appears that they were presented by the Legislature in the interests of the accused. **B. BASAPA NINGAPA v. EMPEROR**, 17 Bom. L. R. 892; 16 Cr. L. J. 765

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ss. 345, 423 (1) (d), 439—Composition, when can be effected—Order allowing composition, nature of—High Court, whether can allow composition in revision.

Section 345 of the Criminal Procedure Code is exhaustive of the circumstances and conditions under which composition can be effected.

An order allowing composition of an offence is not an incidental order within the meaning of clause (d) of section 423, Criminal Procedure Code.

An offence cannot be allowed to be compounded when the case comes before the High Court in revision. **M. SANKAR RANGAYYA v. SANKAR RAMAYYA**, 29 M. L. J. 521; 18 M. L. T. 381; 16 Cr. L. J. 780

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s. 345 — Composition outside Court—Dispute between parties at time of hearing—Power of Court to take evidence—Monetary consideration, whether necessary.

A composition of a criminal case arrived at by the parties outside the Court comes within the terms of section 345 of the Criminal Procedure Code, and has the effect of an acquittal.

Where an offence has been compounded outside the Court, but subsequently at the time of hearing one of the parties resiles from the agreement, it is competent to the Court to take evidence as to the factum of the agreement and give effect to it if it be found to have been entered into.

No monetary consideration is necessary to make the composition valid; it is enough if there is a *quid pro quo* between the parties to support it. **M. MAHOMED KANNI v. PATTANI INAYATHULLA SARIB**, 2 L. W. 1200; 18 M. L. T. 608; 16 Cr. L. J. 803

819

s. 367 1008
s. 370 (1) — Duty of Presidency Magistrate to give reasons for convicting accused—Reasons not given—Judgment, effect of.

Section 370, clause (i), of the Criminal Procedure Code requires that there should be a statement of the reasons which induce a Presidency Magistrate to believe the evidence for the prosecution.

Where, therefore, a Chief Presidency Magistrate convicted an accused, inflicting imprisonment and merely recording the following judgment:

"I convict accused. I believe the evidence of complainant and the witnesses for the prosecution."

Held, that the judgment did not satisfy the requirements of clause (i) of section 370 of the Code. **B. SHANKAR RAMDAS v. EMPEROR**, 17 Bom. L. R. 890; 16 Cr. L. J. 771

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Criminal Procedure Code—contd.

ss. 374, 376—Murder case—Trial by Jury—Reference—Appeal—High Court—Practice—Confirmation of sentence.

Batchelor, J.—In the Bombay High Court where a prisoner has been sentenced to death, even though the conviction was had on the unanimous verdict of a Jury, the whole case is re-opened before the High Court both on matters of fact as well as on matters of law.

Hayward, J.—In the High Court in murder cases it is always necessary to consider the evidence in support of the facts found by the Jury in order to ascertain that there had been no misdirection in the charge to the Jury and to determine whether it would or would not be proper in all the circumstances to confirm the sentence of death passed by the Sessions Judge. **B. EMPEROR v. DADI YESARA**, 17 Bom. L. R. 1072; 16 Cr. L. J. 818

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s. 376

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ss. 380, 408, 562

—Proceedings submitted to First Class Magistrate—Sentence by that Magistrate—Appeal, where lies.

Where proceedings are submitted to a First Class Magistrate under section 562 of the Criminal Procedure Code and he passes sentence in the case under section 380, the conviction must, for the purposes of appeal, be considered to be within the meaning of section 408 of the Code and the order is appealable to the Sessions Court. **B. EMPEROR v. BHIMAPPA ULVAPPA**, 17 Bom. L. R. 895; 16 Cr. L. J. 738

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s. 403

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s. 422

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ss. 423, 422, 367,

537 (a)—Appeal, dismissal of, after notice—Judgment, omission to write, effect of.

In an appeal dismissed not summarily but under section 423 of the Criminal Procedure Code after notice given under section 422, it is incumbent under section 424 on the Magistrate to deliver a judgment which should fulfil the conditions laid down in section 367; in other words, the judgment must contain the point or points for determination, the decision thereon and the reasons for the decision.

Section 537 (a) cannot be invoked in a case in which the Court is concerned not with any omission or irregularity in a judgment but with the absence of a judgment. **B. DEVENDRA SHIVAPPA LINBENAVAR v. EMPEROR**, 17 Bom. L. R. 1085; 16 Cr. L. J. 832

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s. 423 (1) (d) 350

s. 424—Rioting—Omission to consider case of each accused separately, effect of.

In a case of rioting where the Magistrate has failed to consider the question whether the evidence regarding each individual accused is sufficient to show that he participated in the rioting, the conviction is bad and liable to be set aside. **M. In re BAFU NAIDU**, 2 L. W. 958; 16 Cr. L. J. 735

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ss. 435, 439—Complaint dismissed by District Magistrate under s. 203, Criminal Procedure Code—No revision to Sessions Court—Revision to High Court direct, if competent.

It is not an inflexible rule that no revision lies to the High Court unless the party has first applied to the Sessions Court.

Criminal Procedure Code—contd.

The jurisdiction conferred by the Criminal Procedure Code on the High Court is wide and it ought not to be fettered by any hard and fast rule.

M. BASAVANA GOWD v. KRISHNA RAO NAIDU, 2 L. W. 1126; 16 Cr. L. J. 794 **650**

s. 439 337, 350, 367, 650

s. 476 993

ss. 476, 195—Forgery,

not by party to any judicial proceeding—Proceedings, if maintainable.

Section 476, Criminal Procedure Code, applies only where the offences mentioned in section 195, Criminal Procedure Code, are committed by the person or in the circumstances mentioned therein.

Therefore a Munsif has no jurisdiction to take action under section 476 against the executant and attestors of a document found to be forged who were not parties to any proceeding before the Court. **M. In re KALLAMARU RAMALINGAM**, 18 M. L. J. 498; 2 L. W. 1135; 16 Cr. L. J. 797 **653**

s. 476—Judicial proceeding—Statement made to District Magistrate in his executive capacity, if complaint—Oath, administration of.

P, a village headman made a petition to the District Magistrate in which he stated that he wished to resign his post as the headman. On enquiry by the District Magistrate as to the reason of his resignation, he stated that during the course of a Police investigation in a dacoity case, the Police were forcing a large number of people to pay money to them. The Magistrate reduced his statement to writing and sent for the persons named by him. The Magistrate recorded the statements of all of them on oath and sent the case to the Police Superintendent to take action under paragraph 288 of the Police Regulations. The Superintendent reported that the allegations were entirely false. The District Magistrate then ordered the prosecution of P and other persons whom he had examined on oath for giving false evidence.

Held, that the statement made by P to the District Magistrate was not a complaint, nor the action taken by the Magistrate was in the course of a judicial proceeding, in the course of which he was legally empowered to administer an oath, and that, therefore, the Magistrate had no power to take action under section 476 of the Criminal Procedure Code. **A. BHOLE SINGH v. EMPEROR**, 13 A. L. J. 1050; 16 Cr. L. J. 807 **823**

s. 512 359

s. 512—Accused absconding—No finding by Magistrate that there was no immediate prospect of his arrest—Arrest—Statements of witnesses examined in absence of accused, admissibility of—Conviction, legality of.

A murder was committed in 1897. The accused ran away at that time and was not heard of till he was arrested in 1915. The witnesses were examined in 1897 on behalf of the prosecution to prove the commission of the offence by the accused. The Magistrate, however, did not record any finding that in his opinion the accused had absconded and that there was no immediate prospect of his arrest. The accused was convicted on the evidence recorded in 1897:

Criminal Procedure Code—concl'd.

Held, that the evidence given in 1897 was inadmissible to prove the guilt of the accused and that the conviction was bad. **A. RUSTOM v. EMPEROR**, 13 A. L. J. 1043; 16 Cr. L. J. 801 **817**

s. 517—Orders under

section, nature of—Discretion—Power of High Court to interfere.

Orders under section 517 of the Criminal Procedure Code are discretionary, but the discretion is open to correction where it has been exercised in violation of accepted judicial principles.

Where, therefore, in a trial for a criminal breach of trust, it appeared that the accused had transferred one of the misappropriated currency notes to the petitioner, and on the conviction of the accused the trying Magistrate ordered the note to be returned to the Crown:

Held, that this was a case for the application of the general rule that property in a currency note passes by mere delivery and that there being no allegation of fraud or bad faith on the part of the petitioner, he was entitled to retain it. **B. In re PANDHARINATH PUNDLIK REVANKAR**, 17 Bom. L. R. 922; 16 Cr. L. J. 783 **383**

s. 517 (1)—Order as to

disposal of property, when to be made—Order, whether justifiable when no offence committed.

A Court can pass an order under section 517 (1) of the Code of Criminal Procedure as regards the disposal of property only if it appears that an offence has been committed with respect to it, or that it has been used for the commission of an offence.

Where, therefore, an accused was found to be a habitual thief and was bound down for good behaviour, but it did not appear that any offence had been committed with respect to the property in dispute which the accused claimed as his own:

Held, that no order could be passed under section 517 (1) of the Criminal Procedure Code as to the property. **M. In re GOVINDARAJA PADAYACHI**, 16 Cr. L. J. 811 **627**

s. 520—Powers of High

Court as to disposal of property.

Section 520 of the Criminal Procedure Code gives a High Court ample powers to pass any order as to disposal of property which may be just on the facts of the case. **M. RAMAMANI v. KANAKASABAI**, 16 Cr. L. J. 813 **629**

ss. 523, 524 498

s. 530 373

s. 533 340

s. 537 (a) 1000,

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s. 562—Offences of cheat-

ing and using as genuine a forged document, whether covered by the section.

Section 562 of the Criminal Procedure Code is not in terms applicable to convictions of cheating and thereby dishonestly inducing delivery of property under section 420 or of using as genuine a forged document under section 471 of the Indian Penal Code. **B. EMPEROR v. RAMJAN DADUDHAI**, 17 Bom. L. R. 921; 16 Cr. L. J. 781 **381**

Custom. See CUTCHI MEMONS; HINDU LAW.

—, allegation as to, nature of—Issue as to custom, contents of—Pleadings in India—Practice—Issue, ambiguity as to, when can be raised—Hindu Law—Joint family—Impartible zemindari—Members living separately in different houses in same compound, how far evidence of division—Separate possession and enjoyment of property and discontinuance of allowances by zemindar, if evidence of partition—Inheritance—Succession to impartible zemindari—Illegitimate son, widow and step-brother of deceased, contest between—Preference—Separate property of zemindar—Illegitimate son and widow, if share equally—Release by mother of Hindu minor—Consideration inadequate—No independent advice—Absence of dispute—Validity of release—Family settlement—Custom—Gandharva form of marriage, if valid among Kambala caste—Illegitimate son, right of, to share in his father's property in Kambala caste—Illegitimate son, share of, measure of.

Though, as a general rule, a party who relies upon a custom, must allege it with distinctness and certainty, it is not possible or desirable in India in all cases to pin down the parties to the precise form of their pleadings.

The mere fact that a defendant did not object to witnesses for the plaintiff giving evidence in support of a custom set up in a case, does not estop him from objecting to similar evidence being given by another witness on a subsequent date on the ground that it was "beyond the scope of the case in the face of the wording" of the issue on the point.

As a matter of scientific pleading, an issue in a case regarding a custom set up therein and the allegations in the plaint on which the issue is based, ought to contain particulars of the custom upon which the plaintiff seeks to rely at the trial.

Though in cases where an issue is ambiguous and capable of a wider as well as a narrower interpretation and the parties have, in their conduct of the case in its earlier stages, interpreted it in the narrower sense, they will not afterwards be permitted to contend at the latest stage of the case that the wider interpretation ought to be followed; yet where the contention is raised at an earlier stage, it is desirable to give the parties an opportunity of contesting the case upon the wider interpretation of the issue.

Separate living of different branches of a joint Hindu family in different houses in the same compound is no evidence of division among the branches. It does not inevitably follow from separate possession and enjoyment of property that the family is divided, nor does discontinuance of allowances which have been paid to members of his family by a zemindar justify that conclusion.

Where the last holder of an impartible zemindari belonging to a joint Hindu Sudra family died leaving behind him a widow, an illegitimate son and his step-brother:

Held, that so far as the zemindari was concerned the illegitimate son was excluded by the brother of the deceased zemindar but that as regards the separate property of the zemindar not forming part of the zemindari, the illegitimate son was entitled to share equally with the widow.

Custom—contd.

The mother of a Hindu minor, purporting to act as his guardian, relinquished his claim to a zemindari which was of considerable value, on receipt of comparatively insignificant properties. It did not appear that she had obtained any legal advice as to the right of the minor to the zemindari. At the time this arrangement was made, there was no active dispute or question raised as to the minor's title to the zemindari.

Held, that the release was not binding on the minor as it was beyond the powers of the guardian and that it was not valid even as a family settlement.

There is no custom obtaining among the Kambala caste excluding an illegitimate son from inheriting property which would devolve upon him under the ordinary law.

A plaintiff suing for exclusive possession of a zemindari can be given a decree for the share he may be found entitled to in the separate property of the zemindar.

(Per Miller, J.) *Quere*.—Whether the *gandharva* form of marriage is regarded as legal by the custom obtaining among the people belonging to the Kambala caste?

Per *Abdur Rahim, J.*—The *gandharva* form of marriage is not valid among the Kambala caste people.

Where a certain caste among the Hindus has long given up a particular irregular form of marriage and has been consistently adopting other more regular forms, the Courts are not obliged to recognise the validity of the obsolete form in that caste. *M. VISWANATHASWAMI NAICKER v. KAMPU AMMAL*, 2 L. W. 1214; (1915) M. W. N. 968.

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—, connotation of

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—Grant of *dashbandham* rights, validity of

565

—*Reversioners, suit by*—Exclusion of daughters—Land not proved to be ancestral—Burden of proof—*Riwaj-i-am*, entry in, effect of.

In a suit by reversioners against widows and daughters of a deceased collateral for declaration of their claim to the estate of the deceased in exclusion of daughters if the land is not proved to be ancestral *qua* reversioners, the onus lies very heavily upon them to show that they would exclude the daughters.

The *riwaj-i-am*, in the absence of any clear statement to the contrary, is considered to apply to ancestral and not self-acquired property. Hence an entry in the *riwaj-i-am* to the effect that daughters are excluded by collaterals is useless in a case where the property in dispute has not been proved to be ancestral. *P. LELU c. RAM CHAND*, 174 P. W. R. 1915.

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—*Alienation*—Gujars of Gujar Khan Tahsil, Rawalpindi District—Alienation by Will of whole property by sonless proprietor to mother and her brother in presence of collaterals, validity of—Suit for declaration, maintainability of—Custom, proof of—*Punjab Limitation (Ancestral Land Alienation) Act* (I of 1900), Art. 1.

Among *Gujars* of Gujar Khan Tahsil in the Rawalpindi District, a bequest of the whole of his property by a sonless *Gujar* to his mother and his maternal

Custom—contd.

uncle in the presence of the collaterals, is invalid.

In a suit for a declaration by the collaterals of a person to the effect that the Will made by him of the whole of his property in favour of his mother and maternal uncle was invalid and would not affect the plaintiffs' rights after the death or remarriage of the mother, it was contended that the plaintiffs' suit was barred by time inasmuch as the Punjab Limitation (Ancestral Land Alienation) Act of 1900 did not deal with a suit such as the present which was launched only after the death of the alienor.

Held, overruling the objection, that the suit might adequately be described as a suit for a declaration that the alienation effected by the donor was void except for his life-time and that the alienation by Will would not affect the reversionary rights of the plaintiffs.

Custom is a fact which must be proved by authoritative pronouncement or by instances in which it has been followed; it cannot be established by dialectics. **P. GULAB KHAN v. CHIRAGH BIBI** 909

Alienation—Sindh Jats of Mauza

Khalra, Tahsil Kasur, District Lahore—Gift in favour of step-son, whether valid in presence of collaterals of 4th degree—Ancestral property.

Among Sindh Jats of Mauza Khalra, Tahsil Kasur, of the Lahore District a proprietor cannot make a valid gift of ancestral property in favour of a step-son of a different got in the presence of collaterals of the 4th degree. **P. NATHA SINGH v. GANDA SINGH**, 95 P. R. 1915; 175 P. W. R. 1915 **493**

by widow—Daughter, power of, to contest—Burden of proof—Jat Sikhs of Jullundur District—Remand, technically permissible but useless, whether allowed—Practice.

The power to contest an alienation by a widow is usually vested in agnates, which a daughter is not.

Where, therefore, a daughter claims the power by custom to contest an alienation by her widowed mother, of property formerly belonging to her father, the onus lies on the daughter to prove such custom.

A remand which is technically permissible but is not expected to serve any useful purpose is not to be allowed. **P. PARTAP v. HAZARA SINGH** **794**

Succession—Appointment of heir—

Succession to natural father, general rule of—Riwaj-i-am, entry in, whether instances necessary to give effect to—Collaterals, exclusion of—Pleadings—New defence, whether can be raised in appeal.

A recital in the *riwaj-i-am* of a particular custom opposed to general custom and unsupported by instances, is insufficient to prove the existence of that custom.

A clause in the *riwaj-i-am* provided that when a man was adopted and subsequently his brothers died without issue, the adoptee could succeed to his natural father's estate only in the absence of brothers and nephews of his natural father.

Held, that the recital of the custom in the *riwaj-i-am* was opposed to general custom and unsupported by instances and, therefore, insufficient to prove its existence.

According to the Customary Law of the Punjab, in the absence of all other lineal male descendants of the natural father, an adoptee succeeds his natural father to the exclusion of the collaterals of that father.

Custom—contd.

In cases where an entry in *riwaj-i-am* has been attested by people for whom it has been prepared, the Courts have to see what the real custom is and not what the people think to be the custom.

A party is entitled to advance any argument even in appeal for the first time which might enable him to prevent the other party from getting a decree. **P. DEWA SINGH v. LEHNA SINGH**, 8 P. W. R. 1916 **740**

Succession—Daughter of Rau of Jamal Patti of Mauza Lala Darya in Multan District marrying her first cousin—Other first cousins, if excluded.

There is no custom whereby the daughter of a Rau of Jamal Patti of Mauza Lala Darya, by reason of her marriage with her first cousin, excludes her other first cousins from succession to her father's estate. **P. SAHIB ZADI v. ALLAH BAKHSI & Co.**, 161 P. W. R. 1915 **863**

Intestate succession among Amins of Lahore—Brothers and their sons, rights of, as against widow and daughter's sons **633**

Pagwand—Chundawand—Mouza Kakrola, Delhi Tahsil.

Among the Jats of Mouza Kakrola in the Delhi Tahsil *chundawand* and not *pagwand* is the rule of succession. **P. SHEER SINGH v. SALIG**, 72 P. R. 1915; 149 P. W. R. 1915 **241**

Self-acquired property—Paternal aunt's son, whether has preferential right to a near agnate—Onus probandi.

The paternal aunt's son has not, in any tribe in the Punjab, *prima facie* a better right of succession than a near agnate, even where the property is self-acquired and the onus is on him to prove such right. **P. ALLAH DIN v. SALAM DIN**, 96 P. R. 1915; 169 P. W. R. 1915 **497**

Self-acquired property—Kakezai Sheikhs of Hoshiarpur—Sister—Collaterals—Onus probandi—Muhammadan Law, whether can be pleaded in second appeal.

Among Kakezai Sheikhs of Hoshiarpur a collateral cannot oust a sister or her descendants from property which was acquired by her brother and has, after his death, come into her possession.

Where the plaintiffs based their claim to succeed upon a special custom but having failed to establish it sought to rely upon their personal law:

Held, that the plaintiffs could not in second appeal ask the Court to decide the case upon the basis of Muhammadan Law. **P. TUFEL MUHAMMAD v. SHAHAB DIN**, 67 P. R. 1915; 142 P. W. R. 1915 **85**

Sials of Jhang District—Ancestral property—Daughter's preference to collaterals in 10th degree—Power of daughter to alienate by Will—Sister, status of.

Among Sials of the Jhang District, a daughter is entitled to succeed in preference to collaterals in the 10th degree and can alienate ancestral property by Will, the collaterals having no right to contest such alienation.

A sister, though intended to inherit, does not take a full estate and cannot alienate. **P. MUHAMMAD BAKHSI v. MUHAMMAD**, 90 P. R. 1915; 170 P. W. R. 1915 **533**

Cutchi Memons—Custom—Personal law—Hindu Law—Muhammadan Law—Presumption—Will—Gift—Bequest—Interpretation—Disposition of whole property, power of—Conversion to Muhammadanism, effect of—Law, uniformity and certainty of—Courts, policy of—Joint Hindu family—Power of disposition by Will—Succession and inheritance, distinction between—Custom, revocation of—Trusts and life-estates in Muhammadan Law—Evidence of members of Bar, value of—Evidence Act (I of 1872), s. 48.

The Cutchi Memons have acquired by custom the power of disposing of the whole of their property by Will.

The Cutchi Memons have never adopted as part of their Customary Law the Hindu Law of the joint family, as a whole, or the distinction existing in that law between ancestral family, and joint family and self-acquired, property.

The Cutchi Memons are subject by custom to the Hindu law of succession and inheritance as it would apply to the case of an intestate separated Hindu possessed of self-acquired property, and no more.

A Will by a Cutchi Memon recited—

(1) The executors "shall out of my 'punji' set apart three lacs," etc., "shall spend according to law the said sum or certain portions thereof in connection with some good works of charity in such manner as they may think just and proper such as sanitarium, *sarad-khana* (lying-in-hospital), *misafarkhana* (resting house for travellers), *madressas* (schools), scholarships, *dharamshalas*, medical dispensaries, etc., (i. e.), in connection with any such *khairat* (that is, charity work), that is in connection with such different works of charity."

(2) "Should no son be born to me agreeably to what is written above or should (one) be born (and) should (he) die without leaving a son or heir, . . . then as regards my whatever 'punji' there may be left, they shall utilize the whole of the said 'punji' or portions thereof in such manner as they in their discretion think proper in connection with the above-mentioned or any other good works of 'khairat' (charity)."

Held, that the Will was a good and valid Will in all respects, and that the bequests to charity were neither void for uncertainty nor bad under the Muhammadan Law as offending against the radical principle that a gift must be made *in presenti* and not conditioned *in futuro*.

On conversion to Muhammadanism, converts, no matter what their previous religion may have been, must be taken at that moment to have renounced all their former religions and personal law in so far as the latter flowed from and was inextricably bound up with their religion, and to have substituted for it the religion of Muhammad with so much of the personal law as necessarily flows from that religion.

The Wills of Cutchi Memons must be interpreted, where interpretation is necessary, in the light of the Muhammadan rather than of the Hindu Law. Where therefore, it is a question whether a devise by a Cutchi Memon is good or bad, the answer must depend upon whether it conforms in essentials with the requirements of the Muhammadan Law of gift.

A Court should rather look to uniformity of legal decisions than to nice logical or philosophical accuracy. Policy requires that there should be continuity in legal decisions for nothing can be worse

Cutchi Memons—concl'd.

than keeping the law in perpetual uncertainty and so perhaps unsettling title, which have for many years been supposed to be thoroughly sound and marketable.

Muhammadans must, in the first instance, be presumed to be governed by the Muhammadan Law.

Bequests by Will are after all only gifts to take effect upon the death of the donor, and as such originally belong to the law of gift.

The power of disposing by Will of a man's property can have no logical connection whatever with the Hindu Law of the joint family.

Obiter.—As the adoption of a custom is by the volition of the party adopting, so it is equally in their volition to abandon any such custom and once again place themselves strictly under their proper unmodified law.

The distinction of the English Law between succession and inheritance does not exist in India.

Trusts are utterly unknown to the Muhammadan Law and so, too, is the power of creating a succession of life-estates.

Query.—Whether the making of Wills is part of the law of succession and inheritance?

Query.—Whether on the question of sects of Muhammadans having adopted special customs of the Hindu Law, the opinion of the Bar is relevant under section 48 of the Indian Evidence Act? **B. ADVOCATE GENERAL v. JIMBARAI**, 17 Bom. L. R. 799 **106**

Damages—Breach of contract to make plaintiff a partner **73**

—Covenant of title, breach of—Limitation **877**

—Duty of Chairman to register voters—Acting "in good faith," meaning of—Liability in damages—Test **322**

—Land acquisition—Right of owner to compensation for injury done **259**

—Malicious prosecution, damages for, suit for Proof essential—Damages, when awarded—Principle **324**

—Malicious prosecution, suit for **246**

—Mortgage-debt, transfer of—Covenant, implied, for title—Breach of covenant for title—Suit for damages, maintainability of—Cause of action, when arises—Transfer of Property Act (IV of 1882), s. 55 **179**

Damdapat, rule of, applicable to mortgages under Transfer of Property Act (IV of 1882.)

In the Calcutta High Court, the uniform rule has been to disallow as between Hindus interest larger than the amount of principal in making up a mortgage account.

The rule of *damdapat* is applicable to mortgages under the Transfer of Property Act. **C. KUNJA LAL BANERJI v. NARSAMBA DEBI**, 42 C. 826; 20 C. W. N. 110 **6**

Debt. See HINDU LAW.

—Assignment of debt Debtor's assent communicated to assignee—Debtor, whether can subsequently plead any claim or charge **152**

Debtor and Creditor—Agency **215**

Decree. See AMENDMENT OF DECREE; CIVIL PROCEDURE CODE, 1908, s. 2 2).

directing execution of conveyance—Time fixed by decree subsequently extended—No payment of money in time—Decree-holder, if entitled to obtain conveyance.

A decree directed the judgment-debtor to execute a conveyance on payment by the decree-holder of a sum of money within one month. The decree-holder obtained an extension of time, but within that period as well he could not make the payment. Thereafter he applied to the Court to direct the judgment-debtor to execute the conveyance.

Held, that as the application was made beyond the period fixed in the decree, it was ineffective and the judgment-debtor was within his rights in refusing the execution of the conveyance. **M. SHANMUGHAM ASARI v. SYED NATHAN SAHIB** 457

prepared at variance with judgment—Remedy—Procedure—Amendment—Appellate Court, exercise of power of amendment by.

Where a mortgage decree is wrongly drafted as a money-decree, the proper course for an aggrieved party is to apply to the Court which passed the decree for its amendment in order to bring it in conformity with the judgment. An Appellate Court would not exercise that power when it would be inconvenient to do so. **M. UPADHAYAYEE v. YEGNANARAYANA v. KOTTALANKA MAHAYIA**, (1915) M. W. N. 914 478

against several defendants at different times—Consolidated decree—Limitation—Limitation Act (IX of 1908), ss. 14, 18.

A decree for money may be passed against different defendants at different times, and the decrees so passed are not treated as one consolidated decree.

An application by a judgment-debtor to record satisfaction of a decree made by him more than three years from the date of the decree as against him is barred, even though it may be within three months from the date of a revised decree as against defendants other than himself. The two decrees cannot be consolidated for purposes of limitation as one. **M. SAMBASIVA AYYAR v. MUHAMMAD HUSSAIN** 911

, suit to set aside, on ground of fraud 13

Defamation—Defamatory words published in course of official duties—Reasonable and probable cause—Prohibition of illegal business—Action, right of 224

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 22, scope of—

Immunity of agriculturists' house from sale, extent of. The true construction of section 22 of the Dekkhan Agriculturists' Relief Act is, first, a general provision that immovable property belonging to an agriculturist shall be immune from sale, and secondly, a proviso directing that this immunity is subject to exception where the two following conditions are both satisfied, that is to say, (a) where the decree or order in question relates to the re-payment of a debt, and (b) where the agriculturist's property has been specifically mortgaged for the re-payment of that debt. The limiting words in the section referring to a debt occur only in the proviso and cannot be imported into the main rule so as to restrict its express generality. **B. MAHADEV RAGHUNATH v. RAMA TUKARAM**, 17 Bom. L. R. 962 305

Deposit in Government Treasury—Suit for recovery—Limitation 277

Divorce. See MUHAMMADAN LAW.

Divorce Act (IV of 1869), s. 10—Dissolution of marriage—Desertion—Adultery, admission of, when not sufficient—Delay in filing petition, effect of.

The petitioner and the respondent were married on the 12th August 1890. They lived together till May 1892 when the petitioner left the respondent owing to his intemperate habits. Since then, they never met. The respondent who was in the Indian army, left the army and went to England. In 1911 the petitioner obtained his address from the War Office and wrote to him in reply to this, he wrote: "you ask me if I have ever misconducted myself with any woman since you and I parted. I have misconducted myself with several women since I parted with you, but I will not give you their names for obvious reasons." The petitioner thereupon sued for divorce on the ground of adultery coupled with desertion:

Held, (Fox, C. J., dissenting.) that the admission in the letter was not sufficient proof of adultery.

Held, also, that under the circumstances, there was no abandonment against her wish.

Per Fox, C. J.—Disinclination from religious motives cannot be regarded as sufficient excuse for not taking action for obtaining the remedy which the law provides for an injured wife and for delaying presenting a petition.

Per Parlett, J.—A wife who seeks to prove desertion, must give evidence of conduct on her part showing unmistakably that such desertion was against her wish actively expressed. The husband must have wilfully absented himself from her in spite of her wish.

Subsequent conduct cannot transform what was a voluntary separation into desertion by the husband. **L. B. GLANCY v. GLANCY**, 8 L. B. R. 264

ss. 17, 37, 44—Decree for dissolution of marriage passed by Divisional Judge and confirmed by High Court—Application for alimony—Jurisdiction.

Where a decree for dissolution of marriage passed by a Divisional Judge was confirmed by the High Court under section 17 of the Divorce Act and the successful petitioner applied to the High Court for an order for payment of alimony:

Held, (1) that the Court which was empowered to make the order either for alimony or for the maintenance and education of the children was the Court of the Divisional Judge and not the High Court;

(2) that in view of the nature of the High Court's jurisdiction the Court of the Divisional Judge was not a subordinate Court within the meaning of section 24(1) (a) of the Civil Procedure Code and the High Court could not transfer the proceedings to the Divisional Court for disposal. **B. MINNIE WALLACE v. ARTHUR WALLACE**, 17 Bom. L. R. 948 331

ss. 37, 44 331
Easement—Customary right in nature of easement—Right of burial.

Where a particular grove land was used by the family of the Muhammadan residents of a village as burial ground;

Easement—concl.

Held, that the right claimed by them was not an easement but a "customary right in the nature of an easement." **A. MATHURA PRASAD v. KARIM BAKSH**, 13 A. L. J. 1024

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Right of way—Several servient owners—Obstruction by one—Other servient owners, if necessary parties—Enjoyment by tenant, if enjoyment by owner—Permanent tenure-holder, if can acquire right against another under same landlord—"Adhin" in road cess, meaning of—Severance of tenement—Grant—Presumption.

Where a way passes over different parcels of land owned by different persons and the owner of one parcel obstructs the way on his own land and the owners of the remaining parcels do not raise any obstruction nor even deny the dominant owner's right, the latter are neither necessary parties nor can be joined in a suit for a declaration of his right of way by the dominant owner against the servient owner who obstructs the way.

An enjoyment of easement by a tenant in possession of the dominant tenement under a claim of right in respect of the dominant heritage, may give the owner a prescriptive right.

The word "adhin" used in the road cess return means "appertaining to" and not "subordinate" to the *houla*.

Quære:—Whether a permanent tenure-holder can acquire a prescriptive right of way against another permanent tenure-holder under the same landlord?

The plaintiffs purchased the dominant tenement some 60 years before the suit after a partition between their vendors and their co-sharers. A way was in existence from beyond that time. The path was intended to be permanently attached to and for the use of the would-be dominant tenement.

Held, that there was the presumption of an implied grant on severance of the two tenements.

Held, further, that assuming that the way came into existence only after the partition, the fact that the tenant in possession of one tenement had been using the path over the other for about 60 years, would lead to the inference that the user had its origin in a grant not as a matter of legal presumption, but a grant which may be found as an inference of fact.

On a severance of a property a grant of a right of way of necessity by the owner of one of the severed portions to the owner of the other can be presumed. **C. MADAN MOHAN v. SASHI BHUSAN**, 19 C. W. N. 1211

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Easements Act (V of 1882), s. 15,

scope of—Limitation Act (IX of 1908), s. 26—Prescriptive easement, acquisition of—Peaceable and open enjoyment, meaning of—Verbal dispute by servient owner, whether prevents enjoyment by dominant owner from being peaceable.

Mere verbal disputes by a servient owner, which do not cause interruption or obstruction to the enjoyment of an easement by the dominant owner, do not prevent its enjoyment from being peaceable so as to bar the acquisition of a prescriptive title thereto.

Knowledge and acquiescence on the part of a servient owner are not necessary for the acquisition of a prescriptive easement under the Limitation Act.

Easements Act—concl.

Per Sadashira Aiyar, J.—The expression "peaceable enjoyment" means that the dominant owner has neither been obliged to resort to physical force himself at any time to exercise his right within the 20 years expiring within two years of the suit, nor had he been prevented by the use of physical force by the servient owner in his enjoyment.

Sections 26 and 27 of the Limitation Act do not apply to cases arising in territories to which the Indian Easements Act, 1882, applies.

Section 15 of the Indian Easements Act, is only remedial in nature and is neither prohibitory nor exhaustive. It does not exclude or interfere with other titles and modes of acquiring easements. Where open enjoyment has taken place for a long series of years, title by prescription is acquired independently of the Statute and a suit to establish the right can be brought within 12 years after the obstruction.

An easement by statutory prescription cannot be acquired under section 15, paragraph 5, of the Indian Easements Act unless and until the claim thereto has been contested in a suit.

Per Bakerell, J.—The words "peaceably and openly enjoyed by any person" occurring in the third paragraph of section 15 of the Indian Easements Act, mean that the person who claims a right over the property of another must not have deprived him of that right by the use of force or secretly, or in other words, the use must be "nec vi nec clam." The words "peaceably" and "openly" indicate the manner in which the dominant owner must conduct himself in his use or enjoyment of the servient tenement. The conduct of the servient owner is immaterial, except so far as it goes to show the nature of the user by the dominant owner. **M. MUTHE GOUNDAN v. ANANTHA GOUNDAN**, 29 M. L. J. 685; 18 M. L. T. 476; 2 L. W. 1107

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s. 47—Right of Govern-

ment to claim water cess for water flowing through pattah land—Classification of bed as poramboke, if essential—Right to easement as against Government, when and how acquired—Burden of proof.

Water flowing in a continuous manner through a rill, *kuttai* and another water-course may form a natural stream in which easement rights may be acquired as against Government.

Once the existence of an easement is proved as against Government, it is for Government to show under section 47 of the Easements Act that it interrupted that easement more than 20 years ago or that the plaintiff rendered its use impossible. Mere failure on the plaintiff's part to repair the breach would not amount to obstruction by the servient owner or rendering the use impossible by the dominant owner.

If the Government wish to claim right to water which flows through *pattah* land, they can do it only when they classify the bed separately as *poramboke*, otherwise the bed also remains the property of the *ryot*. **M. KALIYANNA MUDALI v. SECRETARY OF STATE**

982

Ejectment. See LESSOR AND LESSEE.

— *Abadi land*

307

— *Insufficient notice—Ex parte decree—Examination of process-server, necessity of—Material irregularity—Revision*

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— *Lease*

590

Ejectment—concl.

— *Suit by mortgagor before obtaining decree in redemption suit, maintainability of.*

A suit for ejectment brought by the mortgagor of a *zemindari* share during the pendency of the redemption suit and before his obtaining a redemption decree is premature and not maintainable. **U. P. B. R. ALI BUX v. PARKASH NAD** 454

— *Suit for—Pro forma defendant, relief not claimed against—Decree against him, validity of.*

An order of ejectment against a *pro forma* defendant against whom no relief was asked as he was alleged to have no connection with the land in dispute, is not bad when that person's rights have been threshed out and he has been found to be a non-occupancy tenant. **U. P. B. R. GANGA CHARAN v. MANCHI PRASAD** 861

— *Tenancies created by mortgagee in possession, whether binding on mortgagor—Mortgagor, right of* 630

Enhancement, suit for, dismissal of—Fresh suit, if maintainable—Exemplar area, extent of.

A dismissal of a suit for enhancement of rent is no bar to the filing of a fresh suit in a subsequent year.

An exemplar area should not be confined to a single-holding area but should extend to an extent sufficient to make certain that the rates arrived at are really prevailing rates. **U. P. B. R. BADEMI PRASAD v. RAM CHARAN** 866

Escheat—Crown, suit by—Burden of proof as to failure of heirs—Evidence Act (I of 1872), s. 13—Ejectment—Lease—Relationship—Gotra.

Per Wallis, C. J.—In a suit by the Government for ejectment of the defendant on the ground of escheat, it lies upon the Crown to prove at least *prima facie* that the deceased died without heirs, and it cannot rely upon the want of title of the party in possession.

The fact that in another contested suit a party has failed to prove the relationship of his line with the deceased is evidence against the existence of the right of that line as heirs of the deceased and is relevant under section 13 of the Evidence Act.

Where a lessee is in possession, the plaintiff to succeed in a suit in ejectment need not sue to set aside the lease.

Per Seshagiri Aiyar, J.—It is the common *gotra* that determines relationship between the parties, and not the use of a common family name.

When once the Crown establishes *prima facie* that the deceased died without heirs, the burden is shifted on to the party in possession to show that he is in the line of heirs. **M. SECRETARY OF STATE v. SUBBAYA KARANTHA**, 18 M. L. T. 504; 2 L. W. 1175; (1915) M. W. N. 962 590

Estoppel—Reversioner's consent—Question of legal inference 487

— *Share-holder—Company—Director acting as such for many years* 595

— *Suit compromised—Sale—Application to set aside—Party compromising suit, if can urge setting aside of sale entirely.*

A party who enters into a compromise is not estopped from contending that a sale in the suit, if set aside at the instance of another party, should be set aside in its entirety. **C. ICCHAMONI DAS v. OSUNNO KUMAR MONDAL** 858

Evidence—Birth-day books, admissibility of—Conditions—Husband—Evidence as to wife's age—Affidavit, previous, admissibility of.

The birth-day books are admissible in evidence under the Straits Settlement Ordinance No. 3 of 1893 as under the Indian Evidence Act, if the parol evidence concerning them is accepted.

Where a husband's statement as to his wife's age is admissible for what it was worth, an affidavit in which he had sworn to the same date previously before the controversy is admissible in evidence. **P. C. CHUAN HOON GNON NEON v. KHAW SIM BEE**, 19 C. W. N. 787 637

— *Chittas—Observations of High Court as to probative values of chittas in another case, how far to be followed by lower Courts—Chittas, when private and public documents* 695

— *Criminal Court, findings of, whether admissible as evidence in Civil suit* 789

— *Inadmissibility in evidence of documents when not material—Finding of fact—Second appeal—Punjab Courts Act (III of 1914), s. 41.*

The inadmissibility of a document supporting a debt is not material where the defendant has admitted having received the money borrowed by him.

A finding that defendant has not made any repayments, cannot be disturbed in second appeal. **P. FAZL AHMAD v. JIWAN MAL**, 178 P. W. R. 1915 800

— *Petition embodying terms of compromise incorporated with judicial record Registration, whether compulsory* 531

— *Unregistered lease-deed, if admissible to prove rent fixed* 604

Evidence Act (I of 1872), ss. 8, 21—Statement of executant considerable time after execution, weight of—Construction of documents—Subsequent conduct, effect of—Ancient document—Gift to wife absolutely—Unambiguous deed—Draft deed prepared long before execution, admissibility of.

A statement made by a person as to the circumstances under which he executed a document a considerable time after the execution, cannot be admitted to prove the facts stated by him.

Except in the case of ancient documents the construction of a document whose terms are clear cannot be controlled by the subsequent conduct of the parties.

Where a person delivered his property absolutely to his wife and said that she was to enjoy the property from generation to generation:

Held, that the document created an absolute interest in favour of the wife.

A draft deed prepared long before a similar unambiguous deed is executed, is inadmissible to construe the latter deed. **M. NABASAMMA HEGADTHI v. BILLA KESU PUJARI**, 25 M. L. J. 637 543

— **S. 13** 590

— **ss. 13, 35, 83—Chittas, if admissible in evidence—Entry in public registers, relevancy of—Bengal Survey Act (V of 1875), ss. 41, 63.**

Where *chittas* were prepared by Government as only part of and in explanation of proceedings which were regularly taken for the assessment of rent upon lands said to be improperly held rent-free and where the whole of the proceedings together with the petition, under which the proceedings were initiated, and the reports of the Collector and the orders of the Board of Revenue were put in evidence:

Evidence Act—contd.

Held, that all the papers taken together furnished a valuable evidence.

Held, also, that the *chittas* were admissible in evidence inasmuch as they were coupled with proceedings which were of the nature of resumption proceedings and the lands therein were identifiable.

An entry in a register prescribed by law and being a public register kept for the public benefit under the sanction of official duty is relevant under section 35 of the Evidence Act no matter whether the clerk who wrote the entry had any personal knowledge or whether the register was a copy of a previous register which had become untidy.

A decision under the Survey Act based upon a survey map made behind the plaintiffs is not binding on the Civil Courts upon the question of title. **C. WILLIAM GRAHAM v. PHANINDRA NATH MITTER**, 19 O. W. N. 1083

— **s. 21** 543

— **s. 23**—"Without prejudice," meaning of, when used in a private document 152

— **s. 24** 340

— **s. 24**—Statement made under promise, of pardon retracted—Want of corroborative evidence—Conviction, whether legal—Criminal Procedure Code Act V of 1898, s. 339 (2).

In the absence of corroboration in material particulars, it is not safe to convict on a retracted confession, unless, from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine.

Where, therefore, an accused retracted a statement made by him under promise of pardon, which so far from being corroborated by any other evidence whatsoever, was contradicted in important particulars by other prosecution evidence, and where the accused was convicted on such a statement:

Held, that the conviction was bad. **P. KHUSHI v. EMPEROR**, 16 Cr. L. J. 815

— **ss. 32, 80**—Dying

declaration, admissibility of—Certificate of correctness by recording Magistrate—Presumption—Dying declaration reduced to writing—Substantive evidence—Criminal Procedure Code (Act V of 1898), ss. 164, 512.

An oral statement of a deceased person as to the cause of his death, if made in the absence of the accused, may be proved by any one who heard it made as well as by the person who recorded it.

It is not necessary in order to make a dying declaration admissible in evidence that the Magistrate who recorded it be examined as a witness in the case.

When the dying declaration has appended to it a certificate that it has been read over to the deponent and declared to be correct, and this is signed by the Magistrate who recorded the statement, section 80 of the Evidence Act creates a presumption that the circumstances under which it is stated to have been taken, are true.

Dying declarations which have been reduced to

Evidence Act—contd.

writing are under section 32 (1) of the Evidence Act admitted as relevant facts and become substantive evidence of the circumstances leading to the deceased person's death when the cause of the death is in question. **M. In re KARUPPAN SAMBAN**, 16 Cr. L. J. 759

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— **s. 32 (2)**—Statements of deceased persons not made in course of business, admissibility of 184

— **ss. 33, 145**—Criminal trial—Statement made by witness before Committing Magistrate, admissibility of, in Sessions trial—Witness procurable—Practice—Procedure.

The application of section 33 of the Evidence Act in criminal cases ought to be confined within the narrowest limits. Where a witness is material, justice requires that he should, if possible, be examined at the trial in the presence of the accused. Where the evidence of a witness is not material, there is no need to introduce it under section 33.

Where in a Sessions trial, the evidence of an absent witness was very material and was relied upon by the Sessions Judge in his charge to the Jury, but he was not produced although he resided within the Court's jurisdiction and could have been procured without any very great delay or expense:

Held, that the deposition ought not to have been admitted and was not evidence.

Where the entire evidence of the complainant given before the Magistrate was admitted as a whole during the cross-examination of that witness in the Sessions Court and where it was intended to be used to contradict him:

Held, that it was contrary to principle to admit the evidence in this manner without first drawing the attention of the witness to every point upon which it was to be used to contradict him.

Scumble.—In every criminal trial, Judges cannot be too careful to conform strictly with the principles of evidence. **B. LAKSHMAN TOTARAM v. EMPEROR**, 17 Bom. L. R. 590; 16 Cr. L. J. 754

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— **s. 35** 41

— **s. 48** 106

— **ss. 65** 30

— **ss. 65, 66**—Redemption, suit for—Mortgage-deed in mortgagee's possession—Oral evidence, admissibility of.

In a suit for redemption when the mortgagee is in possession of the mortgage-deed and fails to produce it, oral evidence is admissible under section 65 (a) read with proviso (2) to section 66 of the Evidence Act. **L. B. MI AMIN NISSA v. MI SURA BI**

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— **s. 66** 892

— **s. 80** 359

— **s. 83** 41

— **ss. 90, 114**—Copy of document thirty years old—Handwriting of copyist—Presumption—Discretion—Appellate Court, interference by—Secondary evidence—Document lost—Proof, necessary—Pit dug by stranger in another's land—Elephant trapped—Ownership, question of.

In the case of a copy of a document 30 years old,

Evidence Act—could.

section 90 of the Evidence Act empowers the Court to presume that the copy is in the handwriting of the person in whose handwriting it purports to be. Though a presumption as to stamping is not raised by section 90 of the Evidence Act, a lower Court can draw that presumption under section 114, and if it so does, an Appellate Court should not lightly interfere with it.

Where an original document is lost the party tendering secondary evidence of it need not show the exact mode and time of the loss but only that it was not lost by his own default or neglect.

Quere.—Whether a stranger who digs a pit in another's land, can claim an elephant which has fallen into it? **M. MANAVIKRAMAN v. NILAMBUR THACHARAKAVIL.** 579

s. 92—Oral sale in discharge of mortgage-debt, whether admissible in suit for redemption—Nature of possession by mortgagee—Prescription.

The plaintiff sued for redemption of a mortgage and for accounts from the defendants as mortgagees in possession. The defendants set up an oral sale by the mortgagor in discharge of the mortgage-debt, and adverse possession for more than the statutory period. The plaintiff's suit having been dismissed, he appealed on the grounds that the plea of oral sale was *res judicata* by reason of the decision in a previous suit and that oral evidence of the alleged sale was inadmissible:

Held, (1) that the existence of the oral sale not being directly and substantially in issue and not having been finally decided in the previous suit, the question was not *res judicata*;

(2) (*Spencer, J.*, dissenting) that the oral agreement was sought to be proved not as modifying the mortgage, but in order to prove the nature of possession taken by the mortgagee and oral evidence, therefore, was admissible;

(3) that the defendants' possession had been all along adverse as against the mortgagor and that they had acquired a title by prescription.

Per Phillips, J.—Oral evidence of a sale by the mortgagor to the mortgagee in discharge of the mortgage-debt is admissible under section 92 of the Evidence Act to prove discharge, although the sale itself is invalid and does not effect any legal transfer of the property, even though it is accompanied by delivery of possession.

Although an oral sale cannot in itself operate as an extinguishment of the mortgage, yet the proof of the payment of a mortgage-debt thereby is sufficient to prove the nature of possession by the mortgagee.

Per Spencer, J.—A simple mortgagee who gets into possession of immoveable property of Rs. 100 in value cannot prove an oral sale as a starting point of adverse possession against his mortgagor so as to acquire a prescriptive title by remaining in possession for over the statutory period.

A mortgagee's possession does not become adverse to the mortgagor merely by his styling himself as proprietor of the mortgaged property or by his denial of the mortgagor's right to redeem; there must be some act done by which the mortgagor may have reason to suppose that his rights have been invaded.

Evidence Act—could.

Sales and mortgages of immoveable property are both transfers of intangible rights, but one is a transfer of ownership and the other is a transfer of an interest in the property concerned. The possession of a purchaser is of a full proprietary character, while the possession of a mortgagee in possession is of a limited nature. Both transactions are required to be registered, if the property is Rs. 100 in value or over. An extinguishment of a mortgage by the mortgagee's rights being merged in those of an owner, involves an alteration of the relationship of mortgagor and mortgagee into one of seller and purchaser. When each of these transactions requires a registered document to make it valid, the law does not permit the substitution of one for the others to be effected in a less formal manner. **M. THOTAKURA GOVINDU v. PEPAKAYALA MALLAYYA.** 678

s. 92, proviso 1—Mutual mistake as to description of land in registered mortgage deed, whether can be proved by oral evidence—Construction of deed—Rights of bona fide purchasers for value.

Oral evidence is admissible under proviso 1 to section 92 of the Evidence Act to prove a mutual mistake made in the description of a piece of land in a registered mortgage-deed.

A Court can, on reception of such evidence, treat the instrument as rectified, and proceed on that assumption, though no suit for rectification of the instrument is brought under section 31 of the Specific Relief Act, provided that the rights of third persons acquired in good faith and for value, are not prejudiced thereby. **M. KOTA CHINA MALLAYYA v. KANSEKANTI VEERIAH.** 671

s. 93 632
s. 114 579
s. 145 554

Execution—Decree passed before the new Civil Procedure Code—Application for order absolute for sale, whether valid—Application dismissed for statistical purposes can be revived.

An application for an order absolute for sale in execution of a mortgage decree, passed before the new Code of Civil Procedure came into force, is an application in execution proceedings and is valid.

An application for execution dismissed merely for statistical purposes, can be revived by a fresh application presented within three years from its dismissal. **M. SINGARAVELU PILLAI v. SANTHANA KRISHNA MUDALIAR, (1915) M. W. N. 643.** 9

Decree passed against heirs of debtor—Attachment—Objection by judgment-debtor—Possession in lieu of dower—Lien.

A decree-holder in execution of a consent decree passed against his judgment-debtors as heirs of a debtor attached a house. One of the judgment-debtors, a young *pardanashin* lady, objected to the attachment. It appeared that by an arrangement arrived at between her and other judgment-debtors she had been placed in possession of the house in lieu of the dower due to her. Among other pleas, she contended that as she was a minor at the date of the decree, she was not bound by it. The executing Court dismissed the objection but on appeal her objection was allowed. On second appeal

Execution—contd.

Held, that the possession of the objector was that of a mortgagee;

that assuming that the objector was bound by the decree, the house was liable to attachment subject to the objector's lien over it to the extent of her dower. **P. JHABHAN LAL v. SAFDRI BEGAM**, 178 P. L. R. 1915; 125 P. W. R. 1915; 80 P. R. 1915 **722**

Decree against one set of defendants on contest, against another by consent—Appeal against whole decree by contesting defendant—Execution, limitation for—Limitation Act (IX of 1908), Sch. I, Art. 182, cl. (2).

A person who is a party to a compromise cannot challenge the validity of the consent decree by way of appeal, but the party to the suit who has not joined in the compromise is competent to appeal against the decree if he has been prejudiced thereby.

In a suit where a decree has been obtained against one set of defendants by consent and against the other on contest and the contesting defendant appeals against the decree and thereby the validity of the entire decree is in controversy in the appeal, the decree-holder is entitled to the benefit of clause 2 of Article 182 of Schedule I to the Limitation Act, 1908, in execution of the decree against both sets of the defendants. **C. LOKE NATH SINGH v. GAJU SINGH**, 22 C. L. J. 333; 20 C. W. N. 178 **426**

Decree for partition specifying several shares—One party getting more than his due share—Re-adjustment of partition in order to make it accord with terms of decree, whether allowed.

A partition-decree was passed in 1888 specifying the shares to be allotted to all the sharers and the terms on which such allotment was to take place. In 1894 defendant No. 8 applied for his share and got it, so did most of the other sharers. In 1900 defendants Nos. 10-12 applied for separate possession of their share. It was then found that the lands remaining for their share were far less than they should have got and that the plots below and adjoining their houses had been allotted to the share of other sharers. They then applied to the Collector to re-open the partition, who declined to do this but proposed that the surveyor should at the applicants' expense see if they could be compensated out of other lands. The applicants wanted time to pay the expenses and the Collector reported to the Court that the applicants refused to take possession of their share.

Held, that inasmuch as the Collector's partition had not been made in accordance with the directions of the decree, the shares of defendant No. 8 and the applicants must be re-adjusted so as to remedy the injustice done to the applicants, who were entitled to have their right share, so far as they could get it, at the expense of defendant No. 8. **B. RANCHANDRA DINKAR v. KRISHNAJI SAKHARAM**, 17 Bom. L. R. 967 **311**

Decree—Sale—Passing of title—Presumption **254**

Suit conditionally decreed on payment of certain amount within certain time—Payment not made—Defendant's execution for costs—Procedure.

A decree was passed in the following terms:—
"It will be established and declared that the sale-deed executed by defendants Nos. 2 and 3 in favour

Execution—contd.

of defendant No. 1, is not binding upon the plaintiff; possession will be delivered to the plaintiff by dispossession of defendant No. 1 on condition of paying into Court Rs. 66 within one month; in case of default, the plaintiff's suit will stand dismissed". A schedule of costs was given on the assumption that the money would be paid in time. The money was not paid within time.

Held, that under the decree as it stood, the defendant was not entitled to execution for costs. **A. RAM NATH TEWARI v. Musammal GENDA** **564**

Decree against wrong legal representative—Sale in execution—Proper legal representative, whether can set aside sale—Civil Procedure Code (Act V of 1908), s. 2 (11).

Decree-holders and purchasers in Court auction should not be deprived of their legitimate rights on bare technicalities when the merits are clearly in their favour.

A decree-holder may select, from among several rival claimants to the estate of his judgment-debtor, any one whom he believes honestly to have the best *prima facie* title as legal representative and that representation, in the absence of fraud or collusion, will be sufficient to validate sales held in execution and to convey the title of the deceased judgment-debtor through such sales.

The term "legal representative" in section 2, clause (11), of the Code of Civil Procedure, 1908, includes any person who intermeddles with the estate of the deceased and the fact that this definition is not found in the old Code does not make it any the less applicable, based as it is on sound legal principles.

Where, therefore, the widow of a deceased testator was wrongly impleaded in a suit for the recovery of money due from him, and a decree having been obtained against her, the property, which under the terms of the Will belonged to some one else, was sold in execution and purchased by a third party and a suit was subsequently brought by the legatee to recover the property bequeathed to him:

Held, that the sale could not be set aside merely on the ground that the legatee was not a party to the decree obtained by the creditor. **M. GNANAMBAL AMMAL v. VEERASAMI CHETTY**, 29 M. L. J. 698 **920**

Ex parte decree—Sale—Auction-purchaser, stranger or decree-holder, rights of—Ex parte decree, set aside—Assignee from decree-holder purchaser, rights of, if affected—Bona fide purchaser for value without notice, plea of, applicability of.

A Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decrees though the sales may be subsequently set aside, where those purchasers are not parties to the suit and the decree has not been passed without jurisdiction. But the same measure of protection is not extended to purchasers who are themselves the decree-holders, nor to the purchasers from those decree-holders-purchasers.

The defeasibility of the decree-holder's title to the property purchased in execution of an *ex parte* decree is of such common occurrence that the plea of a purchaser for value without notice hardly applies to his assignee. **C. SATIS CHANDRA GHOSE v. RA MESWARI DAS**, 22 C. L. J. 409 **894**

Execution—concl.

Injunction, decree for, in respect of easement—Transfer of dominant tenement—No application by transferee—Decree-holder, right of, to execute decree—Executing Court, competency of, to consider incapacity of decree-holder to enjoy easement owing to transfer of dominant tenement
542

Notice, issue of—Attachment—Default on part of decree-holder—Dismissal of application—Order for execution, whether *res judicata*
293

Order for attachment—Application for execution not disposed of—Subsequent application for sale of property, whether barred
87

Simple money-decree, execution of—Property attachable—Execution how effected
285

Suit originally valued at above Rs. 5,000—Decree for less than Rs. 5,000—Execution proceedings, order in—Appeal—Jurisdiction.

Where an original suit out of which an execution proceeding had arisen was valued at over Rs. 5,000 but was decreed for less than that amount, an appeal from an order in the execution proceedings would nevertheless lie to the High Court. **A. KISWAH ALI KHAN v. SALIM-UN-NISSA**
496

Sale—Purchase by decree-holder—
Decree *ex parte*, subsequently set aside—Sale, how effected.

The purchase by a decree-holder of immovable property belonging to the judgment-debtor in execution of an *ex parte* decree becomes *ipso facto* void, when the *ex parte* decree is afterwards set aside. **M. SONHANADRI APPA ROW v. GOVINDARAJU SEKTARAMIAN**, 2 L. W. 1066
305

—, setting aside of—Court, power of, to take notice of events happening after institution of suit—Suit, events happening after institution of—Grounds—*Ex parte* decree, setting aside of, effect of, upon sale held thereunder—Decree-holder auction-purchaser under *ex parte* decree subsequently set aside, assignee of, rights of—Auction-purchaser stranger to suit, special protection afforded to—Retrial of suit—Fresh decree—Sale, effect on.

A Court is competent to set aside a sale held in execution of a decree on a ground which was not mentioned in the application to set aside the sale and which did not in fact exist when that application was made.

A Court may, in order to shorten litigation or to do complete justice between the parties, take notice of events which have happened since the institution of the proceedings and may afford relief to the parties on the basis of the altered conditions.

As soon as an *ex parte* decree is set aside, the sale held thereunder to the decree-holder, is cancelled and it is immaterial that the property has meanwhile been assigned away by the decree-holder auction-purchaser. A fresh decree subsequently made, does not validate the sale.

An assignee of a decree-holder auction-purchaser stands in no better position than his assignor.

The special protection afforded to a stranger who

Execution sale—concl.

purchases at an execution sale, is not extended to an assignee of the decree-holder auction-purchaser. **C. ABDUL RAHAMAN v. SARAFAT ALI**, 22 C. L. J. 412
896

Sale of zemindari—Interest in building in zemindari, if also passes—Sale notification, value of.

Where an inventory of the property to be sold filed by a decree-holder with his application for execution, showed that only a zemindari was to be sold and not a building situated therein:

Held, that the sale did not pass the interest of the judgment-debtor in the building.

Per **Knox, J.**—The sale-notification is a most important document when Court wishes to find out what was sold in an auction sale held in execution of a decree. **A. SAKHAWAT ALI SHAH v. MUHAMMAD ABDUL KARIM KHAN**, 13 A. L. J. 1098
809

Firm. See PARTNERSHIP.

Forest Act (VII of 1878), ss. 81, 82—

Forest produce, right of Government to recover money payable for, without giving credit for amount realized from sale of attached property—Pleadings—New plea, raising of, first in appeal, propriety of.

A by a contract with Government obtained the right of felling and removing timber and of manufacturing charcoal in certain forest coupes. Under this contract A had to pay Rs. 6,431 in four equal instalments. A paid only the first instalment. On his failure to pay the second instalment, the Divisional Forest Officer attached all materials of timber, firewood and charcoal which A had in the coupes or depots and prevented A from further exploitation of the coupes until the instalments due were paid or security for payment given. The materials attached were subsequently sold and the amount retained by Government. The Divisional Forest Officer sought to recover in addition, the full amount of all the three unpaid instalments, as arrears of land revenue under section 81 of the Forest Act:

Held, that the action of the Divisional Forest Officer could not be justified under section 82 of the Forest Act, as that section expressly provides that the proceeds of the sale should be applied first in discharging the amount due and as it does not authorise an absolute confiscation of the forest produce and independent recovery of the entire amount due.

Held, further, that the plea of justification under section 82 not having been raised in the pleadings in the lower Court, could not be allowed to be raised for the first time in appeal. **S. CHANDIRAM KARASING v. SECRETARY OF STATE**, 9 S. L. R. 51
436

— s. 82 436

Forfeiture of estate. See HINDU WIDOWS' REMARRIAGE ACT.

Forfeiture of tenancy. See LANDLORD AND TENANT.

General Clauses Act (X of 1897), s. 3(25)
796

— s. 16 908

— s. 24 646

Gift. See CONSTRUCTION OF DOCUMENT, MUHAMMADAN LAW.

Grant—concl.

—Possession under a gift from a limited owner—
Gift invalid against reversioners—Trespass by stranger—
Suit by donees for possession based on title, maintainability of.

Two days before her death, one S made a gift of certain immoveable properties, which she inherited from her father, in favour of her step-sons. Prior to this gift the properties had been in the possession of her husband on her behalf and subsequent to the gift the husband continued to hold possession on behalf of the donees, his minor sons. Four days after the death of S, the defendant trespassed upon the properties and took forcible possession of the same. Four months afterwards, the plaintiffs, as donees under the gift aforesaid, instituted the present suit in ejectment against the defendant:

Held, that the plaintiffs were entitled to recover possession from the defendant, a trespasser, even though the gift in their favour was invalid as against the reversioners.

Quere.—Whether the plaintiffs would be entitled to possession, if they themselves had obtained forcible possession from the true owner. *M. NALLAGONDA PEDDA v. ASUPALLEK BODDA REDDY*, 2 L. W. 912; 18 M. L. T. 343; (1915) M. W. N. 815

—Will—Bequest—Interpretation

Good faith, test of 50
Government Servants' Conduct Rules, r. 14 301

Government Servant, when personally liable 224

Grant of agharam—Payment of *mevas* and *ruzzums*, when can be enforced 214

—Dasabandham rights, grant of, by zemindar to ladies of house—Mortgagee of such rights, rights of—Transferee of zemindari, liability of—"Son to grandson", interpretation of—Custom of such grant, validity of.

A zemindar made a grant for the benefit of the ladies of his family of the dasabandham dues recoverable by him from certain villages and himself undertook to collect the same and pay them on to the ladies. The grantees mortgaged these rights to another person:

Held, that the mortgagee could enforce his rights under the mortgage against the subsequent purchaser of the zemindar's right with notice of the obligation.

Per Tyabji, J.—The words "son to grandson" used in a grant of this description are merely words of limitation and not of purchase.

A custom providing for grant by a zemindar for the maintenance of the ladies of his family of the dasabandham dues recoverable by him from certain villages and prescribing a particular course of devolution and management of such property, is neither uncertain nor opposed to public policy, and is valid. *M. BANGARU MUTHU VENKATAPPA NAYANVARU v. GOLLA CHINNABBA NAIDU* 565

—Jagir granted by King of Oudh—Sanad granted by British Government—Grant in perpetuity, so long as there are lineal heirs, rights conferred by—Grant, construction of—Pensions Act (XXIII of 1871)—Grant of villages revenue free, if pension—Docu-

ment not enforceable as mortgage, whether admissible for collateral purpose—De facto guardian, effect of dealings of, on minor—Alienation of Muhammadan minor's property by unauthorized guardian, effect of—Muhammadan Law—Continuing obligation, ratification of.

A jagir granted by Wajid Ali Shah, the then King of Oudh, to his eldest son for the maintenance and support of the Prince and his children was maintained by the British Government after the annexation of Oudh. The sanad granted by the British Government provided that it having been established after due enquiry that the villages had been held in rent-free tenure under the former Government, the Chief Commissioner was pleased to maintain the tenure in perpetuity so long as there were lineal heirs subject to the conditions of loyalty, etc., specified in the sanad:

Held, that the grant in question conferred a heritable and transferable estate, that the duration of the grant was to last as long as the grantee had lineal descendants existing and that the grant was to lapse or to be resumed on the happening of any of the contingencies specified therein and on no other.

A grant of villages, revenue free, in consideration of the rights held by the grantee prior to the confiscation of Oudh, does amount to a pension within the meaning of Act XXIII of 1871.

A document which is not enforceable as a mortgage may be used in evidence for a collateral purpose unconnected with the mortgage.

Although as a rule the dealings of a *de facto* guardian of a Muhammadan minor with the minor's property do not bind the minor, there might be cases of urgent and imperative necessity where a transaction entered into for the benefit of the minor may be binding on him.

According to the general principles of Muhammadan Law an alienation of the minor's property by an unauthorized guardian, even if it is not made for a valid cause, is neither void nor voidable, but its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority though the effect of his decision will relate back to the date of the inception of the transaction.

In the case of a continuing obligation, such as the engagement of a servant or the continuance of a tenancy, an absence of repudiation or the acceptance of service or rent with full knowledge of the facts, implies an undertaking to adhere to the obligation and operates as a ratification or renewal of the old contract by the party accepting the service or rent. *O. HUSAIN ALI MIRZA v. MUHAMMAD AZIM KHAN*, 18 O. C. 168 728

—of whole village as *inam*—Proof 791

Grove—Ejectment—Possession by landlord—Grove-holder, possession of, nature of—Remedy of grove-holder 453

—Ejectment 498

—Sale—Custom—Ejectment of vendee—"Land", meaning of—Agra Tenancy Act (II of 1901), s. 4 (2).

A custom by which a grove-holder can sell the grove, is not unusual, the sale carrying with it the

Grove—concl'd.

right of occupation of the land. The vendee of such a grove is not liable to ejectment in the absence of proof that the sale of trees by the original tenant is a breach of the special terms on which the land is held for the purposes of a grove.

Per *Reynolds, J. M.*—A land let for the purpose of planting a grove on it and on which a grove is still in existence is not "land" within the meaning of the Agra Tenancy Act. **U. P. B. R. JAGDAMBA PRASAD v. BEHARI LAL.** 979

Guardian and Ward—*De facto* guardian, effect of dealings of, on minor—Alienation of Muhammadan minor's property by unauthorized guardian, effect of—Muhammadan Law—Continuing obligation, ratification of 728

Minor, liability of, for money not accounted for by guardian—Guardians, transactions entered into by, when binding 574

Guardians and Wards Act (VIII of 1890), ss. 7, 8—Minor girl living with mother—No property—Application to be appointed guardian—Applicant not suitable—Court's duty.

When the sole question before the Court is whether the applicant is a suitable person to be appointed guardian of the minor or not, it is not necessary for the Court to do anything more than accept or reject his application.

Where a minor girl is living with her mother, the Court should leave things as they are, especially when she has no property, and should not appoint a statutory guardian, the mother remaining the natural guardian. **P. MAHANT DEVI v. MADHO, 84 P. R. 1915; 176 P. W. R. 1915** 237

s. 24

186

Highway—Ownership of soil—Ad medium filii doctrine, when applicable.

The doctrine that where a public path is admitted to be the boundary between two estates, the presumption is that the soil up to half the breadth of the road belongs to each estate, must be confined to cases where it is clearly proved or both sides are agreed, that the limits of each village do not extend beyond the offside of the path. **M. ARUNACHALAM CHETTY v. RAMANATHAN CHETTY** 664

Hindu Law. See Cutchi MEMOIRS.

Adoption by Sudras in Dattaka form—Physical delivery and acceptance of child, necessity of.

Among Sudras the corporeal delivery and acceptance of the child is the essential part of adoption in the dattaka form. An actual adoption solely in pursuance of a previously manifested intention or a previous promise made, is not enough. **M. KUPPUSAMI REDDI v. VENKATALAKSHMI AMMAL, 18 M. L. T. 434; (1915) M. W. N. 960** 855

Sudras—Subsequently born aurasa son—Adopted son, share of—Minor, liability of, for money not accounted for by guardian—Partition—Marriage expenses of unmarried members, provision for—Principle—Guardians, transactions entered into by, when binding.

Under the Hindu Law, even among Sudras, an

Hindu Law—concl'd.

adopted son is entitled to one-fourth of the share of a subsequently born aurasa son, i. e., one-fifth of the estate.

A minor is not liable for moneys not accounted for by his guardian.

In partition decrees, a provision should be made for the marriage expenses of unmarried members of the family who are of the same degree of relationship as those who have been married at the expense of the family.

A transaction by which a guardian gives up the rights of the minors in the family property is binding only when it is a bona fide settlement of disputes. **KARUTURI GOPALAN v. KARUTURI VENKATA RAGHAVULU, 29 M. L. J. 710** 574

Alienation by father—After-born son, right of, to question alienation.

As a son acquires a vested interest only in such family property as exists on the date of his birth, he cannot question an alienation made by his father before his birth. **O. MAHESH v. BANWARI LAL, 18 O. C. 162** 717

Alienation by widow, validity of—Test—Disposition for religious or charitable purposes or for spiritual benefit of husband and for worldly purposes, distinction between—Legal necessity—Hindu widow, daughter or mother, power of—Acts of religious merit—Excavation and consecration of tank—Extent of alienation.

Where a deed by a limited owner with qualified power of alienation is impeached, the test is, is the transaction fair and proper, lawful and valid and justified by Hindu Law; necessity is only one of the phases of the test of propriety.

A widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes.

There is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and within proper limits the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce, to his spiritual benefit.

A Hindu widow, daughter or mother, is entitled to alienate a small portion of the estate in her hands for religious purposes.

Under the Hindu Law the excavation and consecration of a tank are acts of high religious merit and a disposition made by a widow for such a purpose is lawful, valid and proper.

An alienation of an area slightly over two bighas out of ten bighas by a widow for the performance of a work of recognized religious merit, is not unreasonable in extent. **C. KHUB LAL SINGH v. AJODHYA MISSE, 22 C. L. J. 345** 433

Reversioner's consent—Estoppel—Question of legal inference.

Where a presumptive reversioner knowing his position as such consents to an alienation of property by a Hindu female, he is estopped from disputing the validity of the alienation.

Hindu Law—contd.

Whether on the facts proved, an estoppel can be raised against a reversioner, is purely a question of legal inference and not one of pure fact. **M. VENKATASUBBIE v. MUTHUSAMI AYYAR**, 18 M. L. T. 521

487

— **Debt** contracted by father for trading purposes, whether lawful—Liability of sons for father's debt

301

— **Karta** of joint Hindu family, acknowledgment by, if valid—Members, if bound

30

— **Joint family**—Charity owned by joint family—Agreement among members re management—Intention.

Where the members of a joint Hindu family, while dividing the family properties agreed that the charities should be managed by the head of the family in each branch for the time being, and where on the death of such a member his widow claimed to succeed him in the management as against a male descendant of the founder by one of his granddaughters:

Held, that the language of the agreement clearly pointed to the intention that the management should be in the hands of the male heads and not in the hands of females; and that the widow could not claim to manage the charity even though it appeared that some females had previously asserted the right. **M. KRISHNASWAMI PILLAI v. MOOKAYI AMMAL**

35

— **Impartible zemindari**—Members living separately in different houses in same compound, how far evidence of division—Separate possession and enjoyment of property and discontinuance of allowances by zemindar, if evidence of partition—Inheritance—Succession to impartible zemindari—Illegitimate son, widow and step-brother of deceased, contest between—Preference—Separate property of zemindar—Illegitimate son and widow, if share equally—Release by mother of Hindu minor—Consideration inadequate—No independent advice—Absence of dispute—Validity of release—Family settlement—Custom—Gandharva form of marriage, if valid among Kambala caste—Illegitimate son, right of, to share in his father's property in Kambala caste—Illegitimate son, share of, measure of

833

— **Mitakshara**—Son, vested right of—Partition—Burden of proof.

According to the Law of the Mitakshara where a son is born to a man governed by Hindu Law, he and that son at once form a joint undivided Hindu family, and any body later on asserting that they were not at any given time such a family, must prove disruption before that time. **P. NARPAT RAI v. DEVI DAS**, 85 P. R. 1915

634

— **Power of disposition by**

106

Will—**Promissory note by member of undivided family—Loan for purposes of family—Liability of all members.**

Where two members of a joint family borrowed some money for the purposes of the family and executed a promissory note for the amount in favour of the plaintiff:

Held, that all the members of the undivided family were liable, the liability being imposed upon them

Hindu Law—contd.

by the Hindu Law, apart from the contract entered into by two of them. **M. CHINNIAH CHETTY v. TIKKANI RAMASWAMI CHETTY**

317

— **Joint family property**—Joint family business—Assets—Minor partners, liability of, extent of.

In the case of a Hindu joint family, the joint family property is not necessarily part of the assets of the joint family firm and the minor partners of a joint family business are only liable for the debts of the business to the extent of their share in the property of the firm. **L. B. O. A. M. K. CHETTY FIRM v. K. P. CHETTY FIRM**, 8 L. B. R. 112

271

— **Self-acquisition by one member—Presumption.**

Where one member of a joint Hindu family acquires property without the aid of ancestral or joint family funds, the property acquired will, in the absence of any indication of intention to the contrary, be owned by all as joint family property. But it may be shown that the person acquiring it treated it as his separate property. **M. MUTHAN v. PUNIAKOTI MUDALIAR**

18

— **Widow of predeceased son holding a share of ancestral property as maintenance, whether can alienate.**

Where in a suit for a declaration that an alienation by a widow shall not affect plaintiff's reversionary rights after the widow's death, it appeared that on the death of the last male owner, the mutation in respect of his estate took place in favour of (1) the plaintiff, (2) the father of the defendants Nos. 2 to 4, and (3) defendant No. 1, the widow of the predeceased son of the last male owner, who alienated her share in favour of the defendants Nos. 2 to 4:

Held, that the plaintiff could not have been separate in estate from his father and as the parties were Aroras and admittedly governed by Hindu Law, the widow received a third share obviously for the purpose of maintenance and had no right to alienate that share to the prejudice of the plaintiff. **P. CHANDAN MAL v. Musammal WASINDI BAI**, 92 P. R. 1915; 168 P. W. R. 1915

541

— **Marriage, form of, how determined—Lingayat form of marriage—Joshi, whether can demand fees.**

In order to determine whether a marriage is in the Hindu form or in the Pancha Kalas Lingayat form, the Court must consider the marriage as a whole rather than the particular ceremonies performed.

If the ceremony performed is not a Hindu marriage ceremony as a whole, the Joshi or gramopadhyas has no right to demand the marriage fees. **B. RANGAPPA NINGAPPA IMMADI v. VENKATBHAT LINGANBHAT JOSHI**, 17 Bom. L. R. 950

448

— **Guardian appointed by Court—Infant girl given in marriage without guardian's consent or in disobedience of Court's order, effect of—Marriage performed in inauspicious times—Right to give girls in marriage—Duty of giving girls in marriage, rules as to, nature of—Guardians and Wards Act (VIII of 1890), s. 24.**

Hindu Law—contd.

A Hindu marriage performed at a time regarded inauspicious by the astrologers cannot be treated as ineffectual in law.

Under Hindu Law, in the event of the father and paternal male relations losing their right by death or waiver to give a girl in marriage, the right of selecting the husband for a female infant devolves on the mother.

The rules as to the duty of giving Hindu girls in marriage are directory and not mandatory. Therefore, in the absence of force or fraud, a Hindu marriage otherwise legally contracted and performed with the necessary ceremonies is not invalidated by the absence of consent of the guardian entitled to give such consent.

The circumstance that the marriage of a Hindu girl was celebrated by her guardian in disobedience of the order of the Civil Court would not invalidate the marriage, if it was performed by the guardian in good faith and for the welfare of the minor and if in the absence of that guardian's appointment under the Guardians and Wards Act by the Court, the guardian would have been entitled to give the girl in marriage. **P. MAYA DEVI v. RAM CHAND, 177 P. W. R. 1915; 20 P. R. 1916** **186**

Partition—Marriage expenses of unmarried members, provision for **574**

Partial partition, when allowable—Deed of partition not mentioning certain properties, whether effects complete severance in status and interest—Intention.

Where a deed of partition, after reciting that the parties had hitherto lived as members of a joint family and that owing to differences among females it had become necessary to effect a partition, divided the joint family properties between the father and son, but left out certain outstanding debts and decrees:

Held, that the language of the document showed that the parties to it were no longer to remain joint but became divided in status and that the decrees and outstanding debts were not divided then simply because they had not been collected and it was not possible to make a division then, as it could not be foretold how much they would realise.

According to Hindu Law, partial partition of a joint family property can be effected only with the consent of co-parceners. **M. BURBA REDDI v. ALAGAMMAL, 18 M. L. T. 545** **674**

Mitakshara.

According to the Mitakshara School of Hindu Law a step-mother is entitled to a share equal to that of a son upon partition. **A. HAR NARAIN v. BISHAMBHAR NATH, 13 A. L. J. 1129** **907**

Stridhan—Succession—Dayabhaga—Ajantuka stridhan—Heir, preferential—Brother or husband.

At the marriage of a Hindu woman governed by the Dayabhaga school of Hindu Law there was a promise by her brother to give some quantity of land as dowry. The property was, however, given to the woman seven years after the marriage. On the death of the woman her brother sued her husband for the property as the rightful heir of the same:

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Held, that the property was the woman's *ajantuka stridhan* and that her brother was the preferential heir to her husband. **C. MAHENDRA NATH MAITY v. GIRISH CHANDRA MAITY, 12 C. W. N. 1287** **561**

Succession—Grandfather's daughter's daughters' son—Bandhu—Mitakshara.

A grandfather's daughter's daughter's son is a *bandhu ex parte paterna*. **A. MUKHA v. QABZA** **553**

Intestate succession—Suit for possession of property on basis of alleged relationship—Onus—Secondary evidence of registered Will admitted without demur—Objection to admissibility, whether can be taken in appeal—Pleadings.

The plaintiffs claimed to succeed to the property in dispute as the last male owner's heirs *ab intestato* under the Hindu Law, on the allegation that they were the sisters' sons of the father of the last male owner, and the defendant, a minor daughter of the last owner's brother, denied *inter alia*, the relationship alleged by the plaintiffs:

Held, that the *onus* lay on the plaintiffs to prove their allegation with respect to the relationship and as they failed to discharge the *onus*, the suit failed.

Where a Will which had been originally registered could not be found and for that reason the trial Court allowed a party to produce secondary evidence thereof apparently without demur by the appellants:

Held, that the appellants could not object to its admissibility on appeal, more especially as the memorandum of appeal did not contain any objection to that effect. **P. HARDEO RAM v. PARBATI** **600**

Mitakshara—Father's sister's sons, whether can inherit as bandhus.

Where the father's sister of the last male owner and her sons sued for a declaration that the alienation made by the mother of the last male owner in favour of the defendant shall not affect their reversionary rights:

Held, that under the Mitakshara School of Hindu Law the plaintiffs were entitled to inherit as *bandhus* and could contest the alienation. **P. SUNDAR SINGH v. MUSAMMAT GURDEVI, 163 P. W. R. 1915** **27**

Property given for maintenance to illegitimate son of deceased co-parcener—Son of illegitimate son, whether can claim vested right of inheritance.

Property given for maintenance to an illegitimate son of an undivided deceased co-parcener cannot be treated as the ancestral property of the illegitimate son in which a son of that illegitimate son gets a right by birth. **M. KRISHNASWAMI NAIDU v. SEETHALAKSHMI AMMAL, 18 M. L. T. 542** **803**

Widow's relinquishment of her estate—Reversioner's interest, acceleration of—Alienation by widow of whole estate with consent of next heirs, legality of—Widow's relinquishment for benefit, effect of—Fraud alleged in plaint not established, effect of.

A Hindu widow may relinquish her estate with the effect of accelerating the estate of the next reversioner and is not precluded from obtaining a benefit for such relinquishment.

Hindu Law—contd.

A Hindu widow's alienation of the whole estate is valid where there is consent of the next heirs, inasmuch as the alienation is capable of being supported by reference to the theory of relinquishment and consequent acceleration of the interest of the consenting heirs.

Under the Mithila Law a widow takes an absolute interest in the moveables of her deceased husband.

Under the Hindu Law, as under the English Law, a mortgage is treated as personal or moveable property, the land being considered as merely a pledge or security for the money lent.

Quere.—Whether where the plaintiff's claim to relief rests solely on the allegations of fraud made in the plaint and fraud is not established, the suit should fail? **C. SURESH MISSEER v. MOHESH RANI MESRAIN.** 20 C. W. N. 142 **983**

Will, construction of.—"Malik"—"Nir-buyadha malik"—Will by husband in favour of his wife—Absolute interest given—Gift over, provision for, validity of—Construction of Will—Plain meaning—Language clear and unequivocal—Rules of law, harsh consequences of.

The use of the term "malik" may not by itself necessarily create an absolute interest, but the term when qualified by the word "nirbuyadha" indicates absolute ownership.

A Hindu testator appointed his wife as his executrix. A clause in the Will vested in her whatever might remain, after the payment of debts and expenses, absolutely and with complete power of alienation. Other clauses provided for the adoption of sons and in case of there being no adopted son or no son or wife of the adopted son at the time of the death of the widow, the heir, according to the Hindu *Shastras* who should be alive at the time, should get the properties which should remain after disposal by the widow by way of gift or sale.

Held, that the testator gave an absolute interest in his estate to his widow with full powers of alienation;

that the gift over of what might remain undisposed of by her was void and inoperative in law.

Seemle.—If an estate is given in terms which confer an absolute estate to a named donee, and, then, further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not cut down and the further interests fail.

A gift over, if a devisee or legatee to whom an absolute interest is given does not dispose of his interest or dies intestate or dies before selling his interest, is void both as regards realty and personality.

When an absolute interest has been given to the first taker, followed by a gift over of what may not be required by him, the gift over, though couched in the most direct and precise words, is void for uncertainty.

An instrument must receive a construction according to the plain meaning of the words and sentences therein contained; that is, the words are to be first read in their grammatical and ordinary sense, unless the context shows otherwise.

Where the language is clear and unequivocal, the construction cannot be altered or wrested to something different from the plain meaning for the

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purpose of escaping from what may seem to be the harsh consequences of rules of law. **C. SURESH CHANDRA PALIT v. LALIT MOHAN DUTTA.** 22 C. L. J. 316 **405**

Will—Legacy to be paid out of property not disposable, validity of.

A Hindu testator has no power to direct legacies to be paid out of property which he has no power to dispose of by Will. **B. PARVATIBAI SHANKAR v. BHAGWANT PANDHARINATH PATHAK.** 17 Bom. L. R. 640 39 B. 593 **280**

Hindu Widows' Re-marriage Act (XV of 1856), s. 2, applicability of—Forfeiture of estate—Existing estate—Future rights, if forfeited—Limitation Act (XVI of 1877), Sch. II, Art. 141—Reversioner's suit—Starting of limitation.

Under the Hindu Widows' Re-marriage Act, 1856, a widow re-marrying forfeits not only the estate inherited from her deceased husband but all existing rights at the date of the marriage, though, after and notwithstanding re-marriage, she may inherit future interest in the family of her former husband; *e. g.*, she may succeed as heir to the estate of her son by a first marriage who has died after her second marriage.

The Hindu Widows' Re-marriage Act, 1856, applies also to widows whose caste customs permit second marriages.

In a case governed by Article 141 of Schedule II to the Limitation Act, 1877, under no circumstances can time run against a Hindu reversionary heir until the reversion vests by the death of the female holding the intervening estate. **N. KASHIRAO v. UKARDA.** 11 N. L. R. 116 **290**

Illegitimate son. See HINDU LAW.

Inam.—See MADRAS REGULATION, s. 4.

Failure of inamdar to fulfil condition—Order of resumption—Suit for declaration of inamdar's right to hold land free of assessment, when maintainable—Suit for cancellation of order of resumption—Limitation Act (IX of 1908), Sch. I, Arts. 14, 131.

Where the Collector resumed a *dasabandam inam* on account of the inamdar's failure to fulfil the conditions of the inam and the inamdar sued after 12 years for a declaration that he was entitled to hold the land free of assessment:

Held, (1) that the plaintiff was not entitled to obtain such a declaration without getting the Collector's order, resuming the inam, set aside;

(2) that the suit for cancellation of the order ought to have been brought within one year of the date of its passing under Article 14 of the Limitation Act. **M. SUBBANNA v. SECRETARY OF STATE.** (1915) M. W. N. 1915 **267**

Income Tax Act (I of 1886), s. 3 (5).—Annuity grant in Mysore—Receipt in British India through agent, if income.

A lady was enjoying an annuity in Mysore Province, instalments of which were remitted to her in British India by her agent in Mysore:

Held, that it was income received in British India within the meaning of section 3, clause (5), of the Income Tax Act and was taxable. **M. NARASAMMAL v. SECRETARY OF STATE.** 2 L. W. 1124; 18 M. L. T. 524 **404**

Inheritance. See **BUDDHIST LAW**; **HINDU LAW**.

Injunction—Mandatory injunction Directing reconveyance of property, whether allowed **216**

Instalment bond. See **LIMITATION ACT**, 1908, **SCH. I, ART. 75** **479**

Interest. See **MESNE PROFITS**.

— High rate—Court, power of, to grant relief **394**

— Tender—Bond payable by instalments—Tender of payment of overdue instalments without interest, whether proper **304**

— on total amount awarded, if legal **320**

Interpretation—Son to grandson, interpretation of **565**

— of Statute **326**

— Marginal notes to sections, reference to **746**

— Rule abridging substantive right, if *ultra vires*—Civil Rules of Practice, rule 49, effect of **924**

— of Will **106**

Issue as to custom, contents of—Ambiguity as to issue when can be raised **833**

— Omission to frame issue, effect of **664**

Jaglr. See **GRANT**.

Joint family. See **HINDU LAW**.

Joint possession—Property belonging to shrine—Mujawars in possession as trustees—Rule of hotchpot, whether applicable.

The principle that one co-sharer who has joint property in his possession cannot seek a decree for joint possession of other property in the possession of a co-sharer-defendant unless and until he brings the property in his own possession into a hotchpot does not apply to a case where property belonging to a shrine is in the possession of *mujawars* as trustees.

Where, therefore, in a suit by certain *mujawars* of the shrine of Data Ganj Baksh in Lahore against another *mujawar* for joint possession of certain properties belonging to the shrine, the defendant contended that the plaintiffs must bring into a hotchpot the properties in their possession:

Held, that the rule of hotchpot did not apply and the plaintiffs were entitled to a decree for joint possession with the defendant. **P. MUHAMMAD HAYAT v. MUHAMMAD ALI**, 94 P. R. 1915 **489**

Joint property. See **BUDDHIST LAW**.

Judgment. See **LETTERS PATENT (MADRAS)**, cl. 15.

Judicial proceeding. See **CRIMINAL PROCEDURE CODE**, s. 476.

Jurisdiction See **CIVIL PROCEDURE CODE**, 1908, ss. 20, 115; **CRIMINAL PROCEDURE CODE**, ss. 147, 181; **PROPATE AND ADMINISTRATION ACT**, s. 56; **SMALL CAUSES COURT**.

— Application for registration of name by purchaser of land dismissed—Suit for declar-

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tion and possession in Civil Court, if maintainable—Renewal of Settlement by vendor after sale, effect of **424**

— Decree for dissolution of marriage passed by Divisional Judge and confirmed by High Court—Application for alimony **331**

— Nature of relief determining factor—Suit to recover damages for wrongful removal of fruits—Provincial Small Cause Courts Act (IX of 1877), Sch. II, Art. 31.

It is merely the nature of the relief sought that has to be looked to in determining the jurisdiction of a Court.

The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes.

Where the plaintiff alleged that he bought the defendant's share of certain fruit produced in a jungle and sued to recover damages for wrongful removal of the same fruit:

Held, that the suit was not one for mesne profits and was triable by a Small Cause Court. **N. BHAXYA v. NAKA**, 11 N. L. R. 160 **5**

— Revenue—Charge on estate—Suit to enforce **255**

— "Such Court", interpretation of—Court abolished but re-established with curtailed territorial limits—Sanction for prosecution for offence committed before abolition **643**

— Suit for damages for illegal distraint by tenant holding under *ryotwari* tenure—Interpretation of Statute **326**

— Letters Patent, 1865, cl. 12—"Suits for land", meaning of—Compensation for wrong to land.

The expression "suits for land" extends to a suit for compensation for wrong to land, where the substantial question is the right to the land, and, therefore, clause 12 of the Letters Patent, which empowers the Calcutta High Court to try "suits for land and other immoveable property" applies to such a suit. **C. SUBRAMIN COAL CO., LTD., v. EMPIRE COAL CO., LTD.**, 42 C. 942 **581**

— Suit for rent—Maintainability of—Land let out by person having no title **883**

— Suit to recover rent for land lent for building houses **852**

— Suit to set aside attachment of immoveable property, valuation of **168**

— Suit originally valued at above Rs. 5,000—Decree for less than Rs. 5,000—Execution proceedings, order in—Appeal **496**

— Suit valued above Rs. 25,000—Decree below Rs. 5,000—Appeal **879**

Kidnapping. See **PENAL CODE**, s. 363.

Lambardar, possession by—Agent—Presumption **464**

Land Acquisition Act (I of 1894), ss. 3, 12—Collector, whether a Court—Order rejecting application for reference—Chief Court, whether can interfere.

Land Acquisition Act—contd.

A Collector who takes action under section 18 of the Land Acquisition Act is not in any sense a Civil Court, and the Chief Court has no jurisdiction to interfere with his order rejecting an application praying that the matter of the award be referred for the determination of the Court. **P. RAFI-UD-DIN v. SECRETARY OF STATE FOR INDIA**, 65 P. R. 1915; 144 P. W. R. 1915 **76**

s. 18**76****s. 23—Right of owner**

to compensation for injury done—Principle—Measure of damages.

Where land is acquired for public purposes, the owner thereof is entitled to be compensated for any injury done to his other lands even though the loss is more than counterbalanced by the advantages he gains by the execution of the project.

In such a case the owner is also entitled to damages for diminished facilities of communication and access to his other lands. **M. NATHAR HUSSAIN MEERA v. DEPUTY COLLECTOR, USILAMPATI** **259**

s. 31**677****ss. 54, 31—Order by**

District Judge allowing Hindu widow to take out compensation money deposited by Collector—Appeal, if maintainable.

No appeal lies under section 54 of the Land Acquisition Act from an order made by the District Judge allowing a Hindu widow to take out compensation money deposited in the District Judge's Court by the Collector under section 31 of the Act. **C. BISWA NATH SINHA v. BIDHUMUKHI DAS**, 9 C. W. N. 1290 **677**

Landlord and tenant—Abadi land—Central Provinces—Wajib-ul-arz—Tenant or village resident, position of—Licensee—Transfer of house—Landlord, right of—Transferee, position of—Site ceasing to be used as dwelling house—Ejectment.

In the Central Provinces the whole of the abadi site belongs to the landlord, and, *prima facie*, every tenant or village resident dwelling thereon and growing crops in the bari attached to his house is a licensee, protected in his occupation by the terms of the *wajib-ul-arz*.

Where the house in the occupation of one tenant passes by sale to another person, the landlord may claim that, the licensee to occupy the site being non-transferable, the vendee shall vacate, taking away the house materials, but where the vendee is also a tenant or a regular resident of the village, the landlord may allow the transfer of occupation expressly or impliedly by raising no objection.

A transferee of a house standing on an abadi site whose occupancy of the site is not objected to by the landlord, must be presumed to have been permitted to occupy it on the same terms as his transferor, namely, as the licensee of the landlord, subject to the village *wajib-ul-arz*.

Where such an occupant ceases to use such site for the purposes of a dwelling house, he loses the protection of the *wajib-ul-arz* and becomes a bare licensee liable to ejectment at the will of the landlord, unless he expressly sets up and earns by lapse of time, a prescriptive title to occupy the land. **N. NABAIN v. BEHARI**, 11 N. L. R. 126 **307**

Landlord and tenant—contd.

—Disclaimers of landlord's title, what is—Forfeiture of tenancy.

As between landlord and tenant to constitute a disclaimer by tenant of landlord's title there must be a direct repudiation of the relationship of landlord and tenant or a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it. **M. KILOTH CHOZHAN OYDAL KURUP v. KIRATHWA ILLATH NARAYANAN SAMBUDRI** **220**

—Durputni lease—Chakran tenants—Khut rent, agreement to pay—Government revenue—Resumption of chakran land—Durputnidar, right of Zemindar, if can settle land with tenants—Mesne profits.

A was originally holding the lands in dispute as chakran lands under B, the zemindar. B resumed the lands and settled them at a money rent with A. The plaintiff, who was the durputnidar, sued for khas possession of the lands and in the alternative prayed that fair and equitable rents might be fixed for them. It was a condition of the durputni settlement that the tenants who held chakran lands for service should pay to the durputnidar khut rent which was assessed on the proportion of land revenue payable to Government on that portion of the estate.

Held, that the payment of the khut rent could not create the relationship of landlord and tenant between the durputnidar and the tenant A.

Held, further, that so long as the chakran tenancy continued B, and not the plaintiff, had the right to settle tenants on the land, but that B had no right after he had resumed the chakran tenancy.

Held, also, that under the circumstances, the plaintiff was entitled to khas possession as well as mesne profits. **C. HAZARI LAL SARKAR v. MAHARAJ KUMAR KSHAUSISH CHANDRA ROY**, 22 C. L. J. 290 **249**

—Extra charge for vanpayir claimed—Long-continued course of payment—Contract to pay—Presumption **539**

—Grant, rent-free, to excavate tank—Long possession—Rent neither claimed nor paid—Presumption—Suit, if can be dismissed on ground of right to have rent assessed not accrued—Late stage of suit—Plaintiff, if can put forward inconsistent case—Pleadings.

A plaintiff cannot be permitted to turn round at the final stage of the litigation and put forward a case inconsistent with the allegation in the plaint, which have been found to be untrue.

Where a land was given rent-free by an ancestor of the plaintiff to the grand-father of the defendant in 1837 in order that a tank might be excavated thereon and the tank was excavated at the expense of the grantee, and although the grantee and his descendants were in occupation for over 60 years no rent was ever claimed or paid.

Held, that the legitimate inference was that the defendants held the land under a rent-free grant.

Held, further, that assuming that the defendant did not hold the land under a rent-free grant, the claim for rent was barred by limitation.

Held, also, that the suit could not be dismissed on the ground that the right to have rent assessed on

Landlord and tenant—contd.

the disputed land had not accrued at the date of suit, inasmuch as no grant was produced and there was nothing to show that liability to pay rent had been suspended and would be revived in a particular contingency. **C. KALI MOHAN TRIPURA v. BIRENDRA KISORE**, 22 C. L. J. 309 **391**

—Lessor and lessee—

Raiyat, essentials of—Lessee not getting juridical possession, whether raiyat—Criminal Procedure Code (Act V of 1898), s. 107—Criminal Court, findings of, whether admissible as evidence in Civil suit.

In order to make the principle, that 'an agricultural tenant who enters upon land and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as *raiya*, although the *de facto* proprietor is subsequently proved to be not the real owner,' available in the case of a lease, it is essential that the lessor should be in possession of the leased property as *de facto* landlord and that in good faith he should have inducted into the land a cultivator who has accepted the settlement in good faith.

Where, a lessee took his lease from a person who had no title to confer on him and he never obtained juridical possession of the leased property but was, on the other hand, in attempting to take possession, resisted by a person to whom the leased property had already been sold in execution of a decree against the lessor and where as the result of criminal proceedings taken by the purchaser-possessor under section 107, Criminal Procedure Code, the lessee not having been found in possession, was bound down to keep the peace so that he might not interfere with the possession of the purchaser though he had failed to establish his alleged title:

Held, that under the circumstances the lessee was not entitled to be treated as *raiya*.

The finding of a Criminal Court on the question of possession is admissible in evidence in a civil proceeding taken for the recovery of possession of the same land, to show what order had been made, who the parties to the dispute were, what the land in dispute was and who was held entitled to possession. **C. KRISHNA NATH v. MUHAMMAD WAFIZ** **789**

Occupation rent—Evidence—Unregistered lease deed, if admissible to prove rent fixed—Claim for occupation rent, whether transferable—Vendee of land, right of, to recover occupation rent for period prior to date of conveyance—Transfer of Property Act (IV of 1882), ss. 3, 6 (e)—Registration Act (XVI of 1908), ss. 7 (d), 49.

An unregistered document purporting to be a lease of immoveable property is not admissible in evidence even to prove the rent agreed to be paid.

The right to claim occupation rent is not a mere right to sue incapable of being transferred, but an actionable claim which can be transferred. Consequently, a vendee of a land is entitled to recover the occupation rent due on it even prior to the date of the conveyance. **M. GOVINDASAMI PILLAI v. RAMASAMI AIYAR**, 18 M. L. T. 483; 2 L. W. 1186 **604**

Suit for rent below Rs. 50—Conflicting claim set up—Suit dismissed as no relation of landlord and tenant found—Appeal, if maintainable—No appeal from first Court's decision

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maintainable—Second appeal, if maintainable—Revision Jurisdiction—Civil Procedure Code (Act V of 1908), s. 115 **812**

—Trespasser, whether can set up rights of real tenant against landlord.

A person who is neither an agent of, nor a transferee from a tenant, but is a pure trespasser, cannot set up against the landlord the plea of non-abandonment of the holding by the tenant. **N. SAHASRAM v. SHEONATH**, 11 N. L. R. 124 **303**

Law, uniformity and certainty of—Courts, policy of **106**

Lease. See LANDLORD AND TENANT; Mortgage LEASE

—Lease by insolvent of his occupancy holding, validity of **716**

—Lease providing for forfeiture of land on alienation—Usufructuary mortgage created but no transfer of possession made—Construction of deed—Transfer of Property Act (IV of 1882), s. 11 (g).

A lease provided: "Further I have no right to alienate the said land in any manner" and contained also a provision for re-entry. The lessee usufructually mortgaged it, though he did not divest himself of possession of the land:

Held, (1) that the mortgage by itself was not such a disposition of the property in the land as could necessarily amount to an alienation within the terms of the forfeiture clause in the lease-deed;

(2) that the law leans against forfeiture, and the party relying on it must prove it to be exact and certain. **M. MOHSEN SAHA v. GOPALA KUDWA** **454**

Registration Act (XVI of 1903), ss. 17, 49—Unregistered lease, terms of, whether admissible for proving fair rent for use and occupation **279**

Legal necessity. See HINDU LAW.

Lessor and lessee—Land let out by person having no title—Suit for rent, maintainability of—Jurisdiction.

A person who lets out land to another, can recover rent from him, though he has no title in law to the land, and Civil Courts have jurisdiction to entertain suits for such rent even though the land be Government waste land. **L. B. ANAMUT v. KALLU** **888**

Lease—Suit for possession—Promise to renew, effect of—Ejectment.

A covenant by a lessor to renew, even if legally enforceable against him, cannot be pleaded in bar to a suit for possession brought by him on the expiry of the term mentioned in the lease-deed.

A promise to renew contained in a lease-deed, cannot be treated as a promise not to eject on the expiry of the term. **M. DISTRICT BOARD OF TANJORE v. VYTHILINGA CHETTY** **919**

—Lessee not getting juridical possession, whether raiyat **789**

Letters of Administration. See WILL.

Letters Patent (Calcutta), cl. 12 **581**

cl. 15 **319**

Letters Patent (Madras), cl. 15—Judgment—Appeal—Order setting aside abatement—Sufficient cause—Administrator-General's Act (II of 1834), ss. 17, 18—Civil Procedure Code Act V of 1908), O. XII, rr. 2, 9—Abatement, order of, if necessary.

An order passed by a single Judge of the High Court sitting on the original side, setting aside the abatement of a suit is a judgment within the meaning of clause 15 of the Letters Patent and is appealable.

The sole plaintiff in a suit, a Muhammadan, died on 13th November 1911, leaving a widow, sons and daughters. On the 29th November 1911, the Administrator-General, Madras, was directed by the High Court to take possession of the estate, effects and assets of the deceased. On the 12th August 1913, an order was passed that the suit abated as no legal representative of the deceased had been brought on record. On the 2nd December 1913 the Administrator-General was directed to obtain Letters of Administration to the estate and this he did on 23rd March 1914. On the 17th April 1914, he took out a Judge's summons praying that the abatement might be set aside and the suit restored to file and that he might be brought on record as the legal representative of the deceased plaintiff. The order of abatement was set aside on the ground that sufficient cause had been shown by the Administrator-General for the delay:

Held, on appeal, that though the Administrator-General, so far as he was personally concerned, had sufficient cause for not making the application before April 1914, he had not explained why the other persons, who were the legal representatives of the deceased till he became such, had not applied to set aside the abatement, that the mere allegation, that the legal representatives had been quarrelling among themselves being no sufficient reason for excusing the delay and that the order setting aside the abatement ought to be set aside.

Quere.—Whether under the new Code of Civil Procedure an order that the suit shall abate is necessary before an abatement of suit takes place? **M. KYLOON BEE v. ADMINISTRATOR-GENERAL OF MADRAS**, 2 L. W. 948

s. 15

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s. 37—Appellate Side Rules of the Madras High Court, r. 105, if ultra vires—Appellant's failure to make necessary deposit for printing—Appeal, whether liable to be dismissed—Civil Procedure Code (Act V of 1908), O. XII, rr. 11, 16.

Rule 105 of the Appellate Side Rules of the High Court directing dismissal of an appeal for default of prosecution if any of the papers mentioned therein have not been printed owing to the appellant's failure to make the necessary deposit therefor, is covered by section 37 of the Letters Patent and is not *ultra vires*.

The rule does not contravene the provisions of the Code of Civil Procedure by limiting the right of appeal conferred by section 100 nor is it at variance with the provisions of Order XII as to the manner of disposal of an appeal.

Where an appeal is liable to be dismissed on a

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preliminary ground, the appellant cannot demand a hearing on its merits. **M. KEEPIACHERI PARKUM v. VANNATHANKANDIYIL**, 2 L. W. 949; 18 M. L. T. 383; (1915) M. W. N. 81; 29 M. L. J. 784

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License for sale of *acvack* 32 degrees under proof, sale in breach thereof—**Adukeration—Allowance of 2 per cent for wastage under rule 229, Standing Orders of the Board of Revenue how far defence—Standing Orders of Board of Revenue, r. 229, scope of—Abkari prosecution—Technicality of offence, whether can be considered by Court**

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Lien. See **EXECUTION.**

Limitation—Appeal against orders made in winding-up proceedings—Limitation Extension of time—Principles—Special circumstances

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Limitation Act (XV of 1877), Sch. II, art. 11

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Limitation Act (IX of 1908), s. 5

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s. 5—Appeal after failure of application for review—Time spent in review, if bona fide prosecution of civil litigation—Exclusion of time—Discretion, exercise of—Laches.

Where an appeal is filed after an application for review has failed and where the grounds for review are the only grounds of appeal, the time taken in prosecuting the application for review will not be excluded for making the appeal within time on the ground of *bona fide* prosecution of civil proceedings.

A mere routine order registering an application for review does not constitute a *bona fide* prosecution of a civil litigation.

The discretion to admit out of time appeals ought not to be crystallised into definite rules to fetter other Judges in the exercise of the discretion which the Legislature has permitted to them. What is sufficient cause and what is reasonable time for filing an appeal, must depend upon all the circumstances of each particular case.

The appellants were minors residing in an out of the way village and their father died during the hearing of appeal before the lower Appellate Court. They applied for a review of the judgment of the lower Appellate Court, which was against them, but the application was rejected. They applied 23 days after for the copy of the order and on receipt of the copy filed an appeal. The appeal was filed beyond time:

Held, that in the circumstances of the case the appeal should be registered. **C. SUDHAKAR RAU v. SADASIVA JHATAP SINGH**, 19 C. W. N. 1113

705

s. 5—'Sufficient cause', meaning of—Appeal filed with wrong decree—Procedure, slack, effect of.

The words "sufficient cause" in section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice where no negligence, inaction or want of *bona fides* is imputable to the appellant.

Where a memorandum of appeal was accompanied not by a copy of the decree appealed against but by a copy of a decree in a connected

Limitation Act—(1908)—contd.

case and where the whole procedure in the case, so far as the appellant was concerned, was slack to the utmost extent:

Held, that there was not sufficient cause for not presenting the appeal within the period of limitation and that, therefore, section 5 of the Limitation Act did not apply. **A. GURPRASAD SINGH v. RAM SAMAJH SINGH**, 13 A. L. J. 1101 **876**

s. 10. Sch. I, arts.**14, 120—Deposit in Government Treasury—Limitation.**

From the year 1836 to 1859, the accounts of the Satara Treasury showed the sum now claimed by the plaintiffs as payable to C, the plaintiffs' ancestor. In 1848 the Satara Principality became a part of the Bombay Presidency. In 1857 the Collector of Satara issued a notice to C's eldest son, S, calling upon him to withdraw the amount. In 1859, S applied for the money. Before, however, the money could be paid, S's younger brother objected to payment to S and asked for the distribution of the amount among C's all heirs. In 1861 the Assistant Collector ordered that the sons and heirs of C should produce a certificate of heirship and then arrangement would be made to pay them the money:

Held, that the order of 1860 as also the notice to S in 1857 was a sufficient declaration of trust and that the money was certainly vested in the Government when it took over the Satara Treasury in 1848 and the purpose of the credit in the name of C was certainly specific and that, therefore, section 10 of the Limitation Act did not apply to the case:

Held, also, that the plaintiffs' claim did not fall within Article 14 of the Limitation Act and would be within time if it fell within Article 120, but that the case was one to which the bar of limitation could not be pleaded. **B. SECRETARY OF STATE v. BAPUJI MAHADEV**, 17 BOM. L. R. 64; 39 B. 472 **277**

s. 14 899, 917**s. 14—Withdrawal of suit by plaintiff—Subsequent suit—Exclusion of time, whether allowed—Civil Procedure Code Act (V of 1908), O. XXIII, rr. 1, 2.**

Section 14 of the Limitation Act has no application to a case where the plaintiff's suit has not been dismissed by the Court, but has been voluntarily withdrawn by him on discovery of a technical defect which would involve failure. **M. ARUNACHELLAM CHETTIAR v. LAKSHMANA AIYAR**, 2 L. W. 1002; 18 M. L. T. 385; 29 M. L. J. 569 **234**

s. 18 917**s. 19—Karta of joint Hindu family, acknowledgment by, if valid—Other members, if bound—Promissory note filed with plaint missing from Court records—Copy filed—Suit, if fails—Evidence Act (I of 1872), s. 65.**

S, the karta of a joint Hindu family, executed certain promissory notes. S died leaving a brother H and a minor son. H succeeded to the karta ship and renewed one of the hand notes executed by S. In a suit on the notes the plaintiff alleged to have filed the notes with the plaint but they were missing from the Court's records. Copies of the notes were filed and admitted by the lower Courts. The debt was not proved to have been contracted for any immoral purpose:

Limitation Act—(1908)—contd.

Held, that the plaintiff's claim could not fail by reason of the theft or his inability to produce the original documents before the Courts:

Held, further, that the debt not being for immoral purposes H as the karta of the family was an agent duly authorized in this behalf so as to give an acknowledgment under section 9 of the Limitation Act and that the son of S was bound by the acknowledgment. **C. HAR PRASAD DAS v. BAKSHI BINDESWARI PRASAD SINGH**, 19 C. W. N. 800 **30**

s. 20 318**s. 20—Payment towards interest—Intention.**

In order to save limitation under section 20 of the Limitation Act, 1908, the payment towards interest must be the payment of interest as such, that is to say, the debtor should pay the amount with the intention that it should be paid towards interest and there must be something to indicate such an intention. **U. B. NGA TWE v. NGA BA, U. B. R. 1915; 11, 80 101**

s. 20—Saving of limitation—Payment of interest—Proof necessary—Debiting interest in account book, if sufficient—Payment in reduction of debt, if saves limitation.

To avoid the bar of limitation in a suit for the recovery of money due on a mortgage-deed, a plaintiff must establish, not only that there was payment within 2 years prior to the date of the institution of the suit, but also that there was either an express intimation by the debtor, or proof of the existence of circumstances going to show, that the payment was on account of the interest on the particular debt sued on.

In the absence of express agreement, debiting to interest in the books of account, cannot be regarded as payment of interest.

Payments made by the debtor in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt, do not amount to a payment of interest as such to save the bar of limitation. **P. MUNI-CH-DIX v. MUHAMMAD AHMAD** **782**

s. 20, proviso—Payment by cheque, if would save limitation—Continuous account—Cause of action.

If a cheque be delivered to a payee by way of payment and is received as such by him, it operates as a payment and is an extinguishment to that extent of the debt, subject to the condition that if upon due presentation the cheque is not paid the original debt revives.

Such cheque signed by a debtor and given in part-payment of the principal and received by the creditor as such would save limitation as contemplated by the proviso to section 20 of the Indian Limitation Act.

Where there are dealings between two parties which give rise to a continuous account so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. **C. KEDAR NATH v. DENOBANDHU SHAHA**, 19 C. W. N. 724; 42 C. 1043 **626**

Limitation Act—(1908)—contd.

— **s. 22—Mortgage, suit on, filed within time—Ad litem defendants, limitation against—Estate of mortgagor, liability of.**

A mortgage, effected on the 3rd of June 1892, became due on demand on the 1st January 1900. The suit to enforce payment of money was brought after the death of the mortgagor, a Muhammadan, against his only son, a minor, on the 23rd of June 1911. The defendant's guardian urged that the mortgagor left other heirs, a widow and two daughters. The plaintiff applied, on the 29th of January 1912, to have them added as parties and they were so added on the 12th of February 1912. The added defendants contended that the suit was barred as against them under section 22 of the Limitation Act.

Held, that the addition of parties after the expiry of the time for the institution of a suit does not necessarily involve its dismissal under section 22 of the Limitation Act.

Held, further, that this suit was not barred against the added defendants inasmuch as the money was specifically charged on the whole property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage. **B. VIRCHAND VAJEKARAN SUT V. KONDU KASAM ATAR**, 17 BOM. L. R. 685; 30 B. 729. **180**

— **s. 23, Sch. I, arts.**

120, 142—Property attached under s. 146, Criminal Procedure Code, suit to recover possession of, and for declaration—Limitation—Continuing wrong—"Dispossession," meaning of—"Discontinuance of possession," meaning of—Attachment, ownership during—Continuing injury—Suit against Magistrate, if maintainable—Specific Relief Act (I of 1877), s. 42—Criminal Procedure Code (Act V of 1898), s. 146.

The plaintiffs claimed title to the disputed property by purchase at a sale in execution of a mortgage-decree. They took possession, but were resisted by the defendants. Proceedings were instituted under section 145 of the Criminal Procedure Code and the Magistrate being unable to satisfy himself as to which of the parties was in possession of the subject of dispute, attached it under section 146 of the Criminal Procedure Code on the 25th April 1902. In 1904 two suits were instituted by two sets of plaintiffs for declaration of their title and for recovery of possession. The plaintiffs were found to have been in possession when, on the 25th April 1902, the property was attached by order of the Magistrate.

Held, that the suits, though framed as suits for possession, could not be treated as such and were not governed by Article 42 of the Limitation Act.

Held, further, that the suits were for declaration of title under section 42 of the Specific Relief Act and there was continuing wrong independent of contract within the meaning of section 23 of the Limitation Act and that consequently a fresh period of limitation under Article 120 of the Limitation Act began to run at every moment of the time the wrong continued, and the suits were, therefore, not barred by time.

Semle.—Dispossession implies the coming in of a person and the driving out of another from possession.

Limitation Act—(1908)—contd.

Discontinuance of possession implies the going out of the person in possession and his being followed into possession by another.

If the seisin or legal possession is, during the attachment of a property under section 146 of the Criminal Procedure Code, in the true owner, the attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession within the meaning of Article 142 of the Limitation Act.

If the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then, in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*.

No action can be brought against a Magistrate for recovery of possession of a property attached by him under section 146, Criminal Procedure Code. **C. BROJENDRA KISHORE ROY V. BHARAT CHANDRA ROY**, 22 C. L. J. 283. **242**

— **s. 26** **528**

— **s. 28** **815**

— **Sch. I, art. 11—Order passed under s. 243 of old Civil Procedure Code, suit to set aside—Limitation.**

Article 11 of Schedule I to the Limitation Act of 1908 has reference only to orders passed under the new Code of Civil Procedure. Therefore, an order passed in 1905 under section 283 of the Civil Procedure Code of 1842 need not be set aside by a suit instituted within one year from its date. **M. T. S. SUBBA AIYAR V. SU. SUBBA AIYAR**. **250**

— **art. 14** **267, 277**

— **art. 20** **277**

— **art. 29—Suit to recover value of standing crops cut and carried away—Standing crops, whether moveable property—Civil Procedure Code (Act V of 1908), s. 2 (13)—Immoveable property, definition of—General Clauses Act (X of 1897), s. 3 (25).**

The definition of "moveable property" given in section 2 (13) of the Civil Procedure Code does not govern the provisions of the Limitation Act.

"Immoveable property" as defined in section 3 (25) of the General Clauses Act, 1897, includes standing crops. A suit, therefore, to recover the value of such crops wrongfully cut and carried away is not a suit for the recovery of compensation within the meaning of Article 29 of the Limitation Act. **M. DEVARASETTI NARASIMHAM V. DEVARASETTI VENKIAH**, 18 M. L. T. 532. **796**

— **arts. 30, 31, 115—**

Railway Company, goods consigned to—Non-delivery—Suit for compensation—Limitation—Cause of action—Common carrier, liability of—Special contract, effect of.

The plaintiff sued the Great Indian Peninsula Railway Company on the 27th April 1914 for compensation in respect of a consignment of grease booked on the 3rd January 1913 from Belanganj (Agra) to Nagpur at owner's risk. The plaintiff alleged that the cause of action arose on or before the 26th January 1913 and that the Company was

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liable for non-delivery of the consignment, inasmuch as its employees had been guilty of wilful neglect not covered by the risk-note taken from the consignor under sub-section (2) (b) of section 72 of the Indian Railways Act, 1890. The Company pleaded that the suit was barred under Article 11 of the Limitation Act and that the risk-note protected it from liability.

Held, that Article 31 of Schedule I to the Limitation Act, 1908, and not Article 30 or Article 115, applied to such a suit.

Held, further, that the time for delivery must be a reasonable time after the goods were made over to the Company.

Semle—A common carrier by entering into a special contract limiting his liability does not cease to fill that character. **N. ALI MOHAMMAD v. GREAT INDIA PENINSULA RY. CO.** 11 N. L. R. 174 **474**

— — — — — **art. 31** **474**

— — — — — **art. 44** **811**

— — — — — **art. 49** **335**

— — — — — **art. 75** **672**

— — — — — **art. 75—Instalment**

Bond—Test of limitation—Liberty to creditor to sue on failure to pay at stipulated time—Time from when runs.

In a suit on an instalment bond on default of payment of an instalment the test whether or not the period of limitation begins to run is—has the payee or obligee a right to file a suit forthwith for the principal remaining due if he so chooses?

Where an agreement provided for payment of the principal within 12 months with interest payable every month or in case of failure, two months' interest together; and permitted the creditor, in default of payment of the principal on the stipulated date or of monthly interest or two months' interest together, to file a suit immediately for the recovery of the whole amount:

Held, that the limitation began to run from the date of the default in the payment of two months' interest together. **S. VISHINDAS WADHURAM v. HOTOMAL DITOMAL**, 9 S. L. R. 10 **479**

— — — — — **art. 91—Sale-deed giv-**

ing no present interest in property—Suit to set aside deed on ground of fraud—Starting point of limitation.

A suit to set aside a sale-deed on the ground of fraud, where the deed does not give any present interest in the property is within time if brought within three years from the date of the defendants' attempt to take unlawful possession of the property. **M. - SUKRAMANIA PILLAI v. KUPPAMA:** **106**

— — — — — **art. 109** **804**

— — — — — **art. 115** **35, 474**

— — — — — **art. 116** **394**

— — — — — **art. 116—Covenant of**

title, damages for breach of—Damages, suit for—Limitation, when begins to run.

A breach of a covenant for title caused by the absence of right contracted for is entire and complete at the time of the execution of the conveyance, and, therefore, the Statute of Limitations

Limitation Act—(1908)—contd.

in such a case in the absence of fraud begins to run in the conveyancer's favour as from the date of the execution of the sale-deed. **PIRABHU v. WIZIABI**, 11 N. L. R. 186 **577**

— — — — — **art. 116, 103—Usufructuary—Possession not delivered—Suit for profits and possession of mortgaged property—Limitation.**

Where a usufructuary mortgagee sued for possession of the mortgaged property within six years of the date from which he was to have received possession and also claimed mesne profits for the same period on the allegation that the mortgagor had never given him possession in accordance with the terms of the deed, the mortgage deed being a registered one:

Held, that the claim for profits was in substance one for compensation for breach of a contract in writing registered and was governed by Article 116, and not by Article 109, of the Limitation Act. **A. NIDHAI SINHA v. TULSI RAM** **504**

— — — — — **art. 120** **335**

— — — — — **art. 120—Suit based on award.**

A suit based on an award cannot be considered to be a suit on a contract and is governed by Article 120 of the Limitation Act. **M. SOMASUNDARAM CHETTY v. RANGASAMI IYANGAR** **516**

— — — — — **art. 121—Encumbrance, meaning of—Adverse possession for statutory period before sale, if encumbrance—Assam Land and Revenue Regulation (1 of 1886), s. 70.**

An interest acquired in an estate by adverse possession for the statutory period before its sale under section 70 of the Assam Land and Revenue Regulation, 1886, is an encumbrance within the meaning of Article 121 of the First Schedule to the Limitation Act, 1908. **C. PRASANNA KUMAR DUTT PURKAYASTHA v. JANENDRA KUMAR DUTTA** **501**

— — — — — **art. 132—Mortgage-**

deed—Option of mortgagee to sue on failure to pay interest or at his pleasure—Starting point of limitation.

A mortgage-deed dated 8th December 1895 provided that the mortgage could be foreclosed at the end of three years, that the mortgage-debt was to carry Rs. 31-8-0 interest half-yearly to be paid half-yearly and that if two periods of six months elapsed without interest being paid, the mortgagee was to have the option of maintaining the period of the mortgage and suing only for the interest or of cutting short the mortgage (*migad-i-rahni fikh karkar*) and suing for the whole debt, principal and interest. No interest was ever paid. The suit was instituted on 17th April 1909. The defendant pleaded limitation:

Held, that under Article 132 of the Limitation Act, the period began to run from the time when the money sued for became due, viz., 8th December 1895, and that, therefore, the suit was barred by time. **P. SHAM SUNDAR v. ABDUL AHAD**, 153 P. W. R. 19.5 **808**

— — — — — **art. 134** **267**

Limitation Act—(1908)—consolid.**Sch. I, arts. 134, 144—**

Adverse possession—Co-parceners, possession of one, possession of others—Possession hostile at commencement—Accrual of peaceful title before completion of adverse possession, effect of—Possession—Title.

On the suit of one of two reversioners, a sale was declared to be a mortgage in 1885 and the plaintiff was given a decree to redeem the property after the death of the widow in case she died without redeeming it. In 1893, the purchaser, whom the decree had declared to be a mere mortgagee, sold the property to the other reversioner and put him in possession. On the widow's death in 1900, the said two reversioners were the only heirs of her husband. When in 1912 the former sued for redemption of the property, the latter pleaded adverse possession from the date of his purchase:

Held, (1) that although the possession of the defendant reversioner when it commenced in 1893 was hostile, yet it ceased to be so in 1900 when on the widow's death succession opened to both the reversioners;

(2) that on the death of the widow, the defendant must be deemed to have held the property on behalf of the plaintiff as well;

The possession of one co-parcener or co-owner cannot be adverse to the other until the latter is notoriously excluded by the former.

The possession should be *prima facie* attributed to a lawful title. *M. VELAYUTHAM PILLAI v. SUBBAROYA PILLAI*, 2 L. W. 989; 18 M. L. T. 424; (1916) M. W. N. 873

_____	art. 141	398
_____	art. 142	290
_____	art. 144	242, 965
_____	art. 158	398
_____	art. 158	536
_____	art. 171	697
_____	art. 178	899
_____	art. 179, s. 12—	

Application for leave to appeal to His Majesty—Limitation, from what date to be computed—Time requisite for obtaining copy of decree, if excluded.

In computing the period of six months under Article 179 of the Limitation Act provided for an application for leave to appeal to His Majesty in Council, an applicant is entitled under section 12, clause (2), of the Limitation Act, to exclude the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree.

Section 12 (2) of the Limitation Act is general and applies to all applications for leave to appeal. *A. RAM SARUP v. JASWANT RAI*, 13 A. L. J. 1114

art. 182—Application
for execution by some of decree-holder's legal representatives not purporting to be on behalf of others, whether saves limitation.

An application for execution of a decree by some of the legal representatives of a decree-holder is covered by Explanation I of Article 182 of the Limitation Act and saves limitation in favour of all the legal representatives even though it does not purport to be on behalf of all. *M. VASUDEVA PATTI JOSHI v. NARAYANAPANI GRAHI*, 18 M. L. T. 517

art. 182 (2) 426

Madras Abkari Act (I of 1886), s. 56

(b)—*License for sale of arrack 32 degrees under proof, sale in breach thereof—Adulteration—Allowance of 2 per cent. for wastage under r. 229, Standing Orders of the Board of Revenue how far defence—Standing Orders of Board of Revenue, r. 229, scope of—Abkari prosecution—Technicality of offence, whether can be considered by Court*

Rule 229 of the Standing Orders of the Board of Revenue, which directs Abkari officers to allow wastage in bottling up to 2 per cent. is only a departmental rule for the guidance of its subordinates, the margin of 2 per cent. being fixed as an allowance for evaporation in cases where there is reason to believe that the diminution in strength is due to natural causes. It cannot be construed to mean that licensees can adulterate arrack so long as they do not exceed 2 per cent. over the strength mentioned in the permit.

The rule not having been made under section 69 of the Madras Abkari Act, 1886, has not the force of law and cannot be read as part of the Act.

Under section 55 (b) of the Abkari Act, an offence is committed the moment a person sells arrack below the strength specified in the permit, no matter what the cause of the variation may be. The fact that the offence is only technical, is not a matter for the Court, but one for the officers instituting the prosecution. *M. IN RE DAMODARA NAIDU*, 2 L. W. 1120; 16 Cr. L. J. 800

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Madras Civil Courts Act (III of 1873), s. 14

104

Madras Civil Rules of Practice (Mofassil), r. 94

502

_____ r. 278, 279, 284
_____ 312

Madras Court of Wards Act (I of 1902), r. 58—Remission of interest on arrears of rent—Manager, power of.

In cases of remissions made by the Manager appointed by the Court of Wards but not included in those specified in rule 58 of the rules framed by the Court of Wards under the Court of Wards Act, it is for the party relying upon the remissions to prove that the Court of Wards had specially authorized the Manager to grant them. *M. MADHAVA BHUNJ SANTO v. RAMACHANDRA MARDARAJ*

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Madras District Municipalities Act (IV of 1884), s. 250 (1) (a), rules under, r. 4, note I—Duty of Chairman to register voters—Acting "in good faith," meaning of—Liability in damages—Test.

The plaintiff firm applied to the Chairman of the Municipal Committee that the name of its representative be registered as a voter. The application was rejected and the firm's representative was not allowed to vote at the election. The plaintiff sued for damages:

Held, (1) that the real test to determine whether the Chairman was liable or not on the ground that the name of the firm was not clearly described in the register of voters, was whether he when he passed the order was acting "in good faith" which implied "due care and diligence,"

(2) that inasmuch as the Chairman was himself responsible for the ambiguous entry in the register,

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it was his duty to hold an enquiry if he entertained any doubt as to the identity of the firm's representative;

(3) that since he had rejected the plaintiffs' application without good cause he was liable in damages. **M. DRAVIYAM PILLAI v. CRUZ FERNANDEZ**, 29 M. L. J. 704; 18 M. L. T. 518 **322**

Madras Estates Land Act (I of 1908), s. 3—“Estate”—Grant of whole village as inam—Proof.

Where a village granted as an inam contains minor inams and ryotwari holdings and the question is whether the village as a whole was granted as an inam or only a portion of it, the fact that it was treated as a whole inam village at the Inam Settlement and the Revenue Authorities themselves subsequently recognized it as such, is a clear proof that the whole village was granted as an inam and is an “estate” within the meaning of Act I of 1908. **M. KASTURI AYYANGAR v. GULAM GHOUSE SAHIB** **791**

— **s. 3**—“Rent,” meaning of—
— Suit to recover rent for land let for building houses—
— Jurisdiction—“Jerayati” land, meaning of.

Money due for occupation of land let for the purpose of building houses is not “rent” within the meaning of section 3 of the Madras Estates Land Act, and a suit to recover it is cognizable by the Civil and not by the Revenue Court.

The term “jerayati” is applied indiscriminately both to “cultivable land” and “inam land,” and does not necessarily mean land let for agricultural purposes. **M. RAMACHANDRA MARDARAJA DEO v. DUKKO PODRANO** **852**

— **ss. 3 (5), 5, 53, 111, 112**—Person entitled to arrears of rent, if landholder—First charge on holding, right of—Landholder out of possession, whether can attach holding—Remedy open to him.

A person to whom arrears of rent are due is a “landholder” notwithstanding the fact that his estate has terminated, but he has not a first charge on the holding. He can distrain the moveable property or the trees on the holding of the defaulter but is not entitled to attach the holding itself. **M. SUNDARAM IYER v. KULATHU AYYER**, 2 L. W. 867; 18 M. L. T. 316; 29 M. L. J. 505; (1915) M. W. N. 731 **81**

— **s. 5** **81**

— **s. 13 (3)**—Landlord and tenant—Extra charge for vanpayir claimed—Long-continued course of payment—Contract to pay—Presumption.

It cannot be laid down as a general rule that in all cases where there has been a long-continued course of payment of an extra charge for vanpayir, a contract to pay it must be presumed. **M. ARUNACHELUM CHETTI v. SYAD AHANED AMBALAN**, 2 L. W. 1117; 19 M. L. T. 128 **539**

— **Ch. IV, s. 52**—Agreement to pay enhanced rate entered into before Act came into force—Pattas and muchilikas exchanged under Rent Recovery Act, whether binding on tenant after Estates Land Act came into force.

An agreement to pay an increased rate of rent

Madras Estates Land Act—contd.

entered into before the Madras Estates Land Act came into force by a person who was a yearly tenant does not bind him after the Act came into force, as his status is changed by the Act.

Section 52 applies only to pattas and muchilikas exchanged since the Act came into force and no retrospective effect can be given to that section so as to bring within its operation pattas and muchilikas executed under the Rent Recovery Act, VIII of 1865, and tenable for a year only. **M. RAJA OF PITHAPURAM v. JONNALAGODDA VENKATASUBBA ROW**, 18 M. L. T. 348; (1915) M. W. N. 813 **93**

— **ss. 53, 111, 112**

— **s. 151**, scope of—Relief

under s. 151, when granted—Circumstances to be considered.

Section 151, Madras Estates Land Act, is intended to give the landholder a right to sue for the reliefs mentioned therein only when the holding as a whole is rendered substantially unfit for agricultural purposes by the acts of the ryot committed on the whole or on any part of the holding.

In arriving at a decision as to whether the holding as a whole is so rendered unfit by the acts of the ryot on any part of the holding, reference must be had to the circumstances of individual cases, to the size of the holding, to the area withdrawn from actual cultivation and to the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation. **M. NAVANNA VENA RAMA CHETTI v. ARUNACHALAM CHETTI & Co.**, 18 M. L. T. 349; 29 M. L. J. 724; (1915) M. W. N. 801 **98**

— **ss. 151, 152**—Tenant committing act of waste on holding rendering it unfit for agricultural purposes—Liability to pay compensation—Relationship of landlord and tenant, whether subsists—Suit for ejectment.

Under the Estates Land Act, it is open to the Courts to award compensation in lieu of ejectment in all cases of waste; but the payment of compensation does not put an end to the relationship of landlord and tenant existing between the parties.

Where in a suit for ejectment by the trustees of a temple, on the ground that the defendants had erected a building on a portion of the holding and had thereby committed an act of waste, it was found that the holding as a whole had been materially impaired for agricultural purposes and rendered substantially unfit for such purposes:

Held, that the defendants could not be evicted but that they must pay compensation to the plaintiffs for the injury to the holding and continue to hold the land and the building thereon subject to the payment of the rent originally agreed upon.

Per **Sheshagiri Aiyar, J.**—The damage to which a tenant renders himself liable is not for the value of the right which the landlord has in the holding, but for the wrongful act which the tenant has committed on the property. **M. SANKARALINGA MOOPANAR v. SUBRAMANIA PILLAI**, 29 M. L. J. 514 **273**

— **s. 152**

— **ss. 149, 213**—Suit for damages for illegal distraint by tenant holding under ryotwari tenure—Jurisdiction—Interpretation of Statute.

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A suit by a tenant of a *ryotwari* land-owner or of any sub-tenant of such for damages for illegal distraint of moveable property, growing crops or the produce of land or trees, in a defaulter's holding is exclusively triable by a Revenue Court.

Section 89 of the Estates Land Act read with section 213 (1) has the effect of taking such suits out of the jurisdiction of Civil Courts, which can be exercised only where the suit is for other reliefs such as injunction, declaration, possession, etc.

Obiter dictum (Wallis, C. J.)—The creation of a new jurisdiction does not affect previously existing jurisdiction in the absence of express provision. **M. NARAYANASWAMY AIYAR v. VENKATARAMANA AIYAR**, 29 M. L. J. 607; 18 M. L. T. 426; 2 L. W. 1037; (1915) M. W. N. 921

s. 213

Madras High Court Fee Rules, 1902,

r. 17, nature of—Provisions to be strictly pursued—Order under rule, when to be made.

Rule 17 of the Madras High Court Fee Rules, 1902, which provides that when the costs of an interlocutory order are not paid all proceedings in the suit or matter may be stayed or set aside, is a highly penal one and should be strictly pursued. An order under that rule can only be made on a summons in Chambers or on the hearing of an application by the party in default and not at the final hearing. **M. MURUGESA CHETTI v. ARUMUGA CHETTI**, 2 L. W. 1205; 18 M. L. T. 601

923

Madras Planters Labour Act (I of 1903), ss. 24, 35—Power of Magistrate to

issue repeated directions—Conviction for disobedience, whether bar to subsequent action—"Failure to account for money advanced," meaning of.

There is no limit to the number of repeated directions which may be issued under section 35 of the Madras Planters Labour Act or to the number of prosecutions and convictions which may follow in default.

Action taken under section 35 of the Madras Planters Labour Act does not put an end to the contract and is, therefore, no bar to a second trial and conviction for disobedience to a direction to fulfil it.

Per Ayling, J.—The words "fails to account for the money advanced to him" mean simply this: failure to either supply labour equivalent to the advance received or to refund any balance of the advance for which he is unable to supply labour or to prove that it has been legitimately expended. **M. N. C. WHITTON v. MAMMAD MAISTRY**, 2 L. W. 1039; 18 M. L. T. 511; 16 Cr. L. J. 777

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s. 35

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Madras Regulation XXV of 1802,

S. 4—Inam—Jodi payable by inamdar to zemindar whether excluded in fixing peishcush—Resumption and levy of full assessment by Government, if takes away liability to pay jodi

Under section 4 of Madras Regulation XXV of 1802, what was excluded from consideration in fixing the permanent assessment payable by a zemindar, was not the jodi payable by an inamdar to a zemindar but the difference between the jodi and the proper assessment claimable from the lands if they had not been granted in inam. The Government reserved its powers to deal with

Madras Regulation—concl'd.

this difference only and not with the jodi itself. The resumption of a service inam and the levy of full assessment by the Government thereon, does not take away the liability of the inamdar to pay jodi to the zemindar. **M. ADAPAKA BAPANNA v. INGANI RAJAGOPALA**, 2 L. W. 1212

813

Madras Village Courts Act (I of 1889), s. 24—Person holding vakalatnamah,

appearance by—Privilege denied—Suit to declare right, maintainability of.

Under section 24 of the Madras Village Courts Act, any person holding a vakalatnamah from a party may appear and plead in a Village Court; and there is no provision in the Act for debarring any one from this privilege.

Where this privilege is denied by an illegal order passed by an officer, a right of action to have that right declared exists in common law, if not under section 42 of the Specific Relief Act. **M. MCHIRAZH RAMACHANDRA ROW v. SECRETARY OF STATE**

310

Maintenance. See HINDU LAW.

Agreement, construction of—Hindu widow agreeing with her husband's reversioner to lead chaste life—Maintenance, forfeiture of—Second appeal—Finding of fact—Punjab Courts Act (XVIII of 1884), s. 44.

Where a Hindu widow who executed an agreement in favour of her husband's reversioner to the effect that she would lead a chaste life throughout the period of her residence in her deceased husband's house and receive maintenance allowance so long as she remained chaste, has taken to a life of immorality, she forfeits the right to maintenance.

A finding that the woman has taken to a life of immorality, cannot be interfered with in second appeal. **P. TARA DEVI v. DHANPAT RAI**, 150 P. W. R. 1915

797

Malabar Law—Gift of land to wife alone—No words of conveyance to children—Absolute interest—Makkalapannaya.

Where a husband made a permanent lease of his properties to his wife, the deed containing no words conveying the estate to the children, and the wife executed a deed of gift in respect of the major portion of these properties in favour of her two daughters, one of whom sold some of the properties which fell to her share to a third party; and a suit was brought by the daughters' children for a declaration that the alienation was not binding on them:

Held, (1) that the donor intended to give an absolute estate to his wife;

(2) that the gift by the wife to her daughters conferred an absolute right on them and the plaintiffs had no right to contest the alienation. **M. DUJA BHANDARI v. VENKU BHANDARI**

854

Kanom mortgage with covenant for perpetual renewal—Intention—Clog on equity of redemption—Denial of jenmi's title—Forfeiture—Statements of deceased persons not made in course of business, admissibility of—Evidence Act (I of 1872), s. 32 (2).

A kanom mortgage, with a covenant for perpetual renewal, is rather a perpetual kanom than an ordinary mortgage with a clog on the equity of re-

Malabar Law—concl'd.

demption and is, therefore, not invalid. The *kanomdar* in such circumstances does not forfeit his *kanom* mortgage by denying the *jeemi's* title.

Mere assertions of title as owner by a person having rights in lands of a very substantial kind should not necessarily be treated as denial of the title of a landlord whose rights are of an attenuated character.

Statements of deceased persons not made in the usual course of business are not admissible in evidence under section 32 (2) of the Evidence Act. **M. KOLANGORATH RAYAN NAYAR v. KAYNGOT, 2 L. W. 941; (1915) M. W. N. 793**

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Mukhammadan following Marumakkattayam Law—Custom of affilating strangers to tarwad, whether valid.

The custom of affiliation prevalent among Hindus, who follow the Marumakkattayam Law, if proved to exist among the Muhammadans, following the same law, must be upheld. **M. MAMU v. MUHAMMAD KUTTI**

385

Tarwad property—Karnavan—Junior members, right of, to pledge tarwad property—Necessity—Motive—Lender, right of, to proceed against tarwad property.

The 1st and 2nd defendants, who were members of a *tarwad*, agreed with the plaintiff to pay a certain remuneration for assisting them in a litigation concerning the *tarwad* property. The 1st defendant who thereafter succeeded to the management of the estate, compromised the suit. The plaintiff was not consulted with regard to the compromise, nor was the 2nd defendant a consenting party. The plaintiff, however, was informed not to do anything in connection with the suit. The suit was consequently dismissed. The plaintiff sued for the remuneration stipulated.

Held, that, in the absence of proof that the defendants acted in the best interests of the family and that there was necessity for promising a large remuneration, the defendants had no authority to bind the family by the agreement.

Per Wallis, C. J.—Though the *karnavan* has the exclusive right of management he does not hold only for himself, but for himself and all the other members of the *tarwad* and, therefore, to some extent in a fiduciary capacity and it is competent to the members next in seniority not only to sue for his removal but also to sue for a declaration that an alienation made by him is not binding on the *tarwad*.

Per Seshagiri Aiyar, J.—In a Malabar *tarwad*, unlike in a joint Hindu family, there is no right to proceed against the share of the alienating member and a member of the *tarwad* is not competent to pledge the credit of the others.

Where the *tarwad* is in its normal state, the *karnavan* alone is competent to pledge the *tarwad* credit but where the acts of the *karnavan* are such as to seriously endanger *tarwad* property the junior members have power to act on behalf of the *tarwad*.

If it is proved in a case where the junior members have pledged the *tarwad* property that the money was advanced and utilized for protecting the property from malversation or mismanagement, the lender has a claim on the *tarwad* for the loan. **M. RAJA OF ARAKAL v. CHUBIA KUNNI KANNAN, 29 M. L. J. 632**

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Malicious prosecution—Causing or procuring another to be prosecuted—Suit for damages, maintainability of.

A person who causes or procures another to be prosecuted is liable notwithstanding the intervention of some other person as the direct or technical prosecutor; it can make no difference whether the other person is or is not an officer of the law.

Where, therefore, in a suit for damages for malicious prosecution, it appeared that the defendant did not set the law in motion against the plaintiff:

Held, that the plaintiff was not entitled to any relief. **M. MANIKAM MUDALIAR v. KUMMALANGUTTAY MANI-SWAMI, 29 M. L. J. 694; 18 M. L. T. 500; (1915) M. W. N. 911**

246

Proof essential—Damages, when awarded—Principle.

In an action for malicious prosecution, the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the Tribunal before which the accusation was made.

A man is not to be mulcted in damages merely because he fails to prove another's guilt, nor is a man to receive compensation merely because there is a reasonable doubt about his guilt; if there is any doubt about his innocence, he fails to prove the absence of reasonable and probable cause.

A man is acquitted in a criminal case if there is a reasonable doubt as to his guilt, but a Civil Court will not award him compensation in a subsequent suit for damages for malicious prosecution unless it has not only itself no reasonable doubt as to his innocence but considers the prosecutor either had, or should as a reasonable man have had, none either. **L. B. MATHA HLA v. MOHILAN**

324

of manager of undivided Hindu family—Cause of action, whether survives to remaining co-parceners

4

Mandamus. See SPECIFIC RELIEF ACT.

Omission of qualified candidate's name from Election Roll—Mistake of Returning Officer—Jurisdiction of High Court to interfere

618

Marriage. See HINDU LAW.**Merger. See MORTGAGE.**

Mesne profits—Decree for possession with mesne profits—Possession delivered late in season—Judgment-debtor, liability of—Interest on mesne profits after three years—Discretion.

In a decree for possession with mesne profits, if the judgment-debtor surrenders possession, he can claim non-liability for mesne profits only if such possession was given up sufficiently early in the season to enable the decree-holder to cultivate the land and raise crops thereon.

It is discretionary with a Court to award interest on mesne profits beyond three years from the date of the decree. **M. NAINA PILLAI MARACATYAR v. ABUMUGA MUDALI, 2 L. W. 1129**

387

liability for—Person in illegal occupation

211

Minor—Mother executing mortgage of minor's property—Document not purporting to be executed by mother as guardian—Property described as belonging to minor and registered in mother's name as guardian—Construction of deed—Suit by minor to set aside

Minor—concl'd.

mortgage-deed—Limitation Act (IX of 1908), Sch. I, Art. 44.

The mother and natural guardian of a Hindu minor executed a mortgage of immoveable properties belonging to him. The document did not purport to be executed by her as the guardian of her minor son, but the mortgaged property was described in the document as having been registered in her name as the guardian of her minor son:

Held, that the document was one executed by the mother not in her individual capacity but as the guardian of her minor son and that a suit brought by the minor more than three years after he attained his majority, to set aside the mortgage, was barred by limitation. **M. VELAYUTHAM PILLAI v. PERUMAL NAICKER**, 2 L. W. 1210 **811**

Mortgage by conditional sale—Foreclosure proceedings—Notice, service of, on *de facto* guardian of minor mortgagor, whether sufficient—Consideration, receipt of, denial of—Burden of proof **212**

—Construction of document—*Perpetual lease—Equity of redemption, clog on.*

A document styled a *patta* contained *inter alia* the following:—

"Thirty years ago I had taken from you Rs. 150 and in lieu thereof executed two bonds mortgaging with possession my agricultural land (*jiayat*). . . . From that year the *jiayat* has remained in your possession and was cultivated by you. Now I execute a new bond for those rupees and agree that in lieu of those rupees, you may take the produce of the *jiayat*. . . . The field has been given in your possession from to-day, there will be no interest and I will claim no produce. When I or my heirs pay the whole amount mentioned, you may receive it and continue to cultivate the field for ever from this day. After payment to you of the whole amount of this bond, you shall pay Rs. 8 per annum on account of rent of the field in perpetuity from generation to generation."

Held, the document was an usufructuary mortgage-deed and that the stipulation in the deed that after the mortgage-money was paid off, the mortgagee would remain in possession as perpetual lessee on payment of a yearly rent, was a clog on the equity of redemption. **N. DAOLAT RAI v. SUEIKH CHAND**, 11 N. L. R. 180 **869**

—Document not enforceable as mortgage, whether admissible for collateral purpose **728**

—by Hindu father—Suit by minor son for declaration that it shall not affect his rights—Son meanwhile becoming Muhammadan—Suit, if maintainable—Alienation for immoral purposes—Burden of proof **476**

—Mortgage-debt, transfer of—Covenant, implied, for title—Breach of covenant for title—Suit for damages, maintainability of—Cause of action, when arises—Transfer of Property Act (IV of 1882), s. 55.

There is no implied covenant for title on a transfer of a mortgage-debt, as it can hardly be regarded as a transfer of ownership of immoveable property.

Therefore, in such a case a suit to recover damages for an alleged breach of covenant for title is not maintainable. The cause of action for a suit for damages for breach of covenant for title arises on the execution of the conveyance. **M. SAMU PATHAN v. CHIDAMBARAM ODATAN**, 29 M. L. J. 454, 2 L. W. 918 **179**

Mortgage—concl'd.

—Occupancy tenant—Mortgage of holding before Agra Tenancy Act (II of 1901)—Relinquishment by mortgagee, effect of.

An occupancy tenant who prior to the coming into force of the Agra Tenancy Act, 1901, mortgaged his holding for consideration and in a genuine way, and put the mortgagee in possession, cannot enter into a bargain with his *zemindar* so as to secure some collateral advantage for himself as consideration for the relinquishment of his holding, to the prejudice of the mortgagee whom he has himself put in possession. **A. SHEO-MANGAL SINGH v. CHEDU**, 13 A. L. J. 1137 **914**

—Verbal mortgage—Subsequent document—Oral evidence admissible to prove transaction **87**

—Deed—Option of mortgagee to sue on failure to pay interest or at his pleasure—Starting point of limitation **808**

—Redemption—Clog on equity of redemption **184**

—by owner of share in equity of redemption or by person having interest in portion of mortgaged property, if allowed **230**

—suit for—Burden of proof—Court's duty in such cases.

In a suit for redemption, the plaintiff when he is put to strict proof and is out of possession, must stand or fall by the strength of his evidence and cannot depend upon the weakness of his adversary's case. In such cases it is absolutely wrong to deal with the case of the defendant first and prove it to be worthless and then turn to that of the plaintiff. The Court should see whether the plaintiff has discharged the burden lying upon him; his case cannot be held to be true because the defendant has failed to prove his defence. **L. B. LA AUNG v. MAUNG SO** **885**

—suit for—Mortgage-deed in mortgagee's possession—Oral evidence, admissibility of **892**

—simple—Lease of property hypothecated to mortgagee—Construction of documents—Assignment of rent—Rent, if debt—Chose in action—Transfer of Property Act (IV of 1882), s. 6.

In 1898, a simple mortgage was executed of certain properties by the mortgagor. In 1904, he executed a lease of the same to the mortgagee and directed him to apply the rent payable under the lease towards the interest due under the mortgage-bond executed in 1898:

Held, that the two transactions must be deemed to be independent of each other and the simple mortgage was not converted into a usufructuary mortgage on the execution of the lease.

An assignment of rent due under a lease is, unlike mesne profits, not opposed to section 6 of the Transfer of Property Act: it is a fixed amount and is a debt included in the term 'chose in action'. **M. CHIDAMBARAM PILLAI v. DORAISWAMY CHETTY** **473**

—Simple mortgagee, rights of—Trespasser dispossessing mortgagor—Possession, whether adverse to mortgagee.

Mortgage—concl'd.

The possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is on adverse to the simple mortgagee and his rights as mortgagee do not become extinguished by the trespasser's possession for more than twelve years. *M. VIJAYAPUR & SONAMMA BOI AMMANI*, 29 M. L. J. 645; 2 L. W. 1080; (1915) M. W. N. 927; 18 M. L. T. 436

412

Subrogation—Satisfaction

of charge undertaken to be satisfied—Frustrated committed in respect of existence or satisfaction of prior charge—Contract, stranger to, when can claim performance of.

The doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge which he has undertaken or is bound to satisfy. If a person purchases a property subject to two mortgages, retains a portion of the purchase-money for payment to the mortgagees, but pays the first incumbrancer alone and not the second, he cannot treat the first mortgage as kept alive for use as a shield against the second; nor can he claim to be subrogated to the position of the mortgagee whose debt he has satisfied.

If A purchases property subject to three successive charges X, Y and Z with full knowledge of their existence, and retains a portion of the purchase-money in his hands with a view to satisfy the mortgages Y and Z, but subsequently discharges the security Z, he cannot, on satisfaction of the mortgage X, use it as a shield against the mortgage Y. But if the acceptance of the mortgage-deed with an untrue recital as to the satisfaction of the mortgage X by the mortgagee Y enabled the mortgagor to commit a fraud upon the purchaser, the latter can, on discovery and satisfaction of the mortgage X use it as a shield against the mortgagee Y.

Although a stranger to a contract may sometimes be entitled to claim the benefit of the performance thereof, the doctrine cannot be allowed to be invoked to defeat the ends of justice. *C. HAR SHYAM v. SHYAM LAL SAHU*, 22 C. L. J. 227; 43 C. 69

22

suit—Mortgage not proved to be duly

executed—Simple money-decree, if can be given—Cause of action.

In a suit on a mortgage for sale of the mortgaged property against the son of the executant of the mortgage, the mortgage was not proved to have been duly executed:

Held, that under the circumstances no simple money-decree could be given inasmuch as it would entirely change the cause of action. *A. MUKSHI LAL v. MANGAT RAI*

706

, usufructuary—Possession not

delivered—Suit for profits and possession of mortgaged property—Limitation

807

Usufructuary mortgagee

—Purchase by mortgagee of mortgaged property—Merger.

Where a usufructuary mortgagee purchases the property in execution of his own decree on the basis of a simple mortgage, he becomes the absolute owner of the property and the mortgagee right ceases to exist by virtue of the law of merger. *A. JAWAHIR MAL v. UPAL RAM*

891

Muhammadan Law. See CUTCHI MEMONS.

Alienation of Muhammadan minor's property by unauthorised guardian, effect of

728

Divorce—Kabinnamah

executed by husband authorizing wife to divorce on ground of second marriage, validity of.

A Muhammadan husband executed a kabinnamah in favour of his wife authorizing her to divorce herself from the husband in the event of his marrying a second wife. He, however, married a second wife and imputed unchastity to his first wife and refused to maintain her. Thereupon a document of talaknamah was executed by the wife in accordance with the provisions to that effect in her kabinnamah:

Held, that the contract was not void and the effect of the second marriage was to give the wife a power to divorce her husband. *C. MAHARAM ALI v. AYESA KHATUN*, 9 C. W. N. 1226

562

Gift—Possession—Muta-

tion, effect of.

Delivery of possession is essential to make a gift valid under Muhammadan Law.

Where there is only an execution of a deed of gift and the donor, retaining the gift-deed himself, continues to exercise rights of ownership over the property for his own benefit and does not profess to hold it either as trustee or agent of the donee, there is no such delivery of possession as is contemplated by the Muhammadan Law, and the gift is invalid. The mere change in the Collector's certificate does not prove, by itself, change of possession. *M. SULFALLA SCHIB v. VAJHUDDIN SAHIB* v. 2 L. W. 1018; (1915) M. W. N. 876

281

Transfer of possession—Do-

nor continuing to receive rents—Presumption.

A deed of gift evidences merely a declaration of intention and nothing more. In order to make the gift complete and operative, the donor must deliver possession of the subject of gift to the donee and must divest himself of all power over it.

Where, therefore, after the execution of a deed of gift, no act of ownership was exercised over the subject of gift either by the donee or any person on his behalf, but the donor reserved to his own use the rents and profits of the property:

Held, that the gift was not intended to operate as a transfer to the donee and could not be given effect to. *M. RAHMAN BI v. FATIMA BIBI*, (1915) M. W. N. 430

545

Marriage—Muta mar-

riage, distinctive features of—Co-habitation and reputed, whether sufficient to raise presumption of legitimacy—Acknowledgment by father or family, necessity of.

'Muta' is the lowest form of marriage known to Muhammadan Law—so low as to be practically indistinguishable from concubinage. The two known features about it are, *first*, that there must be a definite period for the marriage to last either in this world or in the next or in both, and *secondly*, that a sum of money must be paid to the bride as her dower.

None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father.

Mere continued co-habitation does not suffice to

Muhammadan Law—contd.

raise such a legal presumption of marriage as to legitimize the offspring, there must be, besides co-habitation and besides proof of parentage, something in the nature of acknowledgment, either expressed or by conduct, on the part of the reputed father or his family. **M. AKBAR HUSSAIN SAHIB v. SHOUKHAH BEGAM SAHEBA** 2 L. W. 1191; 18 M. L. T. 525 **c57**

Succession—Nawayat

community—Two brothers and their descendants living and trading together as members of undivided family—Rights of parties inter se, how determined—Hindu Law, how far applicable Hindu family firm and Muhammadan family firm, difference between—Contract Act (IX of 1872), s. 241—Act how far applicable to Hindu and Muhammadan family trading firms—Custom, connotation of.

Prior to 1845, one Haji Hassan, a Muhammadan belonging to the Nawayat community and trading separately on his own account, associated with him his younger brother, Hammed, in the trade. In 1845, on the eve of his departure to Mecca, he executed a document whereby, in the event of his not returning from his pilgrimage, he directed that Hammed should get one-eighth of his properties. Hassan returned from Mecca in 1848 and till 1866, when Hammed died, the two brothers lived together and traded together. Their relations were very cordial, Hammed's son marrying Hassan's daughter. Hassan died in 1870. During the life-time of the brothers, properties were acquired indiscriminately in the name of either. Till 1910, the descendants of the two branches of the family lived together as if they were members of an undivided family and trade was carried on as usual, the accounts standing in the name of one or the other of the representatives of the branches who happened to manage the trade for the time being. In 1910, the present suit was instituted by the members of the younger branch against the members of the elder branch for a partition. It was conceded by the defendants that Hammed and his heirs were entitled to one-eighth of the properties covered by the document of 1845:

Held, per Sadasiva Aiyar, J., (Tyabji, J., dissenting).—That all the properties ought to be equally divided between the heirs of the two branches of the family, inasmuch as from 1848 till the date of suit, the two brothers, their heirs and the heirs of their heirs had acted in such a manner as to show that they had all understood their rights as following from the properties being held in common ownership between the two branches for more than 60 years and the imperfect understanding or agreement between the two brothers which began in 1848, had become fully perfected by their own conduct and the conduct of their heirs.

Per Tyabji, J.—That Hammed and his heirs were entitled to one-eighth of the properties mentioned in the document of 1845, the remaining seven-eighths of the suit properties and all other properties acquired prior to 1870 belonging exclusively to Haji Hassan and his sons, and that the properties acquired after 1870 must be equally divided amongst the heirs of Haji Hassan and Hammed in accordance with Muhammadan Law.

The term 'joint family', when applied to parties governed by the Muhammadan Law of succession,

Muhammadan Law—contd.

presumably refers to a group of persons belonging originally to one family and living together without having partitioned such property as they have inherited from some common ancestor. Their continuing so to live does not make their status different from what it would have been, had they not done so. Nor does the fact that they have not partitioned the property in any way, affect their rights therein or the legal incidents applicable to the property. No person can by birth derive an interest in the property belonging to his father during his life-time. The members of the group of persons so living together do not form any legal unit. They are not necessarily heirs of one another. Property acquired by one of them does not necessarily form the property of the whole group. The group as constituted at any particular moment is not the legal representative or the continuous successor in law of the persons who constituted the group in a previous generation. The result of this is that it cannot be said that all the property which at any time in the past belonged to the group as a whole, continues to belong to the persons now included, whether arbitrarily or according to agnatic descent, in the group. Membership of the group does not necessarily imply that a member has any share in all the property possessed by each of the other members, or kept in the possession of some person as the manager on behalf of all the group, whether such possession is held at their request or with their consent or merely with their acquiescence.

Unlike under Hindu Law, under Muhammadan Law the mere fact that one person allows another to live with him and treat him as though he were a co-owner with himself of property which is shown initially to belong to him alone, cannot make the other a co-owner, though, if the origin and ownership of the property is not traced and it is not known which of them is the owner, such circumstances may raise a presumption of co-ownership.

The mode of living adopted by parties cannot affect the law to which they are subject.

In the absence of any agreement to the contrary, express or implied from the conduct of the parties and their mode of life in any particular case, co-owners of property under Muhammadan Law, even if they live together, are expected to pay for their maintenance and other expenses out of their own shares in the property held in co-ownership.

Under Muhammadan Law, property acquired with the aid of what would be called 'ancestral property' according to the Mitakshara Law, does not become 'ancestral,' though acquisitions by co-owners with the aid of property held in co-ownership do accede to that property.

The word 'custom', in its legal sense, necessarily connotes only such rules of conduct as affect rights and liabilities. The ways of living or the observances of a particular class of persons do not become customary rules of law merely because evidence of such ways and observances has to be adduced for the elucidation of the facts existing in any particular case.

Though the provisions of the Indian Contract Act, 1872, are applicable to a Hindu family firm as well, yet in respect of such firms the incidents of the Act are affected by the peculiar doctrines of the joint

Muhammadan Law—concl'd.

Hindu family, which are impliedly incorporated in the law of Hindu ancestral firms.

The cases regarding Hindu family firms only lay down that, in the absence of a contract to the contrary, the Indian Contract Act must be presumed to govern the relations between the members of such a firm and that the contract to the contrary may be an implied contract, which may even be presumed from the mode of life resulting from the general personal law of the parties, especially when not presuming such an implied contract would bring about inconsistencies and results not contemplated by the parties.

In the case of Muhammadans, section 241 of the Indian Contract Act, 1872, has a direct operation, as in their case there is no contract to the contrary nor does their personal law operate so as to make them partners to any extent or otherwise to minimise the effect of the section on their rights.

Per Sadasiva Aiyar, J.—Many of the incidents of Hindu joint family system obtain by custom among the *Narayats*.

Except that the principle of survivorship and that of right by birth as well as that of exclusion of females are inapplicable in considering the rights and liabilities of the persons on whom the business of a *Narayati* family has descended as heirs, in other respects, the principles and considerations applying to the business of Hindu family firms are applicable to the business carried on by a *Narayati* family.

Though the term 'undivided family' cannot properly be used to designate the relationship of the families of two *Narayati* Muhammadan brothers living together and trading together, yet the analogy of the business of a joint Hindu trading family is applicable to such a family. *M. HUSSAIN SAIB v. HASSAN SAIB*, 2 L. W. 1140; (1915) M. W. N. 880 **927**

Trusts and life-estates
in Muhammadan Law **106**

Mulgeni lease—*Lessee, whether can cut trees grown spontaneously or by him—Transfer of Property Act (IV of 1882), s. 108 (h).*

A *mulgeni* lessee in South Canara is not entitled to cut trees standing at the date of the grant.

But the landlord has no title to the trees planted by the lessee after the commencement of the lease or to trees and plants of spontaneous growth. The lessee can remove such trees provided he restores the land at the end of his lease period in as good a condition as he received it at the beginning. *M. KRISHNACHARYA v. ANTHAKKI*, 19 M. L. J. 314; 18 M. L. T. 218; (1915) M. W. N. 726 **12**

Muta Marriage. See MUHAMMADAN LAW.

Nattukottal Chetti. See PRINCIPAL AND AGENT.

Negotiable Instruments Act (XXVI of 1881), s. 118—*Promissory note, suit on—Defendant a young boy just emerged from minority with large expectations—Consideration—Burden of proof.*

Where in a suit on a promissory note alleged to have been executed by the defendant, it appeared that the defendant was a young boy just emerged

Negotiable Instruments Act—concl'd.

from minority, with large expectations but no ready money:

Held, that it was on the plaintiff to prove that consideration had passed for the purpose. *M. SAMI SAIB v. PARTHASARATHY CHETTY* **739**

N. W. Frontier Crimes Regulation (III of 1901), applicability of—General Clauses Act (X of 1897), s. 24

Frontier Crimes Regulation, III of 1901, is still in force in Leiah Tahsil, Mozaffargarh District, and it applies to all persons not being 'European subjects' born or residing in districts to which the Regulation applies.

Though the Regulation IV of 1887 has been repealed by Regulation III of 1901, the notification issued under Regulation IV of 1887, must be deemed to be still in force by virtue of section 24 of the General Clauses Act. *P. BHOLA RAM v. EMPEROR*, 25 P. R. 1915 Cr; 16 Cr. L. J. 790 **646**

N. W. P. Rent Act (XII of 1881), s. 8—Tenant—Tenant—Occupancy right, acquisition of.

A person who has been in possession for twelve years without the consent of the *zemindar*, even if that period of twelve years was completed before the present Tenancy Act came into force, cannot be said to have acquired occupancy right in the holding. *U. P. B. R. NIRMAL SINGH v. BAHADUR SINGH* **445**

Nuisance—Nuisance at law, what constitutes—Act offending susceptibilities of individuals, whether actionable—Establishment of slaughter-house—Suit for injunction, who can bring—Act done under statutory authority, when unlawful—Central Provinces Municipal Act (XVI of 1903), s. 71.

In order to constitute a nuisance at law it is essential that there should exist either actually or impliedly, (1) *injuria*, i. e., a wrongful act constituting or causing damage, and (2) *damnum*, i. e., damage, loss, or inconvenience. *Damnum absque injuria* gives no right of action.

Where the act or omission causing or constituting an alleged nuisance is unlawful *per se*, e. g., where it is of itself a violation of statutory provisions or of private common law rights, the law will presume damage to exist; but where the act is innocent and lawful, then the question whether it amounts to an actionable nuisance is one of fact to be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case.

An act which offends the susceptibilities of individuals or the sentiments of a class is not, *ipso facto*, an actionable nuisance and cannot be made a ground for overriding ordinary rights in property.

The establishment and maintenance of a slaughter-house for butcher's meat is *per se* an offensive trade, even though it is not included as such in section 99 of the Central Provinces Municipal Act, 1903.

But whether in any particular case it is an actionable nuisance depends mainly on the locality in which it is placed: and, therefore, the question is one of fact to be determined upon the circumstances of each particular case.

Nuisance—concl.

Where the establishment and maintenance of a slaughter-house amounts to a nuisance to one or more persons being in the neighbourhood of it, anyone of such persons may sue for an injunction.

The motive which underlies a complaint of nuisance is relevant in a case of injunction.

Where an act is done under an authority conferred by Statute the conditions laid down by the Statute must have been strictly followed: otherwise the act is unauthorized and wrongful.

Section 71 of the Central Provinces Municipal Act requires that the approval of the Deputy Commissioner to the selection of a site for a slaughter-house shall be obtained before any building of the slaughter-house is begun on the proposed site; and a Municipal Committee which builds a slaughter-house on a site selected by itself without the previous approval of the site by the Deputy Commissioner, does an unauthorized and unlawful act and cannot use the Statute as a defence to an action brought against it on the ground that the act has created a nuisance. **N. MUNICIPAL COMMITTEE OF SAUGOR v. NILKANTH, 11 N. L. R. 132**

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Oaths Act (X of 1873), ss. 6, 13—Evidence of child taken without oath, admissibility of—Child's evidence, weight of.

The mere fact that a Court advisedly refrained from administering oath to a witness, who was a child of tender years, does not make his statement inadmissible in evidence. A Court should only examine a child of tender years as a witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what he has seen and to afterwards inform the Court thereof. If the Court is of opinion that by reason of tender years, the child is unable to do this, it ought not only to refrain from administering oath but from examining the child at all. If, on the other hand, the Court thinks that the child, though of tender years, is capable of informing the Court of what it has seen or heard, it is best that the Court should comply with the provisions of section 6 of the Oaths Act.

A child is frequently a most satisfactory witness when the matters deposed to, are not beyond the intelligence of the child. **A. DHANI RAM v. EMPEROR, 13 A. L. J. 1072; 16 Cr. L. J. 829; 38 A. 49**

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s. 13

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Oudh Estates Act (I of 1859), ss. 2, 14, 22—Oudh Estates (Amendment) Act (III of 1910), s. 3—'Primogeniture', meaning of—*Res judicata*—Talukdar—Heir or legatee of Talukdar—"Would have succeeded," meaning of—Sanad, nature of estate created by—"Successors", meaning of—"Nearest male heir," interpretation of.

The Maniarpur Estate was held, at the time of annexation of Oudh, by one Sughra Bibi a Bachgoti Khanzada of Shia faith. The Summary Settlement was made with her and a *sanad* in the ordinary primogeniture form was subsequently granted to her. She died on the 11th November 1865, but her name was entered in the first and second lists framed under section 8 of Act I of 1862. She executed a Will on the 2th June 1862 bequeathing her whole estate to her youngest half-brother Akbar Ali Khan

Oudh Estates Act—concl.

who succeeded to the estate on her death. At the date of the execution of the Will and at the date of her death, her eldest half-brother Jafar Ali Khan was alive. Akbar Ali Khan transferred on the 23rd July 1869, by a *hiba-bil-awaz* 39 villages to his wife Ilahi Khanam. On 29th June 1871, 16 days before his death, Akbar Ali made a Will by which he bequeathed the remaining 43 villages in the estate to Ilahi Khanam. At the time of Akbar Ali Khan's death on the 15th July 1871, his nephew Ghulam Husain Khan, son of his second brother Hasan Ali Khan, was alive. Ilahi Khanam died intestate on 20th April 1899 leaving six daughters Ummatul Fatima, Bibi Batul, Kaniz, Asghari, Ruqaiya and Haidari, who took joint possession of the estate on the death of their mother. After the death of Ilahi Khanam, the question of succession was brought before the Courts on several occasions.

Two suits were now brought, one by Ghulam Abbas son of Bibi Batul and the other by Mohammad Jafar son of Ummatul Fatima, both claiming possession of the Taluqa under the rule of primogeniture, asserting that succession to the estate was governed by the terms of the *sanad*. It was found that Ghulam Abbas was born before Mohammad Jafar.

Held (per Stuart, A. J. C.), that litigations which took place subsequent to the death of Ilahi Khanam to which her daughters were parties, could not operate as *res judicata* in the present suit as the daughter's sons were not parties to them.

That Ilahi Khanam was neither a *talukdar* nor an heir or legatee of a *talukdar* and that succession at her death was not governed by the provisions of section 22 of Act I of 1869.

That the amendment made by the Oudh Estates (Amendment) Act, III of 1910, in the definition of legatee, as given in section 2 of Act I of 1869, could not be given retrospective effect in the present case as it would have the effect of divesting persons who would otherwise be entitled at least to a portion of the estate.

That the words "would have succeeded" as used in section 14 of Act I of 1869 were not equivalent to "might have succeeded," and must be confined to persons in the special line of succession that would have been applicable to the particular case if the transferor or testator had died intestate and the death had occurred at the date of the transfer or in the case of a gift by Will, at the time when the succession opened.

That a transfer to a person coming under any of the clauses of section 22 did not bring the transfer within the provisions of section 14, if that person would be excluded by a senior member in his own class, and that the grouping in the clauses of section 22 could not be held to bind the rule of succession therein.

That therefore at the time of Sughra Bibi's death her eldest brother and the son of her second brother having been alive, the bequest made by her to her fourth brother Abbas Ali Khan had the effect of breaking the prescribed line of succession and so the provisions of section 14 could not be applied.

That explanation to section 3 of the Oudh Estates (Amendment) Act III of 1910, referred only to succession to the estates of a *talukdar* and, therefore, could not apply to Ilahi Khanam.

Oudh Estates Act—concl'd.

That the rule of primogeniture laid down in the *sanads* granted by Lord Canning meant the rule of lineal primogeniture as known to English Law.

That the estate created by the aforesaid *sanad* was not an estate known to English Law and that, to a certain extent, it resembled an estate in fee simple but was differentiated from it by the fact that under its terms, no female could succeed and that it bore some resemblance to an estate in tail male, but was differentiated from that by the fact that a collateral could succeed under the *sanad* whereas no collateral could succeed to an estate in tail male.

That the word "successors" as used in the *sanad* meant "successors on death" and included both heirs and devisees but not transferees during life time.

That the words "nearest male heir" could not be interpreted as meaning "nearest male heir according to the personal law of the grantee."

That the meaning of the *sanad* with regard to succession might be summarized as follows:—In the event of intestacy the case of all relatives of legitimate descent would be considered, all females and those claiming through females would be excluded and the succession would go to the surviving representatives of the highest line, however, collaterals only being admitted in the absence of the survival of descendants.

That, therefore, although succession to the estate was regulated under the terms of the *sanad*, neither of the plaintiffs-appellants, as daughter's sons, had any title under its terms.

Held (per *Kanhaiya Lal, A. J. C.*), that the word "successors" as used in the *sanad* denoted successive heirs or persons succeeding to the intestate or undisposed of residue rather than persons in whose favour a transfer or bequest might be made by the owner in his life-time.

That in the hands of Akbar Ali Khan and Bibi Ikhani Khanam the estate was governed by the Muhammadan Law and the plaintiffs as sons of the daughters were not entitled to the estate in preference to the daughters.

That exclusion of daughters by the *sanad* did not mean exclusion of the daughters' sons and that the disability attached to the sex and not to the line.

That among sons by different daughters the preference was to be determined by seniority of the line and the age of persons representing the senior line, but no question of age arose where the persons claiming were not of the same line. **O. GHULAM ABBAS KHAN v. BIBI UMMATUL-FATIMA, 18 O. C. 148** 748

ss. 14, 22 748

Oudh Estates (Amendment) Act (III of 1910), s. 3 748

Oudh Rent Act (XXII of 1886), s. 60,
ejectment proceedings under—Proceedings declared null and void—Tenant, if trespasser—Jurisdiction of Civil Court—Second application under s. 60, if maintainable.

A *zemindar* served upon his tenant a notice of ejectment under section 55 of the Oudh Rent Act and subsequently applied for assistance to eject under section 60 which was given, but the tenant did not give up possession. The tenant was then criminally prosecuted, when he set up the defence that he

Oudh Rent Act—(1886)—concl'd.

was never legally ejected and that there had been such irregularities in the action taken under section 60, that he was justified in treating the whole proceedings as null and void. This defence was allowed. The *zemindar* put in another application seeking assistance to eject under section 60. The Court below held that the position of the tenant was that of a trespasser and the *zemindar's* remedy was in the Civil Court.

Held, that the tenant never having been legally ejected, he was not a trespasser and the previous proceedings having been found to be null and void, a fresh application under section 60 was maintainable. **U. P. B. R. BHAGWAN BAKSH SINGH v. AMRAH SINGH** 472

— **s. 108 (9) (c)—Illegal ejectment—Compensation, suit for—Necessary party—Limitation.**

A suit for compensation for illegal ejectment under section 108 (9) (c) of the Oudh Rent Act, lies against the landholder alone and the entire body of the landlords is not a necessary party to such a suit.

Though the plaintiff may bring a suit for compensation between any time from the date of the illegal ejectment up to a year after the date of the recovery of possession, yet he can only get compensation in respect of the time during the year preceding the bringing of the suit in which he was out of possession. **U. P. B. R. NATA DIN SINGH v. DWARKA KURMI** 447

Partition. See **BURDHIST LAW; U. P. LAND REVENUE ACT, s. 138.**

— **Execution—Decree for partition specifying several shares—One party getting more than his due share—Re-adjustment of partition in order to make it accord with terms of decree, whether allowed** 311

— **Partition decree not executed—Second suit for partition, whether maintainable** 205

Partnership, constitution of—Partners, rights of, to purchase partnership property—Settled account, action for balance of, maintainability of—Contract Act (IX of 1872), s. 180—Bailor and bailee—Suit against wrong-doer, who can maintain.

A partnership is constituted whenever the parties have agreed to carry on a business or to share the profits in some way in common.

A partner is entitled to purchase partnership property, provided there is full disclosure, and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has a legitimate grievance against the other.

An action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties.

Under section 180 of the Contract Act either the bailor or the bailee may bring a suit against a third person for deprivation or injury to chattel bailed, the latter by virtue of his possession, the former by reason of his property. **C. RAMNATH GAGOI v. PITAMBAR DEB, 22 C. L. J. 339** 430

— **Dormant partner—Contract with firm, suit on—Necessary party.**

Partnership - *contd.*

A dormant partner never need be joined as a co-plaintiff in an action on a contract entered into with the firm or with one of its members. **M. GURZU PAYIDAYYA v. VENKADARU VENKATA REDDI** 913

— *Firm—Partners sued not as partners but in their individual capacity—Pleadings—Plaintiff, whether entitled to change position and seek relief against firm—Acknowledgment of debt without promise to pay, whether can be made basis of suit—Contract Act (IX of 1872), s. 43.*

A plaintiff who sues some of the partners of a firm not as such partners or as representing the firm but in their individual and private capacity, cannot, when he fails to prove his claim as preferred, be permitted to change his ground and continue the suit or ask for relief against the firm itself, nor does section 43 of the Contract Act apply to such a case.

A 'ruqqa' which is merely an acknowledgment or admission of indebtedness and does not contain an express or implied agreement or promise to pay, cannot be made the basis of a suit. **P. RAM ADIN v. MUNSHI RAM**, 76 P. R. 1915 209

— *Joint family—Death of a partner—Surviving partner, if requires certificate to entitle him to effects of deceased—Contract Act (IX of 1872), ss. 45, 263* 904

— *Manager of joint family, death of—Liability of sons for debts of the firm—Contract Act (IX of 1872), s. 247* 45

— *Partner, suit by, to recover damages for use and occupation of partnership property, from other partners, if maintainable.*

An owner of a mill entered into a partnership agreement with two other persons in respect of the mill business. The mill was to be used by the firm thus constituted: cash was to be supplied by one of the partners and the profits were to be distributed in certain proportions. A suit was instituted for dissolution of the partnership, for accounts and for incidental reliefs. During the pendency of this litigation the plaintiff purchased from the owner of the mill his right, title and interest in the mill in question and sued the members of the firm for recovery of damages for use and occupation of the mill.

Held, that the suit as brought was not maintainable either if the mill became part of the partnership property or continued to be the private property of the owner. **C. MANIRUDDIN v. JANENDRA NATH**, 19 C. W. N. 1115 707

Penal Code (Act XLV of 1860), s. 34 345

— *S. 80—Accident, defence of—Burden of proof—Evidence as to deed done convincing—Motive, if necessary—Criminal Procedure Code (Act V of 1898), s. 342—Written statement by accused, practice of filing, illegality of.*

If the accused puts forward a substantive defence of accident within the purview of section 80 of the Indian Penal Code, it is incumbent upon him to prove it.

If the evidence as to the deed done is sufficiently convincing, it is immaterial to consider with what motive it was done.

Penal Code—contd.

Per Beachcroft, J.—When a theory of accident is set up, the Court is entitled to a full and, so far as possible, detailed account of what happened.

The practice of refusing to answer questions in the Sessions Court and of putting in a written statement is a very pernicious practice. There is no provision in the Code for the making of a written statement by an accused and the obvious object of the practice in many cases is to defeat the provisions of section 342, Criminal Procedure Code, probably based on some idea of the Legal Advisers of the accused that he may give himself away. That section if used intelligently by Judicial Officers, is of great use to accused persons for whose benefit the section was enacted. A written statement drafted by an accused's Legal Adviser can never have the same value as answers coming directly from the accused's mouth. The refusal to answer questions may be attended with great risk to the accused, for the Court is bound to question him and a refusal to answer may involve an adverse inference against him. **C. EMPEROR v. DWIDENDRA**, 19 C. W. N. 1043; 16 Cr. L. J. 724 164

— *s. 97—Voluntarily and deliberately engaging in fighting—Private defence, plea of.*

The right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them.

Where, therefore, it appeared that a fight took place in a public street and both sides voluntarily engaged in it:

Held, that it was not open to the members of either party to claim the right of private defence. **B. BECHAR ANOP v. EMPEROR**, 17 Bom. L. R. 888; 16 Cr. L. J. 772 372

— *s. 141* 345

— *s. 143* 337

— *ss. 143, 147—Lawful assembly, whether becomes unlawful by exciting others to unlawful acts—Rioting—Duty of Court.*

An assembly lawful in itself does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts.

An assembly of persons lawfully exercising their lawful rights would not become an unlawful assembly by repelling an attack made on them by persons who had no right to obstruct them nor by exceeding the lawful use of their right of private defence.

Where an assembly lawful in its origin subsequently becomes unlawful and rioting takes place, it is the duty of the trying Magistrate to determine which party was the aggressor and how the riot actually arose. **M. In re MUKKA MUTHRIAN**, 16 Cr. L. J. 743 343

— *s. 144* 345

— *s. 147* 343

— *s. 147—Rioting, charge of—Evidence against each accused, separate discussion of—Practice—Common object, mention of.*

In a charge of rioting where a number of men are accused, the Magistrate should deal with the

Penal Code—contd.

case of each of the accused separately or discuss the evidence against each of the accused, especially when the evidence against each of the accused is by no means equally strong.

In cases of rioting, the common object should be clearly and specifically set out in the charge.

M. In re RAMASAMY NAIDU, 16 Cr. L. J. 809 **825**

_____ **s. 149** **345**

_____ **s. 163** **644**

_____ **s. 193** **340**

_____ **s. 193**, complaint under—Sanction for prosecution, if necessary **161**

_____ **s. 201** **647**

_____ **s. 265** **1001**

_____ **s. 300**, Exception 4—Use of knife—No risk of serious hurt to person using—Offence.

Exception 4 to section 300 of the Indian Penal Code does not apply to the case of an accused, who uses a knife where there is no appreciable risk of even serious hurt to his person. **M. In re MUTHUMADA NADAN**, 16 Cr. L. J. 747 **347**

_____ **ss. 302, 149, 34, 141,**

144—Gang of twenty persons armed with deadly weapons—Arrest of two members of this gang by villagers—Subsequent murder of one of villagers by a member of gang at large—Accused men, whether liable for murder—Intention to commit dacoity—Burden of proof—Common object of gang.

Where a gang of persons making preparations to commit dacoity was discovered and pursued by a body of villagers who succeeded in arresting two members of the gang and just about this time one of the dacoits at large fired his gun and killed one of the pursuing party:

Held, that inasmuch as the separation of the two accused from the gang was prior to the murder, neither section 149 nor section 34 of the Penal Code applied, and the accused could not be held liable for a murder committed by a member of the gang to which they no longer belonged;

(2) that as the prosecution had failed to prove that there was an intent to commit dacoity, or that the party made any movement towards the commission of a dacoity, the charge under section 399 of the Penal Code must fail;

(3) that since there was no proof that the common object was dacoity, nor any evidence that any force or violence was used by the accused party up till the time when the two accused were unwillingly removed from membership of the party, the accused were not guilty of an offence under section 148, Indian Penal Code;

(4) that the accused assembly of about 20 persons in a field at dead of night, many of these persons being armed with deadly weapons, was undoubtedly an unlawful assembly within the meaning of section 141, Indian Penal Code, and since both the accused were so armed, they were liable to punishment under section 144. **B. EMPEROR v. HARI BIJAL**, 17 Bom. L. R. 806; 16 Cr. L. J. 745 **345**

_____ **s. 326**—Nose-cutting—Sentence. Where the accused cut off his wife's nose and was

Penal Code—contd.

convicted under section 326, Indian Penal Code, and sentenced to rigorous imprisonment for four years, but on appeal, the Sessions Judge while maintaining the conviction reduced the sentence to imprisonment for two years:

Held, enhancing the sentence to the full period of four years, that nose-cutting was an offence for which leniency was, ordinarily speaking, quite out of place. **P. SIKANDAR v. EMPEROR**, 20 P. R. 1915 Cr.; 39 P. W. R. 1915 Cr.; 16 Cr. L. J. 782 **382**

_____ **s. 332** **995**

_____ **ss. 361, 363**—Kidnapping—Lawful guardianship—Lawful guardianship of Hindu minor widow—Deceased husband's mother, whether lawful guardian—Hindu Law.

The husband's relations, if any exist within the degree of a *sapinda*, are the guardians of a minor widow in preference to her father and his relations.

Where a minor Hindu widow takes up her residence with her deceased husband's mother with the consent, express or implied, of her husband's brother, the husband's mother is the lawful guardian of the girl for the purposes of section 361, Indian Penal Code. **P. EMPEROR v. TEK CHAND**, 27 P. R. 1915 Cr.; 16 Cr. L. J. 780 **380**

_____ **s. 363** **380**

_____ **s. 379**—Theft—Dishonest removal of property out of another man's possession to be proved.

Before an accused can be found to be guilty of the offence of theft, it must be found that he dishonestly took some property out of the possession of another person.

Where a tenant believing that a legal distraint had been made by his landlord of the crops of his holding which had been previously attached in execution of a decree against him cut and removed the crops:

Held, that the tenant was not guilty of theft inasmuch as he could not be said to have dishonestly taken the property out of the possession of any other person. **A. EMPEROR v. RAM DAYAL**, 13 A. L. J. 1058; 16 Cr. L. J. 812; 38 A. 40 **828**

_____ **ss. 380, 201, 511**—Theft—Causing disappearance of document, attempt of.

The accused brought a civil suit in the Court of the Subordinate Judge of Mungghyr on the basis of a forged promissory note. The file of the case was sent for and kept in the Court of the Additional Munsif of Jaunpur being required in connection with a suit pending in that Court and it somehow found its way to the house of an official of the Court. The accused got into the inner verandah of the house and removed the forged promissory note from the file. From that place, on being pursued, they tore it to pieces:

Held, that they were guilty of an offence under section 380, Indian Penal Code.

Held, further, that they were also guilty under section 201/511 of the Penal Code. **A. SHEONANDAN v. EMPEROR**, 16 Cr. L. J. 791 **647**

_____ **s. 409** **829**

_____ **s. 415**—Cheating—Wrongful gain or loss.

Section 415 of the Indian Penal Code does not

Penal Code—concl.

require, and does not say, that to constitute the offence of cheating, the wrongful gain must be made out of the person deceived. It simply provides that there may be either wrongful loss to the person deceived or wrongful gain to the person who deceives. *M. In re VENGOPAL MUDALI*, 16 Cr. L. J. 753

— — — s. 420	1001
— — — ss. 426, 451	337
— — — ss. 465, 468, 471	641
— — — s. 477A	829
— — — s. 511	647

Pensions Act (XXIII of 1871) 728**Pleadings.** See CIVIL PROCEDURE CODE, 1908, O. 6.

— — — Late stage of suit—Plaintiff, if can put forward inconsistent case	391
— — — New defence, whether can be raised in appeal	740
— — — New plea, raising of, first in appeal, propriety of	436
— — — Objection to admissibility, whether can be taken in appeal	600
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— — — Plea raised for first time, whether allowable	632
— — — Practice	833

Suit, when can be dismissed on pleadings alone—Distinction between actionable and non-actionable claim—Proper procedure.

The practice of non-suiting plaintiffs in other than absolutely plain cases, is to be deprecated.

Where, therefore, the plaintiff's suit for contribution was dismissed merely on the pleading without taking any evidence in the case as to the correctness or otherwise of the contentions on each side:

Held, that, as the distinction between an actionable and a non-actionable claim was a fine one, the only proper course in the case was to hear the evidence and examine the documents, and that, therefore, the case must be tried *de novo*. *M. VENKATARAMA AIYAR v. RAJAGOPALA IYER*, 29 M. L. J. 786

Poisons Act (I of 1904), s. 10, cls. (a), (b)—*Retail sale by unregistered seller, legality of.*

Retail sale of poison by a person is unlawful under section 10 of the Indian Poisons Act, unless exempted under clause (a) being a sale in exercise of his profession by a medical practitioner, or under clause (b) being a sale effected by a registered chemist or druggist.

The rules apply only to retail sales and wholesale sales are left uncontrolled. *L. B. N. M. DEY v. EMPEROR*, 16 Cr. L. J. 764; 8 B. L. T. 244

Police Act (V of 1861), ss. 7, 36—*Police Constable punished for corruption departmentally, whether can be also prosecuted criminally—Penal Code (Act XLV of 1860), s. 163.*

A Police Constable who has been dealt with

Police Act—concl.

departmentally for corruption under section 7 of the Police Act (V of 1861) can be prosecuted and punished under section 163 of the Penal Code. *P. EMPEROR v. GUL MUHAMMAD*, 26 P. R. 1915 Cr. 16 Cr. L. J. 788

s. 36**Practice.** See REMAND.

— — — Appeal—Difference of opinion on some points	565
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— — — Attachment of property, effect of—Omission to frame issue, effect of—Remedy—Certificate sale—Certificate proceedings, irregular—Sale, validity of—Statute, non-compliance with, effect of—Appellate Court, power of, to dismiss suit—Plaint not duly verified and signed—Procedure—Certificate, when invalid—Presumption—Official act, regularity of—Service of notice, proof of	664
— — — Complaint by Magistrate—Magistrate, jurisdiction of, to pass order in that case.	
A Magistrate ought not to make any order in any case in which he is even the nominal complainant. <i>A. RUP LAL v. EMPEROR</i> , 16 Cr. L. J. 801	817
— — — Criminal trial—Statement made by witness before Committing Magistrate, admissibility of, in Sessions trial—Witness procurable—Procedure	354

Gift by widow—Suit for declaration by reversioners—Decision on point not raised in pleas, legality of—Second appeal—Custom, validity of, question of, propriety of—Certificate, necessity of—Punjab Courts Act (XVIII of 1884), s. 40 (3)—Punjab Courts (Amendment) Act (I of 1912), s. 2.

In a suit for a declaration that a gift by a widow of certain ancestral land should not affect the rights of the plaintiffs, who were collaterals of the last male holder, the donee only pleaded that he was the appointed heir of the deceased male holder and though the property after the death of the male holder was mutated in the name of his widow, she was entitled to rectify the erroneous mutation by making the gift. The Court below, however, held that the donee was not the appointed heir, but that the widow was entitled to make the gift in favour of the donee for services rendered;

Held, that the general question of gift by a widow, was not properly before the lower Court and, therefore, the Court had no power to decide the case on that point.

Where the question raised in a second appeal is not the validity or existence of a custom but whether the validity or existence of a custom was a question properly before the lower Appellate Court, a second appeal lies without the certificate of such Court under section 40 (3) of the Punjab Courts Act (XVIII of 1884) as amended by Punjab Courts (Amendment) Act (I of 1912), section 2. *P. NUR ALI v. BAHAWAL*

Legal representative of deceased defendant not impleaded—Decree passed after death of defendant, whether valid—Objection taken in execution, legality of.

Practice—concl.

A decree passed after the death of a defendant and before his legal representative is impleaded, is null and void.

Objection can be taken to such a decree in execution and separate proceedings to avoid it are unnecessary. **M. SUBRAMANIA Aiyar v. VAITHINATHA Aiyar**, 38 M. 682 **193**

— *Mistake in preliminary decree passed by High Court—Final decree in accordance with High Court's preliminary decree passed by District Court—District Court, power of, to correct mistake—Interest on total amount awarded, if legal—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 2*

Where a District Court draws up its final decree in accordance with the High Court's preliminary decree, it cannot correct an error in its final decree as copied from the latter decree.

There is nothing in Order XXXIV, rule 2, of the Civil Procedure Code, which prevents a Court from providing in its own decree for interest on the total amount awarded because such total includes interest on the bond sued on. **M. PECHALAPALLI ADISESHADRI v. MUNGAMUR SIVARAMAYYA** **320**

— *Criminal Procedure Code (Act V of 1898), ss. 374, 376—Murder case—Trial by Jury—Reference—Appeal—High Court—Confirmation of sentence* **995**

— *Rateable distribution, application for, on Original Side—Certificates of Accountant-General and Registrar, necessity of* **616**

— *Rioting, charge of—Evidence against each accused, separate discussion of—Common object, mention of* **825**

Pre-emption. See **BUDDHIST LAW: PESAAR PRE-EMPTION ACT.**

— *, evasion of, by lawful means, effect of* **221**

— *Purchase by person having preferential right of pre-emption along with person having inferior right, effect of—Several vendees—Price paid in lump sum—Construction of document—Pre-emptor, sale by, after pre-emption decree, effect of.*

When a person having a preferential right of pre-emption joins in the purchase a person having an inferior right, he loses his right of pre-emption.

Where the purchase-money for a sale is paid in a lump sum without specification of the amounts paid by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed.

A pre-emptor does not lose his right of pre-emption by selling the land subsequent to the decree for pre-emption. **P. HARRIHARAT v. KALA** **635**

Presidency Small Cause Courts Act (XV of 1882), s. 9 **192**

s. 22 **662**

Presidency Towns Insolvency Act (III of 1909), s. 8—Protection order—Appeal—Aggrieved person—Application for protection to be judged on merits.

An interim protection order made under the

Presidency Towns Insolvency Act—concl.

insolvency jurisdiction is a judicial order and appealable.

The Legislature does not appear to have put any limitation upon appeals made from original orders of a Judge except perhaps orders regulating procedure.

A creditor who has not obtained a decree may be an aggrieved person within the meaning of section 8 of the Presidency Towns Insolvency Act (III of 1909), especially when the insolvent has himself prevented the creditor from attaining that position by opposing proceedings instituted by the creditor for the purpose.

Each application for protection after refusal or suspension of discharge must be judged on its merits. If the insolvent has acted recklessly and disloyally, the fact that he cannot pay is no reason for depriving the creditor of the power of punishing him by attachment and imprisonment to the extent the law allows. **B. MAHOMED HAJI v. ABDUL RAHMAN**, 17 Bom. L. R. 989 **507**

s. 17—Suit against adjudicated insolvent—Leave of Court, when to be obtained.

The leave contemplated under section 17 of the Presidency Towns Insolvency Act is leave which ought to be obtained before the commencement of a suit and cannot be granted after the same is filed. **B. INJE DWARKADAS TEJBHANDAS**, 17 Bom. L. R. 925 **948**

s. 17—Judgment-debtor adjudicated an insolvent—Court, whether has jurisdiction to entertain execution proceedings—Leave of High Court, necessity of—Security bond for appearance of judgment-debtor—Presidency Small Cause Courts Act (XI of 1882), s. 9, rules under.

When once a person is adjudicated an insolvent, creditors seeking any remedy against him must apply to a High Court on its insolvency side to get leave for that purpose.

A Court of Small Causes has, therefore, no jurisdiction without the leave of the High Court to entertain an application in execution after the judgment-debtor has been adjudicated an insolvent.

Quere.—Whether section 30 of the Presidency Small Cause Courts Act, or Order XXI, rule 27, of the Civil Procedure Code empowers a Presidency Court of Small Causes to take a security bond for the appearance of the judgment-debtor arrested in execution of a decree? **M. KASWARA Aiyar v. GOVINDARAJULU NAIDU** **192**

Presumption. See **HINDU LAW.**

— *Copy of documents 30 years old—Handwriting of copyist* **579**

— *Dying declaration, admissibility of—Certificate of correctness by recording Magistrate—Dying declaration reduced to writing—Substantive evidence* **359**

— *Grant, rent free, to excavate tank—Long possession* **391**

— *Grant—Severance of tenement—Easement* **549**

— *Lambardar, possession by.* **463**

Principal and agent—Agent, responsibility of, for an error of judgment—Indemnity—Refusal to indemnify, whether sufficient cause for rescission of contract—Sufficient cause—Agent's due on termination of contract **450**

————— **Insolvency proceeding** —
Notice served upon agent, if effectual—Agent appearing—Waiver—Agent, act of insolvency by, if act of principal—Power-of-attorney—General authority—Agency, termination of—Rules framed under s. 51, Provincial Insolvency Act, r. 21, cl. (3) **583**

————— **Liability of Government for tortious acts of its servants**—Government servant acting under statutory powers, whether agent—Illegal order—Government, whether liable **224**

————— **Nattukottai Chetty**—Contract—Promise to reward, construction of—Collection of old debts—Remuneration, amount of.

A promise to pay reward to deserving persons will be construed according to the circumstances of each case, the principle being, whether there is an unqualified contract to give something or the option of giving anything at all is left to the discretion of the proposed donor.

Where a Nattukottai Chetty impliedly agreed to give something extra to his agent as remuneration for the collection of outstandings left uncollected by the agent's predecessor, but did not fix a rate of percentage:

Held, that, in view of the nature of the business of Nattukottai Chetties, the contract was enforceable and the agent was entitled to a reasonable amount as remuneration. **M. VELLAYAM CHETTY v. KULANDA-VELUAPPA CHETTY**, 29 M. L. J. 749 **783**

————— **Silence or acquiescence of principal, whether amounts to ratification**—Agent obtaining pecuniary advantages for himself, duty of—Trusts Act (II of 1882), s. 88—Decree in favour of principal—Execution sale—Purchase by agent of immoveable property outside British India—Principal entitled to decree for mesne profits—Mandatory injunction directing reconveyance of property, whether allowed **216**

Privy Council Appeal. See **APPEAL**.

————— **Leave to appeal**—Appellate Court—Petitioner entitled to benefit of doubt—Civil Procedure Code (Act V of 1908), s. 110.

The petitioner claimed maintenance and Rs. 15,000 for residence. The Agent to the Governor before whom the suit was brought allowed maintenance at a certain rate and disallowed entirely the claim for residence. In appeal this claim was allowed, but the value of the claim was fixed at Rs. 5,000. The respondents' application for leave to appeal to His Majesty in Council was allowed and the petitioner then applied for leave to appeal to His Majesty in Council for the amount disallowed:

Held, that in view of the fact that an appeal had already been allowed to be filed by the other party, the leave prayed for should be granted.

Per Aylmer, J.—In dealing with an application for leave to appeal, the petitioner should have the benefit of any doubt in the order granting certificate. **M. VIKRAMA DEO GARU v. MAHARAJA OF JYEPPORE**, 18 M. L. T. 387 **272**

Probate. See **WILL**.

————— **Appeal—Division Bench, difference of opinion in**—Letters Patent, cl. 15, appeal under, if maintainable—Will, execution of, determination of—Comparison of signature with 7 or 8 years' previous signature, propriety of—Finding of fact, reversing of.

In a probate case an appeal under clause 15 of the Letters Patent is maintainable when the Judges of a Division Bench originally hearing the appeal differ in their opinion.

In order to decide whether a Will was executed or not, it is a dangerous ground to proceed on the estimate of the signature as derived from a comparison with other admitted signatures written seven or eight years before the signature on the Will and to reverse on that ground the appreciation of fact by the trial Judge. **C. PANCHUMONI DASSI v. CHANDRA KUMAR GHOSE**, 22 C. L. J. 298 **319**

Probate and Administration Act (V of 1881), s. 50—Probate, revocation of, application for—Genuineness of Will, question of, if arises—Just cause for revocation, question of, determination of—Assignment of properties after testator's death—Assignee, right of, to apply for revocation—Revocation, ground for—Fraudulent concealment of transfer.

In a Probate Court, after a Probate of a Will has been granted, no question of the genuineness of the Will arises for consideration till the Court has decided that the Probate must be revoked on one or more of the grounds specified in section 50 of the Probate and Administration Act.

Where an application for revocation of a Probate is made, the only question for consideration is whether the appellants have made out a just cause for revocation, and the application cannot be dismissed on the ground that the evidence adduced by the applicants for revocation, is not sufficient to throw doubt upon the genuineness of the Will.

A person interested by assignment in the estate of a deceased may, where a Will has been set up and proved at variance with his interests apply for revocation of the Probate of the Will so set up.

Therefore, if it is proved that a person has acquired by purchase an interest in the properties left by the deceased, he is entitled to be heard in the proceedings for grant of Probate.

Where a notice was served in a Probate proceeding upon a person who, a week before the service of the notice, had transferred his interest in the properties and where the fact of the transfer was known also to the applicant:

Held, revoking the Probate, that the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case. **C. MOKASHADAYINI DASSI v. KARNA-DHAR MANDAL**, 19 C. W. N. 108 **702**

————— **ss. 56, 76, 98**—Probate granted—Inventory, furnishing of—Property transferred by bifurcation of District to another District—Jurisdiction—Court granting Probate, if can demand inventory **489**

————— **ss. 76, 98** **499**
Procedure. See **COMPANIES ACT**, s. 150; See **PRACTICE**.

————— **Appeal—New party—Remand** **263**

Procedure—concl.

— — — — — Duty of Court to question accused
— Omission to do so, effect of **365**

— — — — — Execution—Decree—Suit conditionally decreed on payment of certain amount within certain time—Payment not made—Defendant's execution for costs **554**

— — — — — Pleadings—Suit, when can be dismissed on pleadings alone—Distinction between actionable and non-actionable claim—Proper procedure **704**

— — — — —, slack, effect of **876**

Provincial Insolvency Act (III of 1907), ss. 4, 12 (3), 51—*Insolvency proceeding—Notice served upon agent, if effectual—Agent appearing—Waiver—Agent, act of insolvency by, if act of principal—Power of attorney—General authority—Agency, termination of—Rules framed under s. 51, Provincial Insolvency Act, r. 21, cl. (3).*

A notice of proceedings in insolvency instituted by a creditor served on the agent of the debtor, is as effectual as if served on the debtor himself.

Although clause (3) of rule 21 of the rules framed under section 51 of the Provincial Insolvency Act, requires the notice to be served on the debtor himself by registered post, there is no express provision that it should be served only on the debtor. Where, therefore, an agent of the debtor gets notice of the proceedings and appears at the hearing he must be deemed to have waived any objection that he might have had to any supposed irregularities in giving the notice.

For the purposes of section 4 of the Provincial Insolvency Act, the act of an agent may be the act of the principal, and, therefore, where an agent departs from the place of business, it constitutes an act of insolvency on the part of the principal, though the English Law requires the act to be a personal act of the principal, i.e., the debtor himself.

Where the power-of-attorney, under which an agent acts, empowers him to do other acts besides carrying on the trade and dealing with his property, his agency does not terminate immediately on the presentation of a petition for the adjudication of his principal as insolvent. It subsists to stave-off bankruptcy orders against his principal. **M. KALIANJI SINGJI BHAI v. BANK OF MADRAS, 29 M. L. J. 788; 3 L. W. 13** **583**

s. 12 (3) 583

ss. 16 (2) (b), 43—

Application for arrest of insolvent debtor—Notice to show cause against re-arrest—Annulment of adjudication, how effected—Order of arrest by Subordinate Judge exercising Small Cause Court powers—Revision.

A Judge sitting in the Small Cause Court cannot divest himself of his powers as a Judge of that Court and immediately proceed to dispose of an oral application made to him to exercise his powers under section 16, clause 2 (b), of the Provincial Insolvency Act.

When a debtor is declared an insolvent, then so long as the order of adjudication subsists and is not annulled, he cannot be deprived of the immunity conferred upon insolvents by the insolvency Act, unless notice has been served upon him to show cause why he should not be arrested.

Provincial Insolvency Act—contd.

There will be no annulment of adjudication once made unless the procedure prescribed in sections 42, 44 and 45 of the Provincial Insolvency Act is followed. The mere fact that proceedings were contemplated under section 43 is not enough to show that the order of adjudication is annulled.

Where on an application being made in execution of a decree of the Small Cause Court to arrest the petitioner, who had already been adjudicated an insolvent, the Subordinate Judge directed the arrest, acting in the exercise of his powers as a Small Cause Court Judge:

Held, that no appeal lay to the District Court against the order made by the Subordinate Judge as a Judge of the Court of Small Causes and the only remedy was by way of revision to the High Court. **M. SESHAIYAR v. VENKATACHALAM CHETTIAR** **15**

s. 22—Receiver—Court's

functions—Remedy of purchaser in auction.

Section 22 of the Provincial Insolvency Act does not contemplate that a lengthy inquiry should be held in a complaint against the irregularities of a sale held by a Receiver in an insolvency case as if the matter was a regular claim for specific performance. Under that section the Court simply ratifies, reverses or modifies the executive acts of its officer and any order under that section does not preclude a party from pursuing his ordinary remedy by a suit for specific performance against the Receiver. **L. B. RAMAN CHETTY v. A. V. P. FIRM** **884**

s. 34—Attachment before

judgment, cash deposited as security for withdrawing—Defendant declared insolvent—Plaintiff, if acquires any right in security deposit—Receiver in insolvency, right of, to get the money.

Where the properties of the defendant, which were attached before judgment, are released on his payment of a cash security and the defendant is subsequently declared insolvent under Act III of 1907, the plaintiff acquires no lien or charge upon the money deposited as security for getting the attachment before judgment withdrawn and the Receiver in insolvency of the defendant's property is entitled to have the money paid to him.

Such money not having been realized in execution of a decree prior to the adjudication order, section 34 of Act III of 1907 does not apply. **G. PRAMODHA NATH v. MOHINI MOHAN SEN, 19 C. W. N. 1200** **573**

ss. 36, 37—Transfer

of property by insolvent shortly before his failure—Good faith, test of—Transfer by insolvent with a view to give preference to one creditor over others—Test—Pressure of creditor, effect of.

Under section 36 of the Provincial Insolvency Act the test of the 'bona fides' of a transfer made by an insolvent in favour of an incumbrancer shortly before his failure is, whether the lender intended that the advance should enable his debtor to carry on his business and whether he had a reasonable ground for believing that it would enable him to do so.

In considering whether a transfer of property made by an insolvent was so made with a view to give one creditor preference over other creditors, the test is "what was the predominant motive in the debtor's mind at the time of the transfer?"

Provincial Insolvency Act—concl'd.

Semble:—The pressure of a creditor excludes preference, which is a voluntary act on the part of the debtor. **S.** *In re FIRM OF MITHOMAL DWARKA DAS*, 9 S. L. R. 65

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s. 37

50

s. 37—*Lease by insolvent of his occupancy holding, validity of—Duty of Receiver.*

If an insolvent lets at a reasonable rent his occupancy holding, the transaction is valid and cannot be avoided under section 37 of the Provincial Insolvency Act, 1907.

It is the duty of the Receiver and the Court administering the estate of an insolvent to preserve, as far as possible, the estate of the insolvent for the benefit of the creditors. It is not desirable to give up any property that is of value. **A.** *DESEAJ v. SAGAR MAL*, 13 A. L. J. 1064; 38 A. 37

716

s. 43

15

s. 51

583

Provincial Small Cause Courts Act (IX of 1887), s. 25

880

Sch. II, art. 7—*Suit*

for enhanced kattubadi, whether cognizable by Court of Small Cause—*Second appeal.*

A suit claiming enhanced kattubadi on the ground of default in payment of the money rate, is not a suit for "enhancement of rent" within the meaning of clause 7, Schedule II, of the Provincial Small Cause Courts Act and is cognizable by a Small Cause Court and, therefore, no second appeal lies in such a suit. **M.** *CHILUKURI SITARAMAYYA v. VENKATA RANGAYYA APPA RAO*

871

art. 8—*Special authori-*

zation personal—Rent for homestead land—Con-

struction of Statute.

The special authorization contemplated by clause (8) of the second Schedule to the Provincial Small Cause Courts Act is entirely personal to the presiding Judge.

Semble:—By enacting clause 8 of Schedule II to the Provincial Small Cause Courts Act the Legislature intended that suits for the recovery of rent should be tried under the Small Cause Court procedure only by such Judges as have been expressly authorized to exercise jurisdiction in that behalf: it was not intended that jurisdiction should be conferred by a general order on a particular Small Cause Court, irrespective of the qualifications of the individual officer who may preside therein. **C.** *SAFER ALI MANDAL v. GOLAM MANDAL*, 19 C. W. N. 1236

177

art. 13—*Suit to recover*

dues of hereditary office—Jurisdiction.

A suit by an archaka of a temple to recover the dues of his hereditary office from the trustee is within the exemption contained in clause (13) of Schedule II of the Provincial Small Cause Courts Act (IX of 1887), and is, therefore, not cognizable by a Court of Small Causes. **M.** *SUBBAYA ACHARYA v. KESAVA UPADHAYA*, (1915) M. W. N. 846

206

art. 31—*Suit to*

recover damages for wrongful removal of fruits—*Question of title, decision of*

5

Provincial Small Cause Courts Act—concl'd.**Sch. II, art. 31**—*Suit of Small*

Cause Court nature—Right of fishery—Second appeal.

Where the plaintiff brought a suit to recover a certain sum of money on the allegation that a particular tank was the joint property of the parties and that the defendant had caught fish from the said tank and appropriated the entire fish by selling them for his own benefit:

Held, that the suit was one of the nature cognizable by the Small Cause Court and that, therefore, no second appeal lay. **A.** *NARAIN DAS v. HARAKH NARAIN LAL*

797

Public Gambling Act (III of 1867),

ss. 1, 3—*'Place,' interpretation of—Enclosure within low brick walls, if place.*

Round the sides of a bullock-run, in the shape of a semi-circle there had been raised a low wall of loose-bricks and it was within the shelter of this low brick-wall that gambling took place:

Held, that the enclosure was a place, within the meaning of the Gambling Act. **A.** *EMPEROR v. MIAN DIN*, 13 A. L. J. 1070; 16 Cr. L. J. 826; 38 A. 47

1002

Punjab Alienation of Land Act (XIII of 1900), s. 3(3)

199

Punjab Courts Act (XVIII of 1884), s. 41

797

s. 40(3)

386

Punjab Courts (Amendment) Act (I of 1912), s. 2

386

Punjab Courts Act (III of 1914), s. 41

800

Punjab Government Tenants Act (III of 1893), s. 8—*Agreement to allow others*

to occupy land granted by Government, whether binding.

Where a Government tenant executed a deed of agreement in favour of his three brothers whereby he let them occupy one-half of the land included in the Government grant and on his subsequently seeking to eject them, the brothers sued to have the notice of ejectment cancelled:

Held, that the agreement admitting the plaintiffs to a share in the tenancy without the previous consent in writing of the Financial Commissioner was void, as being in contravention of section 8 of the Government Tenants (Punjab) Act, 1893, and could not be relied on. **P.** *VIR SINGH v. KALA SINGH*, 3 P. R. 1915 Rev.

400

Punjab Laws Act (IV of 1872), s. 9

—Sale—Exchange—Consideration—Money and land—Principle on which nature of transaction should be determined—Pre-emption, evasion of, by lawful means.

Every transaction in which the consideration does not consist merely of money but also of the conveyance to the vendor by the vendee of some land, must be considered upon its own facts to decide whether it is purely a sale or an exchange or is of a mixed character, being partly sale and partly exchange.

Where the consideration for a transaction consisted of a cash payment of Rs. 3,600 and the transfer by the vendee to the vendor of land valued at Rs. 1,100 and the transaction was an indivisible one;

Punjab Laws Act—concl'd.

Held, that the transaction was not a 'sale' which could be pre-empted.

The evasion of pre-emption by lawful means is quite legitimate. **P. GUL MUHAMMAD v. TOTA RAM**, 82 P. R. 1915; 172 P. W. R. 1915 **221**

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), art. 1**Punjab Pre-emption Act (II of 1905), s. 12—Pre-emption—Pre-emptor co-sharer in shamilat land.**

In applying section 12 of the Pre-emption Act only the proprietary land and not the *shamilat* land of the pre-emptor is to be considered, as for purposes like this *shamilat* is a mere appurtenance of the proprietary land. **P. JAWALA SINGH v. LADHA**, 173 P. L. R. 1915; 114 P. W. R. 1915 **272**

s. 13—'Shop', meaning

of—Residential place with an oven for making rotis, whether shop.

The question whether upon certain facts found a building should or should not be held to be a 'shop' within the meaning of section 13 of the Punjab Pre-emption Act, 1905, is one of law and constitutes a good ground for second appeal.

The word 'shop' in its ordinary meaning denotes a building or an apartment which is primarily used for buying and selling goods.

Where a place was primarily used as a residential place:

Held, that it was not a shop although there was in it an oven for cooking *rotis* for any one who brought his own flour for the purpose and paid in cash or in kind for baking the *rotis*. **P. BHAMBA RAM v. ALGAH BAKSHI**, 69 P. R. 1915; 156 P. W. R. 1915 **191**

s. 16—Notice issued by

Naib-Tahsildar, whether valid—Waiver—Punjab Alienation of Land Act (XIII of 1900) s. 3 (3).

Where a Naib-Tahsildar, under the orders of the Deputy Commissioner, issues a notice with a view to find out whether any member of an agricultural tribe is willing to purchase the land proposed to be sold at a certain price to a person who is not a member of an agricultural tribe, the notice is not one given through any 'Court' as required by section 16 of the Pre-emption Act (II of 1905) and a pre-emptor who asserts his right of pre-emption but protests against the reasonableness of the price at which such land is offered to be sold, does not lose his right of pre-emption. **P. KARAM CHAND v. GHULAM HASSAN**, 74 P. R. 1915 **199**

Punjab Pre-emption Act (I of 1913), ss. 2 (3), 22 (4) (a)—Construction of Statute—Retrospective effects—Punjab Pre-emption Act (II of 1905), s. 11—Proviso—Period of 20 years, computation of.

Section 2 (3) of the Punjab Pre-emption Act (I of 1913) was not intended to give and does not give retrospective effect to sub-section (4) (a) of sections 22 and this sub-section can only apply to a case in which the money deposited by a plaintiff in a pre-emption suit is withdrawn by him after the new Act has come into force. In other words, section 22 (4) (a) when read with section 2 (3) of the Act does

Punjab Pre-emption Act—(1913)—concl'd.

not enjoin the dismissal of an appeal preferred by the pre-emptor in a case where he had withdrawn the money deposited by him in Court before the new Act came into operation.

A pre-emptor who claims the benefit of the proviso to section 11 of the Punjab Pre-emption Act (II of 1905) should prove the existence of *continuous record of ownership of land*, on the strength of which he claims pre-emption, for a period of 20 years *immediately preceding* the date of sale, either in his own name or in that of an agnate of his. In other words, the period of 20 years, referred to in the proviso, over which the record of ownership should extend, should be computed back from the date of sale and if there occur any break, for however short a period, in the record of ownership in the name of the pre-emptor or any other agnate of his, he would forfeit the benefit of the proviso. **P. PRITHVI CHAND v. SAFA CHAND**, 75 P. R. 1915; 157 P. W. R. 1915 **202**

s. 22 (4) (a)**Punjab Tenancy Act (XVI of 1887), ss. 4 (15), 5 (1) (d)—Muafi—Mujawar—Village servant—Jagirdar.**

The *mujawar* of a village *khargah* to whom some land has been granted as a 'muafi' by the village proprietors for the maintenance of the *khargah*, is a 'village servant', and is, therefore, excluded from the definition of 'Jagirdar' as given in section 4 (15) of the Punjab Tenancy Act. **U. P. B. R. SORSA v. KHAWAJA**, 4 P. R. 1915 Rev. **238**

s. 5 (1) (d)**Railway Act of Canada. (Rev. Stat. 1906, c. 37), s. 340****Railway Company. See CARRIER.**

—goods consigned to—Non-delivery—Suit for compensation—Limitation—Cause of action—Common carrier, liability of—Special contract, effect of **474**

Raiyat. See LANDLORD & TENANT.**Ratification—Continuing obligation**

Receiver. See CIVIL PROCEDURE CODE, 1908, O. 40, R. 1, 5; PROVINCIAL INSOLVENCY ACT, s. 37.

Registration Act (XVI of 1903), s. 17

ss. 17, 49—Book containing formal declaration of division of status of members of joint Hindu family unregistered, admissibility of, in evidence for proving divided status of family.

In the course of certain partition proceedings among the members of a joint Hindu family, consisting of a father, his two undivided sons and a grandson by a predeceased son, separate lists were prepared of the properties, both moveable and immovable, in the possession of the several members of the family and available for division. These were entered in a book together with the value of such properties. The several lists were then totalled up and the value of the share of each member ascertained and thereunder the following note appeared:—"In the presence of the witnesses named hereunder we divided." Below this note, the parties and the witnesses signed:

Registration Act—(1908)—concl'd.

Held, that the book containing the above entries was a formal declaration of division of status attested by witnesses and that as such, it affected the immovable properties mentioned therein and that not being registered, it was inadmissible in evidence to prove even the divided status of the members of the family. **M. AYYAKUTTI MAMKONDAN v. PERIASAMI KOUNDAN**, 2 L. W. 1184

615

s. 17—*Compromise in Court—Perpetual lease executed but not registered—Mention of lease in compromise—Terms not entered—Lease, admissibility of, in evidence.*

A previous suit for ejectment was compromised. A *sulehnama* was written and filed in the Court. A lease was executed on the same date giving particulars of the terms upon which the land was to be held by the tenant. The lease was a perpetual lease, but it was not registered. In the *sulehnama*, the lease was mentioned but the terms were not mentioned.

Held, in a subsequent suit for ejectment, that the lease, not being registered, was inadmissible in evidence. **U. P. B. R. HARPAL SINGH v. KANDHIVA BUX MISIR**

449

s. 17—*Compromise incorporated in decree of Court, whether requires registration—Transfer of property by a Hindu in favour of a Hindu widow, effect of—Transfer of Property Act (IV of 1882), s. 8.*

Section 17 of the Registration Act does not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the Court.

Where, therefore, a compromise arrived at by the parties to a case is incorporated in the terms of the decree of the Court, such compromise can be adduced in evidence in a subsequent suit notwithstanding that it has not been registered.

Where, a claim by a Hindu widow to a certain property as absolute owner was compromised by giving to the claimant one-fourth of the property in dispute and it was admitted that this one-fourth was far in excess of what she would have been entitled to get if it were intended merely to take the place of her maintenance:

Held, that the presumption of Hindu Law that in a transfer by a Hindu male to a Hindu female only a limited estate is granted, did not apply and that the transfer was an absolute transfer governed by section 8 of the Transfer of Property Act. **M. SANKARAVELU PILLAI v. MUTHUSAMI PILLAI**, 18 M. L. T. 497; 29 M. L. J. 779; (1915) M. W. N. 956

260

s. 17—*Document promising to do some act in future, if requires registration*

708

ss. 17, 49—*Unregistered lease, terms of, whether admissible for proving fair rent for use and occupation.*

A lease of immovable property which is compulsorily registrable and not registered, cannot be looked at for the purpose of determining the fair amount of occupation rent payable in respect of the property which formed the subject of that demise. **M. ANNAMALAI CHETTY v. POOSARI SUPPIA**, 2 L. W. 1034

279

Registration Act—(1908)—cont'd.

s. 17 (1) (b)—*Agreement to re-sell—Consideration—Offer kept open till certain time, effect of.*

Where A sells a house and site for Rs. 1,500 to B by a registered deed and B on the same or the following day agrees to sell the property to A for the same amount in writing, B's agreement is compulsorily registrable as it is not merely an agreement to sell which does not require registration, but is one which creates a right of redemption for that amount.

An offer to sell and to keep the offer open to a certain day is *voidum pactum* and can at any time before acceptance be recalled. **L. B. MATHURAN. H. M. YASSIN**

390

s. 17 (d)

604

s. 17, sub-s. (2), cl. (1)
Petition embodying terms of compromise incorporated into judicial record—Registration, whether compulsory—Evidence, admissibility in.

A widow applied for Letters of Administration as being the person solely entitled to the estate of her deceased husband, but the application was opposed by the relations of the deceased and she filed a suit for a declaration that she was in possession of the estate and entitled to the whole of it. The parties, however, came to terms and drew up a draft agreement. A petition was then presented to the Court embodying *verbatim* the terms agreed upon and praying for a decree in terms of the compromise. Subsequently the plaintiff withdrew from the suit on the basis of the compromise and the suit was dismissed. The defendants then sued the widow for rendition of accounts of the estate and it was conceded that their claim must fail unless they could put in evidence the terms of the agreement entered into between the parties in the previous suit.

Held, that the petition embodying the terms of the compromise formed part of the pleadings of the parties in the case and being incorporated as such into the judicial record, did not need registration in order to make it admissible in evidence for the purpose of this suit. **P. ROBERT SKINNER v. JAMES SKINNER**, 91 P. R. 1915

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ss. 32, 34, 35, 77—*Suit to compel registration—"Person executing the document", meaning of—Agent—Court, duty of, while proceeding under s. 77—Object of registration—Actual executant—Constructive executant—Suit, maintainability of.*

The phrase "person executing the document" and its derivatives as used in sections 32, 34, 35, 48 and 73, Indian Registration Act, refer to the person who actually signs or marks the document in token of execution, whether for himself or on behalf of some other person; and he is the proper defendant in a suit brought to compel registration under section 77, Registration Act.

A Registering Officer has to satisfy himself that the document was executed by the person by whom it purports to have been signed, not constructively but actually. Neither the Registrar nor a Court proceeding under section 77 has any concern with the legal effect of the document, *e. g.*, when the executant is an agent professing to execute for a principal, whether he has authority to execute.

Registration Act—(1908)—concl'd.

Registration is designed to guard against fraud by obtaining a contemporaneous publication and an unimpeachable record of each document, and for that purpose, the Registering Officer has only to be satisfied that a certain person, not being a minor or lunatic, admits having signed or marked the deed which purports to have been executed by him.

Where a deed is executed by an agent for a principal and the same agent appears and presents the deed or admits execution before the Registering Officer, that is not a case of presentation under section 32 (c) of the Act or appearance and admission by agent under section 34 (1) and 35 (b). It is a presentation, appearance or admission by the actual executant himself.

A person who executes in favour of another any document which is compulsorily registrable, is bound *ipso facto* to assist in having that document registered, wholly irrespective of its legal effect upon himself or any other person. **N. MOTILAL P. GANGA BAI, 11 N. L. R. 177**

ss. 34, 35	867
s. 49	279, 604, 615
s. 77	867

Regulation XVII of 1806—Mortgage by conditional sale—Foreclosure proceedings—Notice, service of, on de facto guardian of minor mortgagor, whether sufficient—Consideration, receipt of, denial of—Burden of proof.

In foreclosure proceedings taken in a mortgage by conditional sale, a notice under Regulation XVII of 1806 delivered to the *de facto* guardian of a minor mortgagor is sufficient, whether that person is described as *de facto* guardian in the notice or not.

If the executant of a mortgage-deed, who admitted receipt of consideration at the time of registration denies the receipt of consideration, the burden of proving its non receipt is on him. **P. JOWALA SINGH, v. TULSA RAM, 78 P. R. 1915; 173 P. W. R. 1915 212**

S. 7—Legal representative, meaning of—'Amount due', meaning of—Redemption by owner of share in equity of redemption or by person having interest in portion of mortgaged property, if allowed.

The expression 'legal representative' ordinarily designates a person who represents the estate of a deceased but in Regulation XVII of 1806, it is used to denote a person who is the mortgagor's representative in law *qua* the mortgaged property. In other words, it means any person who is interested in protecting the estate and it is immaterial whether the interest is created by the operation of law or by a contract between the parties.

The words 'amount due' in the proviso to section 7 of the Regulation refer to the earlier portion of the section and denote the sum lent under a mortgage-deed *plus* the interest, if any, but do not include the costs of improvements or the rent which under the deed may be chargeable on the estate.

When a mortgage is with possession, the amount required to be deposited is the sum lent under the mortgage.

Any person who is entitled to redeem may make the deposit though he is owner of only a share in the equity of redemption,

Regulation—concl'd.

A person having an interest in a portion of the mortgaged property is entitled to redeem the whole, unless his claim is opposed by a part owner of the equity of redemption (who may be the mortgagee himself), and in that case he must redeem only the part to which he is entitled. **P. FAZL-UD-DIN v. KHARAK SINGH, 83 P. R. 1915; 41 P. W. R. 1915**

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Religious Endowments Act (XX of 1863), ss. 8, 10—Devasthanam Committee, vacancy in—Appointment by District Judge—Evidence not taken—Order, if legal—Revision, maintainability of—Nature of proceedings—Qualifications laid down in s. 8, if apply to vacancies subsequent—Improper appointments, how set aside—Civil Procedure Code (Act V of 1908), s. 141—Madras Civil Rules of Practice (Mofussil), r. 94, applicability of, to proceedings under s. 10 of Religious Endowments Act.

A District Judge, acting under section 10 of the Religious Endowments Act, XX of 1863, is not bound to take evidence before appointing a person to the vacancy of a member of the Devasthanam Committee.

Per *Sadasiva Aiyar, J.*—Rule 94 of the Civil Rules of Practice (Mofussil), in so far as it goes beyond section 141, Civil Procedure Code, 1908, is *ultra vires* and in so far as it is in conformity with the said section is unnecessary.

The omission in rule 94 of the Civil Rules of Practice (Mofussil) of the qualifying words 'as far as it can be made applicable,' occurring in section 141, Civil Procedure Code, 1908, cannot make the procedure in regard to suits applicable in their entirety to all original petitions, if by the very nature of such petitions portions of the procedure relating to suits cannot be made applicable to such petitions.

The nature of an application under section 10 of the Religious Endowments Act, invoking the District Judge's power of appointment to the vacancy of a member of the Devasthanam Committee, makes that part of the procedure in the trial of suits which relates to the taking of evidence not obligatory on the District Judge, though there is nothing to prevent his taking such evidence.

Neither appeal nor revision lies against an order passed by a District Judge under section 10 of the Religious Endowments Act, as it is informal in its nature and is one passed outside the Ordinary Civil Jurisdiction of the District Court.

The qualifications contained in section 8 of the Religious Endowments Act, regarding Committee Members apply to vacancies filled up under section 10 of the said Act.

A person improperly appointed under section 10 can be removed either by proceedings by *quo warranto* or by injunction.

Per *Napier, J.*—Neither section 141, Civil Procedure Code, 1908; nor rule 94 of the Civil Rules of Practice (Mofussil), applies to proceedings under section 10 of the Religious Endowments Act.

Proceedings under section 10 of the Religious Endowments Act are not judicial proceedings, and they do not amount to a 'case' within the meaning of section 115, Civil Procedure Code.

Quære.—Whether an order passed by a District

Religious Endowments Act—concl.

Judge under section 10 of the Religious Endowments Act, appointing a person to a vacancy in the Devasthanam Committee can be revised by the High Court?

A High Court will not under section 15 of the Charter Act interfere with a carefully considered order of a lower Court. **M. SUBBIAH v. ABBAY NAIDU**, 29 M. L. J. 671; 18 M. L. T. 46; 2 L. W. 1099 **502**

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Res Judicata. See CIVIL PROCEDURE CODE, 1882, s. 13; CIVIL PROCEDURE CODE, 1908, s. 11.

Erroneous decision on point of law, if res judicata.

An erroneous decision on a question of law in a previous suit is no bar to a subsequent suit between the same parties, but the findings of facts and the relief given in a previous suit may operate as res judicata. **M. VESRARAGHAVA v. KRISHNASWAMI** **269**

Execution—Dismissal of application—Order for execution, whether res judicata **293**

Resulting trust. See TRUSTS ACT, s. 83.

Revenue—Duty of registered holder to pay Government revenue—Co-sharers whether personally liable—Charge on estate—Suit to enforce charge—Jurisdiction **255**

Reversioner, suit by. See CUSTOM.

Reversioner's suit—Starting of limitation **290**

Review—Evidence not originally available—Application for review **196**

Revision (Civil). See CIVIL PROCEDURE CODE, 1908, s. 115.

(Criminal)—High Court, power of, to direct Subordinate Magistrate to take additional evidence—Jurisdiction—Order prohibiting use of public street, interference with—Sentimental caste objections, if to be considered **367**

Unreliable evidence—Conviction, legality of—Criminal Procedure Code (Act V of 1898), s. 439.

Where the persons who restored the stolen property to its owner deposed that it was recovered from the petitioner and he was consequently convicted under section 457, Indian Penal Code, but no name of any burglar was given in the first report to the Police and their evidence was not reliable according to the circumstances of the case:

Held, on revision that the lower Courts were not justified in believing it and convicting the petitioner. **P. MACHIA v. EMPEROR**, 28 P. W. R. 1915 Cr. 16 Cr. L. J. 737 **337**

Rioting. See PENAL CODE, s. 147.

Riwaj-i-am, entry in, effect of **294**

entry in, whether instances necessary to give effect to—Custom **740**

Sale. See EXECUTION.

Exchange—Consideration—Money and land—Principle on which nature of transaction should be determined—Pre-emption, evasion of, by lawful means **221**

Sale—concl.

of immoveable property less than Rs. 100 in value—Unregistered sale-deed—Possession delivered—Title, if passes—Sale-deed, if evidence of contract to sell—Transfer of Property Act (IV of 1882), s. 54.

In the case of immoveable property of the value of less than Rs. 100, the existence of an unregistered deed of sale does not prevent the transferee from relying on an oral sale followed by possession and the unregistered document can be used as evidence of the contract to sell. **M. KATHARI NARASIMH RAO v. BHUPATI RAJ**, 18 M. L. T. 371; 2 L. W. 901; 29 M. L. J. 721; (1915) M. W. N. 819 **52**

Sanad. See OUDH ESTATES ACT, s. 2.

Second Appeal. See APPEAL.

Security to keep the peace. See CRIMINAL PROCEDURE CODE, s. 107.

Shamlat—Entry in two successive Settlements that all members of certain tribe are entitled to share in shamlat—Contingent entry in third Settlement—Declaratory suit—Cause of action

In the Settlement of 1863, it was entered that the shamlat of the village belonged to all the members of a certain tribe and this entry was repeated in the Settlement of 1887, but in the Settlement of 1900 it was provided that it belonged to only one section of the tribe:

Held, that the last entry was unauthorised and was not of much evidential value as there was nothing on the record to show why the entries of the two previous Settlements were changed and the new entry substituted in the place.

Where defendants have done no overt act amounting to an invasion of plaintiffs' right, the mere allegation in the plaint that the defendants consider themselves co-sharers and openly deny the plaintiffs' exclusive proprietary rights in the land, cannot furnish the plaintiffs a definite cause of action so as to enable them to seek declaration of their title. **P. BUDHA KHAN v. MOHAMMAD**, 133 P. W. R. 1915 **267**

Land—Possession of portion by one co-owner—Dispossession—Suit for possession—Possession, nature of, allowed—Joint possession.

In the absence of a special custom whereby a proprietor can hold exclusive possession of a portion of the shamlat until its partition, he is entitled to joint but not exclusive possession if he is ousted by other proprietors in the village. **P. NIHAL SINGH v. MAL SINGH**, 160 P. W. R. 1915 **262**

Sir land. See U. P. LAND REVENUE ACT, s. 4 (12).

Small Causes Court—Jurisdiction—Damages for use and occupation, suit for—Title, determination of—Presumption from occupation—Rent.

A Court of Small Causes has jurisdiction to go into the question of title arising incidentally in a suit for damages for use and occupation.

A purchaser of immoveable property can sue its occupant for damages for use and occupation, if the occupant had occupied the premises with the consent of the previous owner but had been served with a notice that he would no longer be allowed to occupy it free of rent. A presumption to pay rent arises from occupation. **L. B. YOO JOO SEIM v. MAUNG BA TIN** **893**

Specific performance—Contract to sell land—Contract set up different from that proved—Time not of the essence of the contract—Part performance of contract set up—Specific performance of contract proved—Contract with managing member of Hindu family—Sons, whether liable as legal representatives after his death—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint.

A suit for the specific performance of a contract to sell land is not liable to be dismissed merely on the ground that the contract proved in the case is different from the contract alleged in the plaint.

Where time is not of the essence of the contract and especially where there has been a part performance of the contract as alleged by the plaintiff, the Court should allow an amendment of the plaint (if necessary) under Order VI, rule 17, of the Civil Procedure Code, and decree specific performance of the contract as proved.

Where the suit is on a personal contract entered into with the managing member of a Hindu family, it can, on his death, be enforced against the sons and they will be liable, as legal representatives, to fulfil the contract in the place of their father if that contract is, according to Hindu Law, binding on them. But where the sons plead that the sale is not for a legal necessity and that they are not bound by the contract of their father to sell his share in the plaint lands, a Court would be justified in refusing to decree specific performance against them. **M. SHUNMUGAM CHETTY v. SUBBA REDDI** I

Specific Relief Act (I of 1877), s. 9—Adhikar, position of—Tenant or labourer—Suit for possession by adhikar, maintainability of—Civil Procedure Code (Act V of 1908), s. 115.

An *adhikar* is generally a tenant and as such his possession would be protected under section 9 of the Specific Relief Act.

Therefore, a decision in favour of an *adhikar* under section 9 of the Specific Relief Act is not liable to be revised under section 115 of the Civil Procedure Code, 1908, in the absence of proof that the *adhikar* is not a tenant but a labourer. **C. DEN NATH DAS v. RAM SUNDAR BARMAN**, 19 C. W. N. 1205, 579

s. 9—Plaintiff in joint possession with defendant—Court, whether can restore such possession.

A Court has no power to give joint possession to the plaintiff and the defendant in a suit under section 9 of the Specific Relief Act. **M. PARA KOOTHAN v. PARA KULLA VANDU**, 29 M.L.J. 760 720

s. 39—Suit for cancellation of sale-deed—Consideration, non-payment of—Intention to effect transfer—Vendor and purchaser—Vendor's right to demand payment—Deed intended to operate on death of vendor—Will—Construction.

Where there is a deed purporting to convey property for consideration and it is found that no consideration passed, one of the questions to be determined in a suit for cancellation of the deed is whether there was any intention to effect a transfer. If there was, the failure to pay the consideration does not necessarily make the sale-deed void or voidable but may only give the right to payment of the consideration together with a lien on the property until the consideration is paid.

Specific Relief Act—concl'd.

Where in a suit for cancellation of a sale-deed purporting to convey certain properties, it appeared that no title was intended to pass under the document until the death of the plaintiff-vendor, on which the properties would vest in the defendant-vendee:

Held, that the document was really intended to operate as a Will and was revocable by the plaintiff at any time. **M. GOVINDASAMY RAJA v. KUPPAMMAL** 77

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Stamp Act (II of 1899), s. 44, scope of—Stamp duty and penalty—Joint executants—Contribution.

Section 44 of the Indian Stamp Act is only intended to give a right to an innocent party, not guilty of any default in the matter of the proper stamping of a document, to recover the duty and penalty he is obliged to pay from the person or persons guilty of default and is not intended to enable one of several persons, who were under a common duty to pay the proper stamp duty on a document in proportionate shares, to claim from the others contribution in respect of the amount of the stamp duty and penalty which he has been compelled to pay in full owing to their common default. **M. RAMAN CHETTY v. NAGAPPA CHETTY**, 2 L. W. 1024 285

ss. 65, 70—Failure to

affix stamp to receipt—Sanction of Collector, if necessary for prosecution.

A Magistrate has no jurisdiction to try a person in respect of an offence alleged to have been committed under section 65 of the Stamp Act, 1899, without the sanction of the Collector being first obtained to the institution of the prosecution. **P. EMPEROR v. RAMJILAL**, 21 P. R. 1915 Cr.; 38 P. W. R. 1915 Cr.; 16 Cr. L. J. 787 643

s. 70

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Sch. I, arts. 45, 55—Com-

promise—Partition—Release, deed of.

Where each of the two rival claimants to a property claims to be the sole and full owner of the property but in order to avoid litigation agrees to release in favour of the other a certain portion of it, the deed executed by either of them is a deed of release and not a deed of partition and is liable to a stamp duty under Article 55 of Schedule I of the Stamp Act. **A. JIBAN KUMAR v. GOVIND DAS**, 13 A. L. J. 1109 404

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Subrogation. See MORTGAGE.

Succession. See AGRA TENANCY ACT, s. 22; CUSTOM; HINDU LAW.

Succession Act (X of 1865), s. 187—

Party claiming under Will, what must prove—Issue of Probate postponed on account of applicant's failure to pay stamp duty—Legatee, when can maintain suit for administration.

A party claiming an interest under a Will must prove the execution of the document and its terms by the particular procedure prescribed by section 187 of the Succession Act.

Succession Act—concl.

Where, therefore, in a suit by the testator's widow against his executor, it appeared that the defendant did apply for Probate and that the fiat of the Judge was obtained, but that the actual grant had not been issued through the failure of the defendant to pay the stamp duty leviable under the Court Fees Act:

Held, that, as the plaintiff claimed as heir of a legatee, she was under section 187 of the Succession Act in the position of a legatee and must establish her title by production of the evidence required by the section in order to be able to maintain the suit. **M. ALAMELAMMAL v. SURAYAPRAKASAROTA**, 20 M. L. J. 680; 38 M. 688 **491**

Succession Certificate Act (VII of 1889)—*Muhammadans governed by Marumakkattayam Law*—*Karar*—*Self-acquisition to lapse to tavazhi*—*Construction of document*—*Power to dispose of in life-time.*

A *karar* or family settlement among the members of a Muhammadan family governed by Marumakkattayam Law ran in the following terms:—

"The properties acquired by the members of each *tavazhi* as their own as well as those that may be so acquired, shall on the death of such acquirers, lapse only to their *tavazhi*."

Held, that there was nothing in the language of the instrument to show that the acquirer of the property debarred himself from dealing with it during his life-time either by alienation *inter vivos* or by means of a Will, and that, therefore, a legatee claiming under such a Will made by such a member was *prima facie* entitled to a succession certificate. **M. KOYATTI HAJI v. KOYAMAN KUTTI HAJI** **446**

s. 4 (a)—*Proof of representative title*—*Joint Hindu family, death of a member of*—*Survivors, whether require certificate to realize debts of family*—*Partnership*—*Death of a partner*—*Surviving partner, if requires certificate to entitle him to effects of deceased*—*Contract Act (IX of 1872), ss. 45, 263.*

When one member of a joint undivided Hindu family dies, the other members succeed to him by survivorship and do not require any succession certificate in order to sue for debts due to the family.

In the case of a partnership if a partner dies, the surviving partner does not succeed to the dead partner by survivorship and if the surviving partner claims to be entitled to the effects of the deceased person as due to himself alone, a succession certificate is required. **P. GURDITTA MAL v. DHARI MAL** **904**

Succession and Inheritance, distinction between **106**

Suit—Compromise—Decree, binding force of.

When a case is settled by compromise, the decision is as binding as if it had been decided after hearing evidence and it is not permissible to go behind that decision and enquire whether the decision might have been different if evidence had been adduced. **U. P. B. R. BISHESHAH DASS v. SACHIRUNNISA** **902**

—*for declaration*—*Non-proprietors living in village on sufferance*—*Wajib-ul-arz recording exclusive right of proprietary body to refuse of village, whether binding on non-proprietors.*

The non-proprietary body of the village of Nizamabad brought a suit for a declaration that the

Suit—concl.

refuse and sweepings of the village were not the exclusive property of the defendants, the proprietary body, but that the plaintiffs had a right to dispose of and, if necessary, to sell the sweepings and refuse of their own houses:

Held, that as the non-proprietors lived in the village on sufferance on sites belonging to the proprietary body, the provision of the *wajib-ul-arz* specifying that all refuse from their houses should be the perquisite of the proprietary body was not inequitable and that the plaintiffs were not entitled to the declaration sought for. **P. KARIM BAKHSH v. ALTAH ALI**, 18 P. R. 1915; 180 P. W. R. 1915 **469**

—*Decree for possession conditional on payment of money—Decree not executed—Second suit, whether maintainable* **205**

—*for land and suit for money claims, distinction between* **189**

—*Person holding *chaklatnamah*, appearance by—Privilege denied—Suit to declare right, maintainability of* **310**

—*Promissory note filed with plaint missing from Court records—Copy filed—Suit, if fails* **30**

—*Property attached under section 146, Criminal Procedure Code, suit to recover possession of, and for declaration—Limitation—Continuing wrong—"Dispossession," meaning of—"Discontinuance of possession," meaning of—Attachment, ownership during—Continuing injury—Suit against Magistrate, if maintainable—Specific Relief Act (I of 1877), s. 42—Criminal Procedure Code (Act V of 1898), s. 46* **242**

—*remitting of—Determination of other questions* **240**

—*right of—Criminal Procedure Code (Act V of 1878), ss. 523, 524, distinction between—Claim under section 523 disallowed by Magistrate—Aggrieved person, right of.*

The special provisions relating to investigation of claims to property mentioned in section 523 Criminal Procedure Code, do not deprive the person aggrieved of any right of action.

The distinction between a case under section 523 and one under section 524 of the Code of Criminal Procedure suggested by the Judges in *Secretary of State for India in Council v. Vakhatsangji Meghrajji* 9 B. 668, has no substance. **B. WASAPPA TIMAPPA SONAGAR v. SECRETARY OF STATE**, 17 Bom. L. R. 979 **498**

Suits Valuation Act (VII of 1887), s. 4 **188**

— **s. 8** **104**

Tender—Interest—Bond payable by instalments—Tender of payment of overdue instalments without interest, whether proper.

Where the money due on a bond was payable by instalments, one of the conditions being that if three instalments remained in arrears, the whole money would become payable at once and where after three instalments had fallen due, the debtor tendered payment of the principal money of those instalments without the addition of the interest:

Held, that there was not a proper tender and the plaintiff was entitled to recover the interest on the overdue instalments. **M. THIRUVANNAMALAI SERVAI v. VARADARAJULU NAIDU** **304**

Theft. See PENAL CODE, s. 379.

Tort—*Joint tort-feasors*—*Trespasser, lessee from—Joint liability.*

Where more persons than one are concerned in the commission of a wrong, the wronged person has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage and it does not matter whether they acted as between themselves as equals or one of them as agent or lessee of another.

Therefore, where a trespasser let the land trespassed upon to another person who cultivated it and took the produce, both are liable for damages caused by the trespass. **N. GOVERDHAN v. MARUTI**, 11 N. L. R. 184. **872**

Transfer of Property Act (IV of 1882)—*Damdupet*, rule of, if applicable to mortgages under the Act. **6**

————— **s. 3** **604**

————— **s. 6** **473**

————— **s. 6**—*Relinquishment—Reversionary rights—Settlement of disputed claim.*

One Bhagga Lal died possessed of certain property and his daughter-in-law got possession of it. On the death of the daughter-in-law, one Barati Lal made an application for mutation of names on the ground that he was the heir of Bhagga Lal. This application was opposed by Mohan Dei daughter of Bhagga Lal. The dispute resulted in execution of a document by which Barati Lal for a consideration of Rs. 5,000 and on receipt of certain immoveable property, abandoned his entire claim to the property recognizing *Musammat* Mohan Dei to be absolute owner of it.

Held, that the transaction was not a sale of the reversionary rights of Barati Lal, but was a settlement of disputed claims and was not void under section 6 of the Transfer of Property Act. **A. BARATI LAL v. SALIK RAM**, 13 A. L. J. 114. **919**

————— **s. 6 (e)** **604**

————— **s. 8** **263**

————— **s. 52**—*Decree for sale by*

1st mortgagee—Subsequent mortgage in favour of 2nd mortgagee—Sale in execution of decree of 1st mortgagee, effect of, on second mortgage—Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Second mortgagee, right of.

A mortgaged certain land with B in 1903. B got a decree for sale of the mortgaged property in 1905. After the decree A mortgaged the same land by way of second mortgage with C in 1906. In 1910 the land was sold by the Court in execution of B's decree and purchased by D. The surplus after paying B's claim was paid away to A. Subsequently C filed the present suit against A and D claiming to have the mortgaged property re-sold.

Held, (1) that C had no remedy against the land but was only entitled to a personal decree and that what was sold at the sale in execution of the 1st mortgagee's decree was the right, title and interest of the mortgagor as it existed at the time of the first mortgage;

(2) that the second mortgage being subsequent to the decree the second mortgagee had no rights other than those of the mortgagor through whom he claimed and was bound by the decree;

Transfer of Property Act—contd.

(3) that the mortgagor's right of redeeming the first mortgage was determined by the decree and the effect of the sale was to deprive the second mortgagee of his security;

(4) that as the second mortgagee failed to save his security by paying the amount of the decree on the first mortgage into Court under Order XXI, rule 89, as representative of the judgment-debtor, the mortgagor, he had no remedy against the land. **S. KANAYARAM v. TIRITHISING**, 9 S. L. R. 86. **37**

————— **s. 54** **52**

————— **s. 54**—*Sale in favour of minor, validity of—Contract Act (IX of 1872), s. 11.*

A sale-deed of a house executed in favour of a minor is a valid transaction and the minor can sue for possession of the same after the transaction is complete. **A. MUNNI KOER v. MADAN GOPAL**, 13 A. L. J. 1084. **792**

————— **s. 55** **179**

————— **s. 58 (c)**—*Sale-deed—Price treated as continuing debt—Property made security for re-payment of debt—Agreement to reconvey—Transaction, nature of—Construction of documents—Mortgage or sale.*

Where in a suit for a declaration that a certain apparent sale was in reality a mortgage and for redemption of the mortgage, it appeared that plaintiffs executed a sale-deed in favour of the defendants giving them certain property in lieu of a total debt of Rs. 2,500 and contemporaneously with it two other documents were executed, one, an agreement by the defendants to reconvey the property to the plaintiffs on payment within a specified time of the total amount due as well as of any moneys the defendants may spend on the lands, and the second, a rent note passed by the plaintiffs to the defendants providing for the payment to the defendants annually for ten years of a rental of Rs. 287, an amount which was made up of Rs. 62 on account of the Government assessment and Rs. 225 on account of interest on the principal sum of Rs. 2,500 at 9 per cent.

Held, that, inasmuch as the apparent price of Rs. 2,00 was treated and regarded as a continuing debt between the parties and the property was made security for the re-payment of that debt, the deed in question was a deed of mortgage and the plaintiffs were entitled to redeem.

A mere agreement to reconvey does not necessarily signify that the transaction is a mortgage.

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. **B. KASTURCHAND LAKHMAJI v. JAKHIA PADIA PATIL**, 17 BOM. L. R. 928. **368**

————— **s. 76 (a)**—*Tenancies created by mortgagee in possession, whether binding on mortgagor—Ejectment—Mortgagor, right of.*

Tenancies created by a mortgagee in possession are binding on the mortgagor even after the redemption of the mortgage in so far that the relationship of landlord and tenant continues.

Transfer of Property Act—concl.

A person, therefore, who is in possession as a tenant from year to year under a mortgagee and who continued in possession after the mortgage is redeemed by the owner, should be deemed to be a tenant from year to year under the owner thereafterwards instead of under the mortgagee.

Where in the deed of redemption the mortgagee assured the mortgagor that all his (the mortgagee's) rights in the mortgaged property had been extinguished and that thereafter the mortgagor (owner) was to obtain rents from the tenants who had been let into the lands by the mortgagee:

Held, that the right of the mortgagee as the tenants' lessor became transferred to the mortgagor and he was entitled to evict them. **M. CHINNAPPA THEVAN v. PAZHANIAPPA PILLAI**, 18 M. L. T. 492; 2 L. W. 1132 **630**

_____ **s. 106** **697**

_____ **s. 108 (b)** **12**

_____ **ss. 108 (e), 106—**

Destruction of leasehold property by fire or other irresistible force—Notice to avoid lease, operation of—Time, if necessary.

A notice avoiding a lease under section 108 (e) of the Transfer of Property Act does not require any length of time for its operation. The lease becomes *ipso facto* void when the lessee serves a notice under section 108 (e). Section 106 of the Transfer of Property Act does not apply where a lessee serves a notice on the lessor to avoid the lease on the ground of the destruction of the property by fire or other irresistible force. **C. DAMODA COAL CO. LTD. v. HURMOKE MARWARI**, 19 C. W. N. 1019 **697**

_____ **s. 111 (g)** **454**

_____ **s. 111 (g)—“Some act**

showing an intention to determine the lease,” meaning of—Lawyer's notice to quit, whether sufficient—Person in illegal occupation—Mesne profits, liability for.

The expression “some act showing his” (lessor's) “intention to determine the lease,” occurring in section 111, clause (g) of the Transfer of Property Act, must not be confined to an attempt at re-entry or to the filing of a suit in ejectment. A Lawyer's notice by the lessor showing unequivocally his intention to determine the lease is quite sufficient.

A person who is in illegal occupation of land without the owner's permission or consent is liable for mesne profits. **M. SIVARAMA AYYAR v. ALAGAPPA CHETTI**, 2 L. W. 944; (1915) M. W. N. 545 **211**

_____ **s. 132—Actionable claim**

—Transfer prima facie subject to equities—Transferee, liability of, to ascertain extent of equities

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Trial—Criminal Circulars of Bombay High Court, Circular No. 37—Trial on holiday, if irregular—Right of accused to defend himself.

A trial of an accused person on a Sunday or any other holiday would not necessarily make the proceedings invalid, but is irregular as being contrary to the provisions of Circular No. 37 of the Criminal Circulars of the Bombay High Court.

Where, therefore, the trial of an accused was commenced and practically finished on a Sunday, the

Trial—concl.

accused being unable to engage a Pleader, and the judgment was pronounced on the following day:

Held, (1) that there was an irregularity in procedure which had prejudiced the accused who could not be said to have had a fair opportunity to defend himself;

(2) that the fact that the accused did not ask the Court to adjourn the case did not make any difference. **B. BABAN DAUD v. EMPEROR**, 17 Bom. L. J. 918; 16 Ck. L. J. 752 **352**

Trust—Bills sent with direction to collect and remit—Fiduciary relationship **215**

Trusts Act (II of 1882), s. 6—Trust, declaration of—Terms—Misrepresentation of fact—Contract executed under misrepresentation of fact—Liability of party misrepresenting—Misrepresentation of future intention—Registration Act (XVI of 1908), s. 17—Document promising to do some act in future, if requires registration.

Where a person set apart a sum of Rs. 20,000 for the benefit of his nephew and the nephew's wife and provided that they were to enjoy the interest until his death or until having attained years of discretion they elect to separate from him and where he retained possession and control of the fund, subject only to the interests of his *cestui que trust* in it:

Held, that there was a clear and sufficient declaration of trust within the meaning of section 6 of the Trusts Act and that there was no need of transferring possession inasmuch as the author of the trust was himself the trustee and the property was specified, the intended beneficiaries were specified, and the purposes of the trust were specified.

Where there was a misrepresentation of fact, the relations of the parties in law would have to be determined by assuming that the fact was as it was represented to be.

In entering into a contract or inducing another person to act, if one should misrepresent a fact, the contract between him and the person so deceived shall be based in law upon the ground that the fact so misrepresented must be made good by the party misrepresenting it. Whereas if it is merely a representation of future intention, it is then only a contract and can only be proved as a contract.

Where, therefore, there was a representation by one H that one L was the adopted son of H and it was upon the faith of that representation that the plaintiff married L and where L died after H and L's widow sued for the property of H:

Held, that the representation should be made good and that, therefore, L's widow was entitled to the property.

A document which is simply a promise to do a certain act in the future or is an offer to be completed when a certain marriage takes place, does not require registration. **B. LADKABAI v. NAVIVAHU**, 17 Bom. L. R. 783 **708**

_____ **s. 83—“Legal representative,” meaning of—Failure of trust after settlor's death—Resulting trust in favour of heirs of settlor.**

Where the subject of dispute is the estate of a deceased intestate for which no administration has been granted, the term “legal representative” in section 83 of the Trusts Act includes the person or persons beneficially entitled who represent the interests of the deceased by virtue of inheritance.

Trusts Act—concl.

The representative by inheritance is to be found according to law at the moment of the death of the deceased.

Where, therefore, a Hindu woman conveyed certain property by a deed of trust, and the trust failed after her death:

Held, that there was a resulting trust in favour of the settlor, and, therefore, the property descended to her heirs at the time of her death. **B. DWARKA-DAS DAMODAR v. DWARKADAS SHAMJI**, 17 Bom. L. R. 935

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216**U. P. Land Revenue Act (III of 1901), s. 4 (1), cls. (a), (b), (c)—*Sir* meaning of.**

A mere record of certain plots as *sir* in partition is not sufficient to bring them under the category of clause (b) of section 4 (1), which requires the establishment of village custom. **U. P. B. R. MURID v. KASHIA**

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s. 4 (12)—Sale of proprietary rights including *sir* by Hindu widow—Ex-proprietary rights not allowed—Sale declared null and void on suit by reversioners, effect of, on *sir* land.

A Hindu widow alienated the property of her husband including *sir*. Three years after the sale she claimed ex-proprietary rights but her claim was disallowed. On the death of the widow, the reversioners got the sale cancelled:

Held, that the effect of the cancellation of sale was that *sir* rights revived in favour of the reversioners. **U. P. B. R. BARNAL SINGH v. SHEO NATH**

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ss. III, 112—Partition

—Party required to file civil suit—Failure to file civil suit—Order—Appeal—Jurisdiction.

The applicant applied in the Revenue Court against the defendant claiming partition. The defendant objected that the applicant's share was less than what he claimed. The Collector made an order under section 111 of the Land Revenue Act, requiring the defendant to bring a suit in the Civil Court within three months to determine the question. This was not done. After the expiry of three months, the case again came up before the Collector. The defendant alleged that the decision of the Civil Court for partition in respect of the non-revenue paying property of the parties had settled the question. The Collector overruled this objection. The defendant appealed to the District Judge:

Held, that no appeal lay to the District Judge. **A. HAR PRASAD v. MUKAND LAL**, 13 A. L. J. 1107

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s. 112

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s. 138—Partition of under-proprietary right in specific plots, suit for, maintainability of.

Held, (per *Holmes, S. M.*)—An application to partition specific plots held in an under-proprietary tenure does not lie in the Revenue Court.

Held, (per *Campbell, J. M.*)—An application to partition specific plots held in an under-proprietary tenure on which no revenue is assessed can lie in the Revenue Court. **U. P. B. R. BISHKSHAR PATHAK v. RAM PRASAD PATHAK**, 13 A. L. J. 5 REV.

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Vendor and purchaser—Vendor's right to demand payment—Deed intended to operate on death of vendor—Will—Construction.

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Waiver—Acquiescence

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—Limitation Act (IX of 1908), Sch. I, Art. 75—

Instalment bond, consent not to sue on failure to pay instalment, if would amount to waiver.

Waiver is consent to dispense with or forego something to which a person is entitled.

Where it was proved that demand was made in three successive years in respect of three instalments due upon an instalment bond, but the plaintiff consented not to sue for the whole amount, as he was entitled to do under the bond, for default on the first two occasions but refused to consent on the third:

Held, that this amounted to a waiver of the payment of the two earlier instalments.

When the instalment bond was executed on the 6th of November 1908 and provided payment of Rs. 10,000 by annual instalments of Rs. 400, commencing from the 30th of September 1909, and further that in case of default the whole amount payable on the bond was to fall due, and the plaintiff waived the payment of the first two instalments as aforesaid and filed a suit for the recovery of the whole amount on the 12th of November 1914:

Held, that his suit was not barred by limitation and it was decreed for Rs. 9,200. **C. RAM CHANDER BAKKA v. RAWATMULL**, 19 C. W. N. 1172

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Pre-emption—Pre-emptor protesting against price

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Will. See HINDU LAW.**—, construction of**

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—, construction of—Legacy of six acres out of 19.40 acres, whether void for uncertainty—English rules of construction, applicability of, to Wills of Hindu agriculturists—Will, uncertainty, validity of.

A Hindu agriculturist bequeathed to his father's sister's second son "six acres of good irrigated nanja lands" and died leaving behind him 19.40 acres of land answering to that description. The legatee died before he got the bequest and his heirs sued the residuary legatee for possession of six acres and for mesne profits. The residuary legatee contended that the legacy of six acres was void on account of uncertainty:

Held, that the legacy was not void on account of uncertainty and that the intention of the testator, as gathered from the document, was that, in the absence of agreement, the lands in question should be partitioned by the Court and six acres out of the 19.40 acres allotted to the legatee who had a vested interest in them as a tenant-in-common along with the residuary legatee.

Per *Wallis, C. J.*—English rules of construction of Wills are too artificial to apply to the Wills of Hindu agriculturists.

Per *Srinivasa Aiyangar, J.*—A Will is not void for uncertainty unless it is utterly impossible to put a meaning upon it. **M. BHARADWAJ MUDALIAR v. KOLANDAVELU MUDALIAR**, 29 M. L. J. 717; 19 M. L. T. 141

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—, execution of, determination of—Comparison of signature with 7 or 8 years' previous signature, propriety of—Finding of fact, reversing of

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Will—contd.

Executor—Death of executor—Heir of executor, Locus standi of, to enforce agreements—Letters of Administration—Probate.

An heir of an executor, who has taken the Probate of the Will of a deceased testator and who has died without administering the whole estate, has no *locus standi* after his death to enforce an agreement entered into by him as such executor with a third person with a view to carry out the intention of the testator.

When such an executor dies, the estate of the testator remains unrepresented until some one takes out Letters of Administration or Probate from the Court. **P. DITTA RAM v. RUP CHAND, 152 P. W. R. 1915 802**

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Legacy—Legatee to make good what he owes to the estate before he can take anything.

A legatee is bound to make good to the estate of a testator what he owes to that estate before he can claim payment of a legacy out of the same estate.

Where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to it. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained, it must be ascertained in order that the rights of the parties may be adjusted. **B. HALAI v. CHATURBHAI GOPALJI, 17 Bom. L. R. 985 500**

Residuary clause providing for pooja, etc.—Fund unknown to testator when making Will, whether governed by the Will—Release of claims against estate under mistake, whether binding.

Where in a suit for an account of the administration of the estate and for its administration under the orders of the Court, it appeared that the Will after stating the property which the testator intended to dispose of and dividing it up amongst the various beneficiaries, provided that "the sum which may be left after deducting the above mentioned legacies and such other expenses, shall be utilised in my name without defect for pooja," etc., but that at the time of making the Will, the testator did not know that there was a fund in Court to his credit:

Held, that this fund did not pass under the Will of the deceased but went to the heirs as on an intestacy;

(2) that a release of all his claim against the estate executed by the plaintiff under a mutual mistake was not binding on him. **M. KUNTHALAMMAL v. SUTAPRAKASARAYA MUDALIAR, 29 M. L. J. 652; 38 M. 1096 494**

Revocation by parol—Actual destruction, whether necessary—Animus revocandi—Omission to make a subsequent Will, effect of—Custom—Intestate succession among Arnins of Lahore Brothers and their sons, rights of, as against widow and daughter's sons.

In cases not governed by the English Law, the Indian Succession Act or any other Statute specifying a particular method of revocation, actual destruction or a formal revocation is not essential to constitute the revocation of a Will.

Under the Muhammadan Law a bequest may be revoked by expressed declaration, oral or written.

Where, therefore, a testator expressed in a Court of Justice his intention of revoking a Will previously made:

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Held, that this was a case of the revocation of Will by parol and that the mere fact that the testator failed to destroy the existing Will or omitted to make a subsequent one, could not have the effect of reviving a Will which had been cancelled.

Among the Arnins of Lahore brothers and their sons are not heirs *ab intestato* in the presence of the widow and the daughter's sons. **P. MIRAN BAKSHI v. MEHR BIRI, 6 P. W. R. 1916 693**

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 942 OF 1913.

August 9, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

S. SHUNMUGAM CHETTY—PLAINTIFF—
APPELLANT
versus

SUBBA REDDI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Specific performance—Contract to sell land—Contract set up different from that proved—Time not of the essence of the contract—Part performance of contract set up—Specific performance of contract proved—Contract with managing member of Hindu family—Sons, whether liable as legal representatives after his death—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint.

A suit for the specific performance of a contract to sell land is not liable to be dismissed merely on the ground that the contract proved in the case is different from the contract alleged in the plaint. [p. 2, col. 2.]

Where time is not of the essence of the contract and especially where there has been a part performance of the contract as alleged by the plaintiff, the Court should allow an amendment of the plaint (if necessary) under Order VI, rule 17 of the Civil Procedure Code, and decree specific performance of the contract as proved. [p. 3, col. 1.]

Where the suit is on a personal contract entered into with the managing member of a Hindu family, it can, on his death, be enforced against the sons and they will be liable, as legal representatives, to fulfil the contract in the place of their father if that contract is, according to Hindu Law, binding on them. But where the sons plead that the sale is not for a legal necessity and that they are not bound by the contract of their father to sell his share in the plaint lands, a Court would be justified in refusing to decree specific performance against them. [p. 3, col. 2.]

Second appeal against the decree of the District Court of Ramnad at Madura, in Appeal Suit No. 687 of 1911, preferred

against that of the Subordinate Judge of Ramnad at Madura, in Original Suit No. 250 of 1910.

Mr. R. Kuppasami Aiyar, for the Appellant.

Messrs. K. Balamakunda Aiyar and K. Jagannatha Aiyar, for the Respondents.

This second appeal coming on for hearing on the 27th October 1914 and having stood over for consideration till the 10th November 1914, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant in the second appeal here. He sued for specific performance of a contract whose terms according to the plaint were as under:—

(1) The purchase-money was fixed at Rs. 4,600 on the 11th November 1909 out of which the plaintiff gave an advance of Rs. 200;

(2a) Of the remaining Rs. 4,400, Rs. 900 should be deposited before the Sub-Registrar before whom the sale-deed of the plaint properties had to be registered;

(2b) For the remaining Rs. 3,500, the plaintiff (vendee) was to execute a mortgage-deed to the defendants (vendors) mortgaging the properties that were to be sold, and fixing a period of three years for the repayment of the Rs. 3,500 with interest at $8\frac{1}{4}$ per cent. per annum; and

(3) That the defendants should go to Satur with the title-deeds of the properties on 1st December 1909 and execute the sale-deed and register it.

The lower Appellate Court found that the contract between the plaintiff and the

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defendants was not on the terms 2 (a) and 2 (b) mentioned above, but that the term was that the plaintiff should pay the Rs. 4,400 (the balance of purchase-money) in cash before the 1st December 1909 and obtain the sale-deed, and that the plaintiff's case as to his being entitled to obtain the sale-deed by merely tendering a hypothecation deed for Rs. 2,500 of the purchase-money repayable in three years was false and that it was due to the default made by the plaintiff in not being ready to pay the whole Rs. 4,400 that the contract was rightly put an end to by the defendants. On these findings, the plaintiff's suit was dismissed with costs.

We must accept the findings of fact by the learned District Judge including the finding that the plaintiff was not ready and willing to pay the Rs. 4,400 on or before the 1st December 1909. But then it is contended by the plaintiff's learned Vakil

(a) that time in this case is not of the essence of the contract; and

(b) that the plaintiff ought to have been at least given a decree for the specific performance of the contract with the terms as found by the District Court.

Neither of the Courts below has definitely found that time was or was not of the essence of the contract in this case. Even if time was not of the essence of the contract, the question remains whether the contract proved in this case being different from the contract alleged in the plaint, the plaintiff is entitled in a Court of Equity to obtain specific performance of the contract proved. This question is by no means free from difficulty. (See paragraphs 634 to 636 of Fry on Specific Performance.) In *Mortimer v. Orchard* (1), Lord Chancellor Loughborough considered that in strictness the bill ought to have been dismissed when the contract alleged by the bill filed in equity was different from the contract made by the defendants. (In Fry the decision is attributed to Lord Rosslyn.) But the Lord Chancellor gave "the plaintiff credit for building the house" on the property agreed to be leased and specific performance was decreed for the plaintiff according to the contract set up by the answers of the

defendants. In *Hawkins v. Maltby* (2) where one contract was alleged and another proved, the bill was dismissed without prejudice to another bill permitted to be filed. Under the old practice of the Court of Chancery that Court was incapable of permitting an amendment of the record at the hearing except under very unusual circumstances, and hence unless the defendants consented to a decree being passed in the plaintiff's favour according to the contract admitted by them or unless the variation between the contract alleged and that proved consisted in the plaintiff's admission of some terms against himself or the omission of some terms in his own favour or unless such variation was immaterial and unimportant, the Court of Equity had to dismiss the bill. But after the Judicature Acts, the High Court with its larger powers of amendment of records at any stage and ability to deal with the matter once for all would probably allow such amendments as are necessary "for the purpose of determining the real questions in controversy between the parties". Where there had been part-performance, the inclination of Lord Cottingham's mind in *Mundy v. Jolliffe* (3) seems to have been against dismissing the bill. Their Lordships of the Privy Council seem also to have been influenced by the fact of the part-performance of the contract in *Oxford v. Provan* (4) in arriving at the conclusion that the real contract between the parties might be ordered to be specifically performed, though the contract alleged in the plaint was different. In the present case the plaintiff alleged in paragraph 5 of the plaint that the properties agreed to be sold were placed in plaintiff's possession on the very date of the contract but the defendants denied it. That question has not been gone into by the lower Courts. Nor was any specific issue raised upon the question whether time was or was not considered of the essence of the contract and whether on the plaintiff's failure to pay the Rs. 4,400 in cash before the 1st December 1909 the defendants were entitled to rescind the contract. This suit was brought

(2) 3 Ch. App. 188; 37 L. J. Ch. 58; 17 L. T. 397; 16 W. R. 209.

(3) (1839) 5 Myl. & Cr. 167; 9 L. J. Ch. 95; 3 Jur. 1045; 41 E. R. 334; 48 R. R. 262.

(4) 5 Moore P. C. (N. S.) 150; 2 P. C. 135; 16 E. R. 472.

(1) 2 Ves. (Jun.) 243; 30 E. R. 615.

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on 21st January 1910 within two months of the time fixed for the performance of the contract. Having regard to Order VI, rule 17, of the Civil Procedure Code if time was not of the essence of the contract and the defendants were, therefore, not justified in putting an end to the contract and if especially there had been a part-performance of the contract as alleged by the plaintiff, I would be disposed to allow an amendment of the plaint (if necessary) and give judgment for the plaintiff for specific performance of the contract as proved in the case, allowing damages to the defendants for the plaintiff's failure to pay the Rs. 4,400 within the 1st December 1909. But before deciding the second appeal, it is necessary to obtain findings on the following issues on the evidence on record:—

(1) Was the time mentioned in Exhibit I for the performance of the contract of the essence of the contract?

(2) Was there part-performance of the contract by the plaintiff's having been put in possession of the properties as alleged in the 5th paragraph of the plaint?

Two months' time from the date of the receipt of records is allowed for submission of findings, and ten days for objections.

NAPIER, J.—I concur in the order proposed by my learned brother and reserve the consideration of the principles to be applied until the return of the findings.

In compliance with the above order, the District Judge of Ramnad submitted a negative finding on the first issue and an affirmative finding on the second issue.

This second appeal coming on for final hearing yesterday and to-day after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—The 2nd defendant's sons, though they obtained their father's interest in the plaint properties by survivorship, might be treated as properly added as his legal representatives for the purposes of the Code of Civil Procedure in this suit brought on a personal contract by their father and they will also be liable as legal representatives to fulfil that contract in the place of their father if that contract was, according to the Hindu Law, binding on them.

There is nothing in the plaint to indicate that the plaint contract was entered into for

any such family necessity as will be binding on the undivided minor sons of the 2nd defendant. The plaintiff ought to have, strictly speaking, made the sons of the 2nd defendant also parties to the suit from the beginning, as they were interested in the properties in respect of which he wished to obtain a sale-deed [see section 27, clause (c) of the Specific Relief Act.]

The plaintiff's learned Vakil argued that it is possible that the plaint lands are the self-acquisitions of the defendants Nos. 1 and 2 and that the 2nd defendant's sons are only entitled to their father's half share as his heirs in the strict sense. There is, no doubt, such a possibility though the probability seems to point the other way.

One of us was to some extent prepared at the former hearing in this case to use the discretionary power of the Court to decree specific performance in the plaintiff's favour even though plaintiff did not prove the particular contract set up by him. But having regard to the further difficulties raised by the contention now put forward by the minor sons of the deceased 2nd defendant who are, having regard to the presumptions of Hindu Law, *prima facie*, not bound by the contract of their father to sell his share in the plaint lands, we are of opinion that the Court's discretion will be more properly exercised by refusing specific performance in plaintiff's favour.

In the result the lower Appellate Court's decree so far as it dismisses the suit is confirmed but as to the question of costs, we think that the proper order is to direct the parties to bear their respective costs throughout.

Appeal dismissed.

SUBRAMANIA IYER V. VENKATARAMIER.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 2 OF 1914.

August 31, 1914.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

K. R. SUBRAMANIA IYER—DEFENDANT—
PETITIONER

VERSUS

VENKATARAMIER AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9, cl. (2), applicability of—Abatement of suit owing to cause of action not surviving—Plaintiff's legal representative, whether can apply to set aside abatement—Order of abatement a decree—Malicious prosecution of manager of undivided Hindu family—Cause of action, whether survives to remaining co-parceners.

Order XXII, rule 9, clause (2) applies only to cases where an abatement takes place in consequence of an application not having been made "within the time limited by law" to bring in the legal representatives. [p. 4, cols. 1 & 2.]

Where, therefore, a Court treats a suit as having abated owing to the cause of action not surviving, there is no right in the plaintiff's legal representative to apply under rule 9 clause (2) to set aside that abatement. [p. 4, col. 2.]

An order of a Court declaring that a suit has abated owing to the cause of action not surviving is a decree as it determines that the right of the plaintiff ceased to exist on his death. [p. 4, col. 2.]

An appeal against an order passed on one date cannot be treated as one against a decree passed on a different and prior date. [p. 4, col. 2.]

The cause of action for a suit for damages caused by the malicious prosecution of the manager of a joint undivided Hindu family does not, on his death survive to the remaining co-parceners even as regards that portion of the claim which related to the loss incurred by the estate, because the surviving members of an undivided family are not representatives of the deceased member. [p. 5, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Tanjore, in Appeal Suit No. 623 of 1912, preferred against that of the Court of the District Munsif of Valangiman, in Interlocutory Appeal No. 259 of 1912, in Original Suit No. 347 of 1910.

Mr. G. S. Ramachandra Aiyar, for the Petitioner.

Messrs. M. O. Parthasarathy Aiyar and T. Natesa Aiyar, for the Respondents.

JUDGMENT.—We think that when a Court treats a suit as having abated owing to the cause of action not surviving, there is no right in the plaintiff's legal representative to apply under Order XXII, rule 9, clause (2), of the Civil Procedure Code to set aside that abatement. Clause (2) of rule 9 applies

only to cases where the abatement takes place in consequence of an application not having been made "within the time limited by law" to bring in the legal representatives. This seems to us to be quite clear from the second sentence in clause (2) of rule 9 which refers to the setting aside of "the abatement" (that is, the abatement mentioned in the 1st sentence) if it be proved that he (the legal representative) was prevented by any sufficient cause from continuing the suit.

We think that an order of the Court declaring that a suit has abated owing to the cause of action not surviving is a decree, as it determines that the right of the plaintiff ceased to exist on his death and, therefore, it falls within the definition of a decree, there being no appeal provided for in the Code from that order "as an appeal from an order" [see exception (a) to section (2) of the Civil Procedure Code].

The District Munsif, therefore, acted illegally in entertaining and adjudicating on the incompetent application filed under Order XXII, rule 9, and the District Judge also acted illegally in adjudicating upon such an application on appeal. Both Courts ought to have rejected the petition filed under rule 9 in March 1912, leaving the plaintiff's legal representatives to appeal against the prior order and decree of 19th December 1911 which dismissed the suit as having abated and on the ground that the right to sue did not survive.

We set aside the order of the lower Appellate Court and restore that of the District Munsif dismissing the respondent's application, though the ground of our decision is different from that relied on by the District Munsif.

It is urged that we might treat the appeal to the District Court against the order of the District Munsif on the petition of 7th March 1912 (Interlocutory Appeal No. 259 of 1912) as an appeal against the decree of the District Munsif dismissing the suit passed on 19th December 1911. It is difficult to treat an appeal against an order passed on one date as an appeal against a decree passed on a different and prior date and there is also the fact that the Court-fees paid (8 annas) cannot cover the fees due on the memorandum of appeal against the decree (that is Rs. 37-8). Further, we are of opinion

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that treating the appeal to the lower Appellate Court as an appeal against the decree of December 1911, the lower Appellate Court was in error in holding that the cause of action for a suit for damages caused by the malicious prosecution of the manager of an undivided Hindu family could survive to the remaining co-parceners even as regards that portion of the claim which related to the loss incurred by the estate in the defence of the criminal case brought against the manager. The cause of action is a single and indivisible one and it is a personal action, though the injury caused to the plaintiff may not be a personal injury in the sense of an injury to the physical or bodily personality. Section 89 of the Probate and Administration Act admittedly cannot be availed of, as the survivors cannot obtain Letters of Administration to the undivided properties and the deceased left no estate, all his interests having lapsed to the other members of the family by survivorship at the moment of his death. Nor could the Legal Representative Suits Act, XII of 1855, apply for three reasons. *Firstly*, because the wrong which survives to the legal representatives must "have been committed within one year before his death" (that is, the death of the plaintiff) whereas in this case the wrong was committed more than one year before the plaintiff's death; *secondly*, because section 1 of the Act of 1855 relates to the maintainability of a suit by the representatives and not to the continuation of a suit already instituted and *thirdly*, because the surviving members of an undivided family are not representatives of the deceased member.

There will be no order as to the costs of the petition.

Petition allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 34 OF 1914.

December 5, 1914.

Present:—Sir Henry Drake-Brockman, K.T., J. C.

BHANYA—PLAINTIFF—APPLICANT

versus

NAKA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Jurisdiction—Nature of relief determining factor—

Suit to recover damages for wrongful removal of fruits—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31.

It is merely the nature of the relief sought that has to be looked to in determining the jurisdiction of a Court. [p. 6, col. 1.]

Bijurji v. Kuvacji, 15 B. 400 and *Lakshmanadas v. Anna*, 32 B. 356; 6 Bom. L. R. 731, referred to.

The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes. [p. 6, col. 1.]

Narayan v. Balaji, 21 B. 248; *Pattangunda v. Nilkanth*, 20 Ind. Cas. 974; 15 Bom. L. R. 773; 37 B. 675, followed.

Where the plaintiff alleged that he bought the defendant's share of certain fruit produced in a jungle and sued to recover damages for wrongful removal of the same fruit:

Held, that the suit was not one for mesne profits and was triable by a Small Cause Court. [p. 6 col. 1.]

Civil revision against the order of the District Judge, Bhandara, dated the 19th December 1913.

Mr. A. V. Zinjarde, for the Respondents.

JUDGMENT.—This is an application under section 115, Civil Procedure Code, for revision of an appellate order passed by the District Judge, Bhandara, deciding that the applicant's plaint was rightly returned to him by the Munsif, Bhandara, for presentation to the local Court of Small Causes.

The plaint was originally presented to the Subordinate Judge, Bhandara, who exercises the powers of a Court of Small Causes in suits cognizable by such a Court and not over Rs. 500 in value. That learned Judge considered the claim to be one for mesne profits and following the decision in *Lachman Rao v. Waman Rao* (1) returned the plaint.

The claim as laid in the plaint is to recover damages for wrongful removal of *mahua* and mango fruit from the jungle of *Mauzas* Pipria and Pitesur, in which the defendant Naka has a share. The plaintiff alleges that he bought Naka's share of the said fruit produced in the *Fasli* year 1321 (1911-1912 A. D.), but that the other defendants, Sakia and Appa, forcibly removed the produce. He seeks to recover Rs. 150 from Sakia and Appa or in the alternative from Naka.

I agree with the Munsif and the District Judge in thinking that the suit as brought

(1) 16 C. P. L. R. 1.

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is not one for mesne profits. The decisions in *Krishna Prasad v. Maizuddin* (2), *Annamalai v. Subramanyam* (3) and *Ramji v. Srinivasa Iyer* (4) are clear authorities for the view that Article 31 of the second Schedule to the Provincial Small Cause Courts Act, 1887, has no application. *Nasir Khan v. Karamat Khan* (5), cited by the learned Munsif, was decided under the Act of 1865, but in *Krishna Prasad v. Maizuddin* (2) it was pointed out that under that Act also a suit for the wrongful reaping and carrying off of the produce of land was cognizable by a Small Cause Court. What has to be looked to in determining the jurisdiction is merely the nature of the relief sought: see *Bapuji v. Kavarji* (6) and *Lakshmandas v. Anna* (7). The mere fact of a question of title arising does not prevent a suit being cognizable by a Court of Small Causes: see *Narayan v. Balaji* (8) and the decision of the Full Bench in *Puttangonda v. Nilkanth* (9). I may add that it has long been the practice of this Court in applying section 102, Civil Procedure Code, to treat cases of the present kind as so cognizable.

The suit must be tried by the Subordinate Judge, Bhandara, in the exercise of his Small Cause Court jurisdiction. All costs hitherto incurred will be costs in the case. I allow Rs. 10 as Plender's fee in this Court.

Revision rejected.

(2) 17 C. 707.

(3) 15 M. 298.

(4) 11 Ind. Cas. 31; 35 M. 726; 21 M. L. J. 442; (1911) 2 M. W. N. 180.

(5) 3 A. 168.

(6) 15 B. 400.

(7) 32 B. 356; 6 Bom. L. R. 731.

(8) 21 B. 248.

(9) 20 Ind. Cas. 974; 37 B. 675; 15 Bom. L. R. 773.

CALCUTTA HIGH COURT.
ORIGINAL CIVIL SUIT NO. 1039 OF 1910.
February 15, 1915.

Present:—Mr. Justice Chaudhuri.

KUNJA LAL BANERJI—PLAINTIFF

versus

NARSAMBA DEBI AND ANOTHER—

DEFENDANTS.

Damdapat, rule of, applicable to mortgages under Transfer of Property Act (IV of 1882.)

In the Calcutta High Court, the uniform rule has been to disallow as between Hindus interest larger than the amount of principal in making up a mortgage account. [p. 6, col. 2.]

The rule of *damdapat* is applicable to mortgages under the Transfer of Property Act. [p. 7, col. 1.]

Mr. C. C. Ghose, for the Plaintiff.

JUDGMENT.—This matter arises upon a contention raised on behalf of the plaintiff that the rule of *damdapat* does not apply to mortgages under the Transfer of Property Act. There was a reference for accounts upon a mortgage decree in this suit in the usual course. Accounts have been taken and the Official Referee has made his report, disallowing interest exceeding the amount of principal applying the rule of *Damdapat*. It was contended before me on the strength of *Madhwa Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu* (1) that the rule of *Damdapat* does not apply. The question has not so far come up for decision in this Court. In *In the matter of Hari Lal Mullick* (2), the point was raised but not decided. It was held in that case that an order admitting a creditor's claim was tantamount to a decree, and as such put an end to the contractual relationship between the parties. The very same principle has been acted upon in the case of *Nanda Lal Roy v. Dharendra Nath Chakravarti* (3). In the Bombay case of *Jeevanbai v. Manordas Lachmandas* (4), the learned Judge held that the rule of *damdapat* was applicable. I find, however, that in that case 26 Madras was not cited. The current of decisions in the Bombay Court has been that the rule of *Damdapat* does apply: see the case of *Sundarabai v. Jayavant Bhikaji Nadgawda* (5).

In this Court the uniform rule, so far as I know, has been to disallow as between Hindus interest larger than the amount of principal in making up a mortgage account. As a Court of first instance I am not prepared to follow, under the circumstances, the Madras case of *Madhwa Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu* (1). It seems to me that in that case the learned Judges have overlooked the provision of section 4 of the Transfer of Property Act,

(1) 26 M. 662.

(2) 33 C. 1269; 10 C. W. N. 884.

(3) 21 Ind. Cas. 974; 40 C. 710.

(4) 8 Ind. Cas. 649; 35 B. 199 at p. 203; 12 Bom. L. R. 992.

(5) 24 B. 114; 1 Bom. L. R. 551

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taken with section 37 of the Contract Act. It is conceded in the Madras case that in the Contract Act provision has been made for the application of the rule of *dandupat*. Section 4 of the Transfer of Property Act provides that the chapters and sections of that Act which relate to contract shall be taken as part of the Contract Act. I, therefore, confirm the report made by the Referee and disallow the contention raised.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 13 OF 1913.

March 19, 1915.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

Musammam NUR KHATUN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

SUMAR SAWAYO AND OTHERS—PLAINTIFFS
RESPONDENTS.

Civil Procedure Code Act (V of 1908), s. 153, O. VI, r. 17—Amendment of plaint—Discretion of Court to permit—New cause of action arising during pendency of suit—Amendment, if permitted.

The plaintiffs sued to recover a share of the estate of A alleging that they were his heirs, but it was found that they were excluded from the inheritance by a nearer cousin who was alive at the time of A's death. [p. 7, col. 2.]

During the pendency of the suit, B one of the defendants, a daughter of A, died and the plaintiffs applied for amendment of the plaint so as to include a claim to a share as heirs of B. The amendment was opposed on the ground of its being based on a new cause of action based on events which occurred subsequently to the suit.

Held, that although the amendment under which the plaintiffs claimed as heirs of B referred to an event which had occurred after the suit had been filed there was nothing in the Civil Procedure Code, 1908, forbidding such an amendment. [p. 7, col. 2.]

Bishop Mellus v. Vicar Apostolic of Malabar, 2 M. 295; 3 Ind. Jur. 406; *Sakharam Mahadev Dange v. Hari Krishna Dange*, 6 B. 113; *Sangili v. Mookan*, 16 M. 350; 3 M. L. J. 137; *Ramanadan Chetti v. Pulikutti Serrai*, 21 M. 288 at p. 290; 8 M. L. J. 121, referred to.

Ashidbai v. Abdulla Haji Mahomed, 31 B. 271; 8 Bom. L. R. 652; *Turabalishah v. Bibi Naju*, 25 Ind. Cas. 863; 8 S. L. R. 28 at pp. 31, 32, distinguished.

There is no absolute rule of law on the subject of amendments. The matter is merely one for the judicial discretion of the Court, which will allow or disallow amendments as the circumstances of the case dictate, only remembering that it should not cause prejudice to the other side and it should, if possible, avoid multiplicity of suits. [p. 8, col. 2.]

Second appeal against the decision of the Joint Judge, Sukkur-Larkana.

Mr. Rupchand Bilaram, for the Appellants.
Mr. Parsram Javaharmal, for the Respondents.

JUDGMENT.

PRATT, J. C.—The plaintiffs sued to recover a share of the estate of Panjul, alleging that they were heirs as their grandfather, Fazul, was the son of Iso, the great-grandfather of Panjul.

The first Court found that Fazul was a son of Iso, but that the plaintiffs were excluded from the inheritance by a nearer cousin, Safar, who was alive at the time of Panjul's death. But during the pendency of the suit one of the defendants Alim Khatun, a daughter of Panjul, died and the Sub-Judge allowed the plaint to be amended so as to include a claim to a share as heirs of Alim Khatun. The Subordinate Judge then dismissed the claim to a share in Panjul's estate, but decreed the claim to a share in the estate of Alim Khatun. This decree was confirmed on appeal by the District Court.

This appeal is filed by the other heirs and proceeds on two main grounds, (1) that the amendment of the plaint was illegal and (2) that there was no evidence in support of the finding that Fazul was the son of Iso.

Now it is true that the amendment under which the plaintiffs claimed as heirs of Alim Khatun referred to an event which had occurred after the suit had been filed. But the Code does not forbid such an amendment; if it did, there would be many cases in which the plaintiff would be obliged to withdraw his suit and file a fresh suit instead of merely altering the form of his suit to adapt it to subsequent events. For instance, a plaintiff suing for a declaration of title may, if dispossessed *pendente lite*, amend his plaint and sue for possession, see *Bishop Mellus v. Vicar Apostolic of Malabar* (1). And in partition suits it is now well established that amendments may be made to meet alteration of shares occurring while the suit is pending, *Sakharam Mahadev Dange v. Hari Krishna Dange* (2), *Sangili v. Mookan* (3).

But it is contended that leave to amend on subsequent events should be limited to cases where the plaintiff had a cause of action when the suit was filed. This appears to have been the view taken in *Ramanadan Chetti v. Puli*.

(1) 2 M. 295; 3 Ind. Jur. 406.

(2) 6 B. 113.

(3) 16 M. 350; 3 M. L. J. 137.

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kutti Serrai (4). In that case the plaintiff sued to eject trespassers on land which he had leased. The suit was not maintainable owing to the outstanding lease. But that lease determined in the course of the litigation and the plaintiff was not allowed to continue the suit in virtue of the right that accrued to him on the determination of the lease. That was a case under the Code of 1882 and I doubt if it can be supported under the present Code in view of the express injunction in Order VI, rule 17, that all such amendments (*i.e.*, all amendments that work no injustice) shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

The case cited in argument is that of *Ashid-bai v. Abdulla Haji Mahomed* (5) and it does not support the appellants' contention. The plaintiff had sued for partition and failed, as she was proved to have surrendered her rights to the joint property. Another set of heirs who were defendants in the suit then claimed to continue the suit for the ascertainment of their share. This they were not allowed to do, but the Court merely denied their right to have their share ascertained in plaintiff's suit on the ground that their right was a corollary to plaintiff's right and fell with it. But the judgment makes it clear that the Judge considered that he had a discretion in the matter and that he refused to exercise that discretion in favour of the defendants on the facts. The defendants' share was not admitted and the decision of their claim would have involved as the Judge said (page 292), "trying a practically separate suit."

But apart from the cases, I do not understand why the absence of an original cause of action should affect the power of the Court to allow an amendment. When a plaint is presented that discloses no cause of action, the Court is not bound to reject it. It may require it to be amended. This is apparent from section 53 (a) and (b) of the Code of 1882 and the present Code makes no change in this respect for Order VII, rule 11 (a), does not exclude Order VI, rule 17. Hence the Court's power of amendment may supply a cause of action where one does not appear

and there is no distinction between what does not appear and what does not exist. If the Court has this power and if it may be exercised at any stage of the proceedings, why should it not be exercised so as to enable a plaintiff, whose original cause of action has failed, to continue the suit on one accruing *pendente lite*?

There is in truth no absolute rule of law on the subject. The only mandatory provision of the old Code was the proviso to section 53, which forbade an amendment which converted a suit of one character into a suit of another and inconsistent character. This has been omitted from the present Code. The matter is merely one for the judicial discretion of the Courts. The new Code has enlarged the limits of that discretion both by section 153 and Order VI, rule 17, and the question has become one rather of fact than of law. The Court will adopt the course that is most convenient in the circumstances of the case and in exercising its discretion it will remember that it should not cause prejudice to the other side and that it should, if possible, avoid multiplicity of litigation. Decided cases, therefore, afford but little help to the determination of questions of amendments.

In the present case the amendment involved no fresh evidence and caused no prejudice to the other side which could not be compensated for in costs, and such compensation has been awarded by the first Court. The Judge was, therefore, we think, right in allowing the amendment instead of referring the plaintiffs to a fresh suit. But even if we thought otherwise, the procedure of the lower Court would be only an irregularity cured by section 99 of the Code of Civil Procedure.

The *second* point raised is purely one of fact. The lower Courts have found that Fazul was the son of Iso and that his mother was married to Iso. The evidence on which the Courts have come to this conclusion is (a) cohabitation of Iso and Fazul's mother, (b) Fazul's sons called Iso's son Kaim 'uncle' (c), intermarriages between Fazul's children and Kaim's children. This is evidence from which the marriage and legitimacy can be legally inferred not only under the special rules of Muhammadan Law if applicable, but also under section 50 of the Indian Evidence Act.

I would, therefore, confirm the decree of the

(4) 21 M. 288 at p. 290; 5 M. L. J. 121.

(5) 8 Bom. L. R. 652; 31 B. 271.

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lower Appellate Court and dismiss this appeal with costs.

Fawcett, A. J. C.—I concur.

The wide powers which a Court has under the present Code in respect of granting amendments of the pleadings have already been pointed out by this Court in *Turabali-shah v. Bibi Naju* (6). And even if it is a good general rule that the rights of the parties in a suit must be ascertained as at the date of the action brought, there is good reason for treating the case of suits for partition as an exception to this general rule. Cf. *Ramanadan Chetti v. Pulikutti Servai* (4). The Courts do not ordinarily allow partial partition in such cases and endeavour to make it as complete as possible and settle the rights of all the parties interested. It would obviously be inconvenient, if in doing so the Court could not have regard to events occurring subsequent to the date on which the suit is instituted. This differentiates the case from those which Boyd, A. J. C., had in his mind in *Turabali-shah v. Bibi Naju* (6) when he says the Indian Courts have ordinarily refused amendments in cases where the plaintiff tries to add, by proving some new cause of action, to the dispute which already exists.

Appeal dismissed.

(6) 25 Ind. Cas. 863; 8 S. L. R. 28 at pp. 31, 32.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 73 OF 1914.

August 16, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SINGARAVELU PILLAI—DEFENDANT
No. 11—RESPONDENT—APPELLANT

versus

SANTHANA KRISHNA MUDALIAR—
ASSIGNEE DECREE-HOLDER—PETITIONER
—RESPONDENT.

Execution—Decree passed before the new Civil Procedure Code—Application for order absolute for sale, whether valid—Application dismissed for statistical purposes can be revived.

An application for an order absolute for sale in execution of a mortgage decree, passed before the new Code of Civil Procedure came into force, is an application in execution proceedings and is valid.

Krishna Bar v. Srimati Ranamoyi Debi, 29 Ind. Cas. 120; 19 C. W. N. 470, followed.

An application for execution dismissed merely for statistical purposes, can be revived by a fresh application presented within three years from its dismissal.

Subba Chariar v. Muthuveeram Pillai, 14 Ind. Cas. 264; 36 M. 553; 24 M. L. J. 545, followed.

Civil Miscellaneous Second Appeal against the decree, dated the 31st November 1914, of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 821 of 1913, preferred against the order of the Court of the District Munsif of Mayavaram, in Execution Petition No. 82 of 1913, in Original Suit No. 274 of 1906.

Mr. K. Ramachandra Aiyar, for the Appellant.

Mr. S. Muthiah Mudliar, for the Respondent.

JUDGMENT.—Following the decision *Krishna Bar v. Srimati Ranamoyi Debi* (1), we hold that the application of 30th October 1909 for an order absolute for sale was a valid application in execution proceedings, as the mortgage decree had been passed before the new Civil Procedure Code came into force.

We agree with the lower Courts that the application of 1909 was dismissed only for statistical purposes. An application in execution so dismissed in 1910 for statistical purposes can be revived within three years of such dismissal. [*Subba Chariar v. Muthuveeram Pillai* (2).] The present application of December 1912 was, in our opinion, rightly treated as one for continuation of the proceedings in the old application of 1909 and hence no question of limitation arises.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 29 Ind. Cas. 120; 19 C. W. N. 470.

(2) 14 Ind. Cas. 264; 36 M. 553; 24 M. L. J. 545.

RADHA GOBINDA V. NABADWIP CHANDRA PAL.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1963
OF 1909.

February 20, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beacheroff.

RADHA GOBINDA MOZUMDAR—

PLAINTIFF—APPELLANT

versus

NABADWIP CHANDRA PAL, CHAIRMAN,
KUMARKHALI MUNICIPALITY AND

OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Municipal Act (III of 1884), ss. 321, 322
(4)—Dwelling house defined.*

A dwelling house is a house with the superadded requirement that it is dwelt in. [p. 12, col. 1.]

Where a holding was ordinarily used as a place of business and was also occupied by the plaintiff while he was in a state of unsound mind and where there was also a cook-shed or cowshed on the property:

Held, that on these facts the holding could not be deemed a dwelling house within the meaning of the first proviso to section 321 of the Bengal Municipal Act. [p. 12, col. 1.]

The effect of amendments of section 322 Bengal Municipal Act considered. [p. 11, col. 1.]

Appeal against the decree of the District Judge, Nadia, dated the 10th August 1909, reversing that of the Additional Mansif, Kushtea, dated the 23rd March 1909.

Babus Kishori La' Sircar and Parish Chandra Roy, for the Appellant.

Babus Hara Kumar Mitra and Rupendra Kumar Mitra, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for cancellation of latrine tax, for refund of the amount realised from him and for damages. The case for the plaintiff is that he has been made liable for latrine tax in respect of holding No. 466 in ward No. 2 within the Kumarkhali Municipality, although that holding was not liable to be assessed with latrine tax under section 321 of the Bengal Municipal Act, 1884. He seeks to make the Chairman and the Commissioners of the Municipality as also the Municipal Corporation responsible for his claim. The Court of first instance dismissed the suit as against the Chairman and Commissioners personally, but allowed the plaintiff a decree as against the Corporation. Upon appeal by the Municipality, the suit has been dismissed by the District Judge and the cross-appeal of the plaintiff to hold the Chairman and the Commissioners personally liable has also failed. On the present appeal, the judgment of the

District Judge has been challenged on the ground that the holding was not liable to be assessed under the proviso to section 322 of the Bengal Municipal Act. The appeal was heard in the first instance by Mr. Justice Sharf-ud-din, who was of opinion that the findings of the District Judge were defective and accordingly remitted an issue to determine whether there is a privy or cesspool within the holding. The District Judge has returned his finding to the effect that there is no privy within the holding. But he has expressed the opinion that upon the question whether there is or is not a cesspool attached to the holding, it is not possible to come to any conclusion, because apparently evidence was not directed to this point. The appeal has now been re-argued before us.

Section 321 of the Bengal Municipal Act provides as follows: When such provision, that is, a provision for the maintenance of an establishment for the cleansing of private privies and cesspools as contemplated by section 320 has been made, the Commissioners may levy fees, to be fixed on such scale with reference to the annual value of the holding, containing dwelling houses or privies within the limits of the Municipality or such part thereof as aforesaid, as the Commissioners may at a meeting from time to time direct. Sub-section (1) of section 322 provides for the levy of the fee payable by the occupier or owner. A proviso is attached to sub-section 4 of section 322 in the following terms: "Provided that no such fee shall be levied in respect of any shop or place of business which does not contain any privies or cess-pools, when a fee under this part is levied from the occupier thereof in respect of his dwelling-house within the same Municipality." There is an apparent contradiction between the terms of the first paragraph of section 321 and the proviso to sub-section 4 of section 322. To explain the precise difficulty, it is necessary to refer briefly to the history of the legislation on the subject. Section 321, as originally framed and incorporated in Act III of 1884, authorised the Commissioners to levy fees in respect of holdings within the limits of the Municipality. The proviso to sub-section (4) of section 322, read

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with the first paragraph of section 321 in its original form, does not create any difficulty. Section 321 authorises the levy of the fee on all holdings. The proviso to sub-section 4 of section 322 lays down that the fee shall not be levied in certain specified circumstances, that is, if three elements are established, namely, (1) that the holding is a shop or place of business; (2) that it does not contain any privy or cess-pool; and (3) that the occupier thereof has been made liable for latrine fee in respect of his dwelling house within the same Municipality. Section 321 was first amended by section 87 of Act IV of 1894, by which the words "containing dwelling houses" were inserted between the words "value of the holding" and "within the limits." It was apparently overlooked by the Legislature that the result of this amendment was to make the proviso to sub-section (4) of section 322 wholly nugatory. Under section 321 as amended in 1894, the Commissioners were authorised to levy latrine fees only in respect of holdings containing dwelling houses. Consequently, no question could arise as to the exemption of a shop or place of business. Subsequently, by section 15 of the Act II of 1896, section 321 was again amended by the insertion of the words "or privies" between the words "containing dwelling houses" and "within the limits." The section now stands in its amended form. After this second amendment the proviso to sub-section (4) of section 322 is equally superfluous, because under section 321 as finally amended, the Commissioners are authorised to levy latrine fees on holdings containing dwelling houses and holdings containing privies. The latter, that is, holdings containing privies might no doubt include holdings which contain a shop or place of business, but there cannot arise an occasion for exemption of a holding which contains a shop or place of business but does not contain a privy, inasmuch as a holding which does not contain either a dwelling house or a privy cannot at all be assessed under section 321. Be that as it may, there cannot be any occasion for application of the proviso in so far as cess-pools are concerned. We have referred in detail to the terms of the proviso to sub-section (4) of section 322 and contrasted them with those of the first paragraph of section 321

because, in the case before us, at one stage reliance does appear to have been placed upon the proviso. It is plain, however, that the proviso does not touch the present case. The question whether the claim of the plaintiff is well founded or not, must be determined with reference to the terms of section 321. Now, it has been found by the District Judge on remand that the holding in dispute does not contain a privy. Consequently, if latrine fee is sought to be levied, it can be so levied only if it is found that the holding contains a dwelling house, and the question for determination reduces to this, is the holding of this description? The District Judge, who heard the appeal in the first instance, found that there can be no doubt that the holding is used as a place of business. But he added that there was ample evidence that the place was used also as a dwelling house. He took this view, because the witnesses on the side of the plaintiff admitted that there was a cowshed and that the plaintiff himself occasionally resided there while in a state of unsound mind. The District Judge, who heard the appeal after remand, has further found that there are cowsheds on the holding. We have consequently to decide, whether upon these facts, the holding can be regarded as one which contains a dwelling house within the meaning of section 321. It may be added that the plaintiff has admittedly another property which he uses ordinarily as a dwelling house. Now the term "dwelling house" is not defined in the Bengal Municipal Act and we have consequently to attach to the expression its ordinary natural meaning. The learned Vakil for the respondent, however, contended on the authority of the case of *Lawson v. Fraser* (1) that as the plaintiff occasionally sleeps in a room in this holding, it may be deemed a dwelling house. An examination of the decision mentioned does not bear out this contention. In that case, there was a dwelling house on the property and the real question in controversy was whether the petitioner inhabited that dwelling house. With a view to the determination of this question, the Court held that the fact that he had a building and occasionally slept therein, justified the

(1) (1881) 8 Ireland 55.

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view that the dwelling house was inhabited by him. This decision consequently does not assist the contention of the respondent. But, what is meant by a dwelling house? Clearly, it is a house with the superadded requirement, that it is dwelt in. In the case of *Forl v. Barnes* (2), it was held that a house in which a person occupied rooms, though he was absent occasionally on duty, might be properly described as his dwelling house. The meaning of the expression "dwelling house" was also considered in the case of *Riley v. Reid* (3) where Kelly, C. B., observed that the proper interpretation of the expression "to dwell" is "to live and occupy for all the purposes of life". In the case before us, all that has been found is that the plaintiff uses the place for residence while he is in a state of unsound mind. The circumstance that there is a cookshed or cowshed on the property, plainly does not indicate that it is a dwelling house. There may be a cookshed or a cowshed on a property which is not a dwelling house but which is merely a place of business. On the facts found, we are clearly of opinion that the holding in question cannot be deemed a dwelling house within the meaning of the first proviso to section 321 of the Bengal Municipal Act. The conclusion follows that the latrine fee has been levied in contravention of the Statute.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below.

Appeal allowed.

(2) (1885) 55 L. J. Q. B. 24; Colt. 396; 16 Q. B. D. 254; 53 L. T. 675; 34 W. R. 78; 50 J. P. 37.

(3) 4 Ex. D. 100; 27 W. R. 414; 48 L. J. Ex. 437.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2355 OF 1913.

August 10, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Kumaraswami Sastri.

KRISHNACHARYA—PLAINTIFF—

APPELLANT

versus

ANTHAKKI AND OTHERS—DEFENDANTS—

RESPONDENTS.

Mulgeni lease—Lessee, whether can cut trees grown

spontaneously or by him—Transfer of Property Act (IV of 1882), s. 108 (h).

A *mulgeni* lessee in South Canara is not entitled to cut trees standing at the date of the grant. [p. 12 col. 2.]

Gangamma v. Bommakka, 5 Ind. Cas. 437; 7 M. L. T. 231; 33 M. 253, followed.

But the landlord has no title to the trees planted by the lessee after the commencement of the lease or to trees and plants of spontaneous growth. The lessee can remove such trees provided he restores the land at the end of his lease period in as good a condition as he received it at the beginning. [p. 13, col. 1.]

Vasudevan Nambudripad v. Valia Chathu Achan, 24 M. 47 (F. B.); 10 M. L. J. 321; *Ruttonji Edulji Shet v. Collector of Tanja*, 11 M. L. A. 295; 10 W. R. 13 (P. C.); 2 Sar. P. C. J. 292; 20 E. R. 113, referred to.

Second appeal against the decree of the District Court of South Canara, in Second Appeal No. 131 of 1912, preferred against that of the Court of the District Munsif of Mangalore, in Original Suit No. 363 of 1910.

Mr. K. Ramanath Shenai, for the Appellant.

Mr. B. Sitarama Rao, for the Respondents.

JUDGMENT.—This suit was brought to restrain a *mulgeni* tenant from cutting down the trees in his holding. These include three classes of trees, viz., (1) trees in existence at the grant of the lease, (2) trees planted by the tenant and (3) trees of spontaneous growth. In the District Munsif's Court the plaintiff's Pleader conceded that he had no title to the trees planted by the lessee after the commencement of the lease. In this Court even this position is contested, but if we rely upon the analogy of the Transfer of Property Act, as it was held in *Gangamma v. Bommakka* (1) that Courts were entitled to do, section 108, clause (h), is against the appellant's contention and no direct authority has been cited for a different view.

The decision in *Gangamma v. Bommakka* (1) is conclusive on the point that a *mulgeni* lessee in South Canara is not entitled to cut trees standing at the date of the grant. The plaintiff failed to prove that the defendant had sold or felled any of such trees. Therefore, an injunction was properly refused.

There remains the case of trees and plants of spontaneous growth. In other (1) 5 Ind. Cas. 437; 33 M. 253; 7 M. L. T. 231.

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parts of the Presidency by section 12 of the Madras Estates Land Act the Legislature has, as regards *ryots* possessing occupancy rights in land situated in estates, put trees planted by the *ryot* and those that grow naturally upon the holding on the same footing and has recognised the *ryot's* right to enjoy and cut them. In Malabar under the Malabar Compensation for Improvements Act compensation is allowed to the tenants at the rate of $\frac{1}{3}$ ths of the market value for trees spontaneously grown during the tenancy and the cost of protecting and maintaining such trees grown prior to the commencement of the tenancy is to be paid to the tenants. In *Vasudevan Nambudripad v. Valia Chathu Achan* (2), the right of *kanomdars* was recognised to remove trees which they have planted during the period of their occupation. This decision does not decide the right even of *kanomdars* in Malabar to remove trees of spontaneous growth, but it is worthy of notice that when an argument was advanced that trees exhaust the ground and that this was a reason for the landlord being more interested in their growth than the tenant, this suggestion did not meet with the approval of the Full Bench. The only obligation on the part of the tenant that they recognised was that he should restore the land at the end of his lease period in as good a condition as he received it at the beginning. The observation in *Ruttonji Edulji Shet v. Collector of Tanna* (3), that the trees upon the land were part of the land and the right to cut down and sell them was incidental to the proprietorship of the land, had reference to trees standing on the land when the lease was made. Mr. Ramanath Shenai for the appellant has not been able to advance any sound reasons for vesting in the *mulgar* the entire right to trees that have sprung up without any effort or expenditure on his part. Nor has the appellant adduced any evidence of custom or usage by which he is entitled to such growth. The lease is silent on the point. We consider that if landlords were to have the power to prevent their tenants from clearing the ground of shrubs and

undergrowth, this would greatly interfere with the tenants' use of the land for agriculture. Even in England the property in bushes is in the tenant, vide *Berriman v. Peacock* (4). In this country it may well be that on leasing land capable of growing timber the lessee may intend to raise and cut timber for sale as firewood, etc., and so long as the trees growing on the land at the date of the lease are not interfered with and the nature of the holding is not changed, it is difficult to see why the tenant should not be entitled to any benefits conferred on him by nature. We, therefore, dismiss this second appeal with costs.

Appeal dismissed.

(4) (1832) 2 M. & Scott. 524; 9 Bing. 384; 2 L. J. C. P. 23; 131 Eng. Rep. 600; 35 R. R. 568.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1933 OF 1914.

July 21, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice and Mr. Justice Holmwood.
KUSADHAJ BHAKTA PRINCIPAL
DEFENDANT—APPELLANT

versus

BROJA MOHAN BHAKTA, MINOR, BY HIS
MOTHER AND GUARDIAN, *Srimati*
RASHMANI DASSI—PLAINTIFF—

RESPONDENT.

Compromise decree, suit to set aside—Mistake, if valid ground—Remedy—Amendment of decree—Fresh suit, not maintainable—Fraud, suit to set aside decree on ground of, maintainability of.

A contract of the parties is nonetheless a contract because, there is superadded to it the command of a Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract. [p. 14, cols. 1 & 2.]

A suit to set aside a decree obtained after contest and giving accurate expression to the Court's intention, is not maintainable. [p. 14, col. 2.]

Per Holmwood, J.—Where there is any divergence between the decree and the judgment, the matter is for amendment of the decree and not for a fresh suit to set aside the decree. [p. 14, col. 2.]

Obiter dictum:—(Per Jenkins, C. J.)—A decree can be set aside on the ground of fraud, if of the required character. [p. 14, col. 2.]

Second appeal against the decree of the Subordinate Judge, 3rd Court of Midnapore dated the 7th April 1914, affirming that of the

(2) 24 M. 47 (F. B.); 10 M. L. J. 321.

(3) 11 M. L. A. 295; 10 W. R. 13 (P. C.); 2 Sar. P. C. J. 292; 20 E. R. 113.

KUSADHAR BHAKTA P. BROJA MOHAN BHAKTA.

Munsif, 1st Court, at Tamlook, dated the 22nd February 1913.

Babus Bipin Behari Ghose, Satindra Nath Roy and Manmatha Nath Paul, for the Appellant.

Babu Jyotish Chandra Hazra, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of a suit to set aside a decree in a previous suit, on the ground that the Judge in passing the decree in that previous suit made a mistake. As an authority for this suit and its competence we have been referred to the decision in the case of *Jogeswar Atha v. Ganga Bishnu Ghattack* (1). It may be that a superficial examination of that decision gives an appearance of authority for the proposition which the respondent advances before us and apparently has advanced with success in both the lower Courts.

Already it has become noticeable that there has been a crop of cases in this Presidency in which it has been sought to set aside previous decrees on the ground of fraud. The readiness to find fraud encourages this class of litigation and the new departure has been a misfortune. If we encourage the idea that the alleged mistake of a Judge is to furnish a disappointed litigant with a fresh starting point for keeping his opponent in Court, then the misfortune would be gravely increased to the public detriment. There must be some end to litigation. I have said there may appear to be some authority for this suit in the case I have mentioned. But it is apparent from the judgment in that case that there was no intention of proceeding beyond the English authority. No instance has been brought to our notice when a suit to set aside or rectify a decree in a previous suit has succeeded on the ground that the Judge was mistaken though his decree accurately expressed his intention. The only case to which reference was made in the case of *Jogeswar Atha v. Ganga Bishnu Ghattack* (1) was a decision of an English Court, where the decree was one passed not after contest but on agreement between the parties. But that class of case is governed by a principle that has no application here. It is well settled that a contract of the parties is nonetheless a contract because there is superadded to it

the command of a Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract. I am unable to draw from those decisions of which *Haddersfield Banking Company Limited v. Henry Lister and Son Limited* (2) are typical the conclusion that a decree after contest and giving accurate expression to the Court's intention can be set aside. There is no analogy between the two cases. In the one the decree is set aside merely because the agreement on which it was founded was set aside. In the other case this consideration has no application. It is not as if the litigant is without remedy. Our Code provides ample means without a fresh suit whereby the litigant can obtain the correction of error. If a fresh suit can be started on the ground placed before us here, then I can see no end to litigation. In holding as I do that this suit does not lie, I am making no new departure. I am merely following previous decisions of this Court and in particular the decision of Sir Comer Petharam in *Mahomed Golab v. Mahomed Sulliman* (3), the decision of a Division Bench in the case of *Sulho Misser v. Golab Singh* (4) and finally, the decision of a third Division Bench in the case of *Bhonda Singh v. Dowlat Roy* (5).

It is not suggested in this case that there was any fraud. Had that been so then the matter would have been different, for it is recognized that a decree can be set aside on the ground of fraud if of the required character.

In my opinion the decree under appeal is erroneous and should be set aside and the suit dismissed with costs throughout.

HOLMWOOD, J.—I entirely agree with what has fallen from the learned Chief Justice. I desire to add that I do not think it matters whether the decree accurately expresses the intention of the judgment, as if there is any divergence between the decree and the judgment, as has been thrown out at one part of the argument before us, then this is a matter for amendment. As long as the Court has

(2) (1895) 2 Ch. D. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567.

(3) 21 C. 612.

(4) 3 C. W. N. 375.

(5) 14 Ind. Cas. 93 15 C. L. J. 675.

(1) 8 C. W. N. 473.

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jurisdiction and authority to decide a matter, as it has decided it, it cannot be re-opened by a suit.

I desire to emphasise all that has fallen from the Chief Justice with regard to the disastrous consequences which will follow by opening any fresh door of litigation, such as appears to be indicated in this case.

Appeal allowed; Suit dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 693 OF 1914.

August 27, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

G. SESHAIYANGAR—DEPONDANT NO. 1—
PETITIONER

versus

A. B. VENKATACHALAM CHETTIAR—

DECREE-HOLDER—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 16 (2) (b), 43—Application for arrest of insolvent debtor—Notice to show cause against re-arrest—Annulment of adjudication, how effected—Order of arrest by Subordinate Judge exercising Small Cause Court powers—Revision.

A Judge sitting in the Small Cause Court cannot divest himself of his powers as a Judge of that Court and immediately proceed to dispose of an oral application made to him to exercise his powers under section 16, clause 2 (b), of the Provincial Insolvency Act. [p. 15, col. 2.]

When a debtor is declared an insolvent, then so long as the order of adjudication subsists and is not annulled, he cannot be deprived of the immunity conferred upon insolvents by the insolvency Act, unless notice has been served upon him to show cause why he should not be arrested. [p. 16, col. 1.]

There will be no annulment of adjudication once made unless the procedure prescribed in sections 42, 44 and 45 of the Provincial Insolvency Act is followed. The mere fact that proceedings were contemplated under section 43 is not enough to show that the order of adjudication is annulled. [p. 16, col. 1.]

Where on an application being made in execution of a decree of the Small Cause Court to arrest the petitioner, who had already been adjudicated an insolvent, the Subordinate Judge directed the arrest, acting in the exercise of his powers as a Small Cause Court Judge:

Held, that no appeal lay to the District Court against the order made by the Subordinate Judge as a Judge of the Court of Small Causes and the only remedy was by way of revision to the High Court. [p. 15, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate

Judge of Kumbakonam, in Execution Appeal No. 2135 of 1913, in Execution Petition No. 1634 of 1913, in Small Cause Suit No. 916 of 1910.

Mr. T. R. Venkatarama Sastri, for the Petitioner.

Mr. T. Ranga Ramanujachariar, for the Respondent.

JUDGMENT.—A preliminary objection is taken by Mr. Ranga Ramanujachariar that this petition does not lie, as the proper remedy of the petitioner was to have filed an appeal to the District Court against the order of the Subordinate Judge. The Subordinate Judge in directing the arrest of the petitioner acted in the exercise of his powers as a Small Cause Court Judge. The plea of the petitioner was that so long as the insolvency proceedings were undisposed of, he was not liable to be arrested in execution of the decree of the Small Cause Court. The Sub-Judge dealt with this objection as a Judge of the Court of Small Causes. Its correctness can be decided only by a Court to which the Small Cause Court is subordinate and that Court is the High Court. Therefore the petition was rightly filed in this Court.

On the merits.

This was an application in execution of a decree of the Small Cause Court to arrest the petitioner who had been adjudicated an insolvent already. Proceedings were taken under section 43 of the Provincial Insolvency Act, but, apparently on the ground that they may not be successful, they were dropped. While ordering execution of the decree by directing the arrest of the petitioner, the Judge was exercising his powers as a Judge of the Small Cause Court. Mr. Ranga Ramanujachariar argued that in directing the arrest of the petitioner the Judge really exercised the exceptional powers given to him by the penultimate clause of section 16, clause 2 (b), of the Provincial Insolvency Act. I am doubtful whether a Judge sitting in the Small Cause Court can divest (himself) of his powers as a Judge of that Court and immediately proceed to dispose of an oral application made to him to exercise his powers under section 16, clause 2 (b). Even if such an application had been made, though there is nothing

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on the record to show that it was made, before the immunity given in the Insolvency Act is taken away from a person, there must be a notice to him to show cause why he should not be arrested. As there are no indications in the proceedings before me to show that such a notice was given and that the petitioner had an opportunity of showing cause, I cannot accede to the contention of the learned Vakil for the counter-petitioner that the Subordinate Judge directed the arrest of the petitioner under section 16, clause 2 (b).

The main contention relates to the question whether the adjudication proceedings against the insolvent had come to an end, thereby depriving the petitioner of the protection he had. The view taken by the Subordinate Judge is this: that as the proceedings under section 43 of the Insolvency Act were contemplated by implication, the adjudication had been put an end to. I am unable to follow the reasoning. The Act provides various modes by which an adjudication can be annulled. Sections 42, 44 and 45 provide the procedure to be adopted for annulling an adjudication once made. None of the proceedings contemplated in those sections were adopted in this case: and I am unable to agree with the Subordinate Judge that the mere fact that proceedings were contemplated under section 43 is evidence of the Subordinate Judge having annulled the order of adjudication. As the adjudication must be deemed to have been subsisting, the arrest of the petitioner was illegal. I must, therefore, set aside the order of the Subordinate Judge; and as I am informed that the prisoner has undergone imprisonment no further order is necessary. I make no order as to costs in this Court.

Petition allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2724 OF 1912.

March 29, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Newbould.

DINA NATH NAG AND OTHERS—DEFENDANTS
—APPELLANTS

versus

SASHI MOHAN DEY TARAFDAR—

PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 182—Homestead, meaning of—Land used for agricultural purposes—Land used for the purpose of gathering and storing thereon the crops raised on adjacent lands.

In order to make section 182 of the Bengal Tenancy Act applicable, it is not essential that the homestead should be in the same village or be held under the same landlord as the holding of the *raiyat*. [p. 17, col. 2.]

The expression 'homestead' as used in the section denotes land on which a *raiyat* has his homestead, that is, land used by him for residential purposes. The section is not applicable where it is established that the land is not used by the *raiyat* as his homestead; it is not sufficient to show that the character of the land is such as would justify its use as a homestead. [p. 17, col. 2.]

The provisions of the Bengal Tenancy Act are applicable to all lands used for agricultural purposes, and are not restricted to such lands alone as are actually under cultivation. [p. 17, col. 2; p. 18, col. 1.]

Where the defendants were *raiya*s in respect of lands in the vicinity of the land in dispute which they had taken with a view to gather and store thereon the crops raised on the adjacent lands actually cultivated by them:

Held, that the provisions of the Bengal Tenancy Act applied, and the defendants were *raiya*s also in respect of the disputed land. [p. 18, col. 1.]

Appeal against the decree of the Subordinate Judge of Mymensingh, dated the 9th July 1912, affirming that of the Munsif of Tangail, dated the 5th March 1912.

Babun Nilmadhub Bose and Mukund Nath Roy, for the Appellants.

Babu Ram Chunder Mozumdar and Dr. Nares Chunder Sen Gupta, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in an action in ejectment. The plaintiff seeks to eject the defendants on the ground that they were tenants of the disputed land and that their tenancy has been terminated by service of notice to quit under the provisions of the Transfer of Property Act. The Courts below have decreed the suit. Upon appeal to this Court, the defendants have contended that they are *raiya*s and cannot be ejected except in conformity with the provisions of the Bengal Tenancy Act. This contention is based on a two-

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fold ground, namely, *first*, that the disputed land is the homestead of the defendants, governed by the provisions of section 182 of the Bengal Tenancy Act; and *secondly*, that if the land is not their homestead, it is held by them as *raiyats* and for agricultural purposes. It may be premised here that the defendants hold as *raiyats* parcels of land in the neighbourhood; those parcels, however, lie in a different village and are held by them under a landlord other than the plaintiffs. The previous history of the land in dispute has not been very successfully investigated. We are told that it was used as a homestead by one Ram Kani Seal; but no information is available as to whether he was a *raiyat* or not. In 1904, he transferred the land to the defendants. Since then, the land has been used by the defendants, not as their homestead, but only to gather and store the crops raised by them in the neighbouring fields. The plaintiff-respondent asserts that the holding of Ram Kani Seal was non-transferable and that the defendants did not acquire a valid title by their purchase; this may be assumed to be correct for the purpose of the present argument. The position consequently is that the defendants are tenants in respect of the disputed land, as after their purchase rent was accepted from them by one of two joint landlords; and the land in suit represents only a half share of the entire holding. What, then, is the status of the defendants?

The *first* branch of their contention is that this is homestead land governed by the provisions of section 182 of the Bengal Tenancy Act. That section is in these terms: "When a *raiyat* holds his homestead otherwise than as part of his holding as a *raiyat*, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of this Act applicable to land held by a *raiyat*." With regard to this section it has been ruled by this Court in the cases of *Kripa Nath Chakrabutty v. Sheikh Anu* (1), *Protap Chandra Das v. Biseswar Pramanick* (2), *Golam Mowla v. Abdool Sowar Mondul* (3)

and *Harihar Chattopadhyaya v. Dinu Bera* (4) that in order to make section 182 applicable, it is not essential that the homestead should be in the same village or be held under the same landlord as the holding of the *raiyat*. This position has not been controverted by the respondent and has been made the foundation of an argument by the appellants that even though the land is not used as a homestead by the *raiyat*, section 182 applies on proof that the land is capable of use as a homestead. The argument in substance is that we should read "any homestead" for the expression "his homestead" and "any holding" for "his holding", to justify the conclusions adopted in the cases mentioned. In our opinion there is no foundation for this contention. To substitute for the expressions "his homestead" and "his holding" the phrases "any homestead" and "any holding" respectively would obviously be to undertake legislation beyond the competence of a Court of Justice. The cases on which reliance has been placed were decided in view of the fact that there is nothing in the language of section 182 to justify its restriction to cases where the homestead and the holding are situated in one village and are held under one landlord. That this was the reasoning on which the principle in question was adopted is clear from the decision in *Harihar Chattopadhyaya v. Dinu Bera* (4). We are further not prepared to accede to the contention of the appellants that the expression 'homestead' is used in section 182 as a generic term descriptive of a particular kind of land; on the other hand, we think, it denotes land on which a *raiyat* has his homestead, that is, land used by him for residential purposes. In our opinion, it is plain that section 182 is not applicable where it is established that the land is not used by the *raiyat* as his homestead; it is not sufficient to show that the character of the land is such as would justify its use as a homestead. The first branch of the contention of the appellants entirely fails.

The *second* branch of the contention of the appellants is that the land in suit is held by them as *raiyats*. It is plain that the provisions of the Bengal Tenancy Act are applicable to all lands used for

(4) 10 Ind. Cas. 139; 14 C. L. J. 170; 16 C. W. N. 536.

(1) 4 C. L. J. 332; 10 C. W. N. 944.

(2) 9 C. W. N. 416.

(3) 9 Ind. Cas. 922; 13 C. L. J. 255.

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agricultural purposes, and are not restricted to such lands alone as are actually under cultivation. This view is supported by a long series of decisions, amongst which may be mentioned the cases of *Fitzpatrick v. Wallace* (5), *Latifur Rahman v. A. H. Forbes* (6) and *Hedayet Ali v. Kulanand Singh* (7). In the case last mentioned, the question arose, whether land leased for grazing purposes was governed by the provisions of the Bengal Tenancy Act. It was pointed out that the Bengal Tenancy Act would be applicable if it was found that the grazing was in relation to cultivation, which is the primary purpose for which a *raiyat* acquires the right to hold land. In the case before us, the defendants are *raiyats* in respect of lands in the vicinity of the land in suit, which they have taken with a view to gather and store thereon the crops raised on the adjacent lands actually cultivated by them. This gathering and storage of crops raised by them is clearly a purpose ancillary to cultivation. Where, as here, land has been let out for a purpose like this, it is impossible to hold that the provisions of the Bengal Tenancy Act do not apply; the inference is thus irresistible that the defendants are *raiyats* also in respect of the disputed land. On behalf of the respondents it has been strenuously contended, however, that there is nothing to indicate that the land was actually let out for this purpose. But we have the undeniable fact that ever since the defendants came into occupation of this land, they have used it for this purpose without protest by their landlord. The landlord is in fact in an inextricable difficulty. If it is his case that the land was let out as a homestead to *raiyats*, though no doubt they are *raiyats* in respect of other lands in a different village under other landlords, the provisions of section 182 are applicable. If, on the other hand, the land was let out, as it apparently was, to *raiyats* for a purpose ancillary to cultivation, the grantees are *raiyats* in respect of the land. In either view, the defendants are *raiyats* and can be ejected only in accordance with the provisions of the Bengal Tenancy Act. The plaintiff has not shown

that he is entitled to eject them under the Bengal Tenancy Act. His case, on the other hand, throughout has been that the tenancy of the defendants is governed by the provisions of the Transfer of Property Act, which, in the view we take, are inapplicable as is plain from section 117.

The result is that this appeal is allowed and the suit dismissed with costs in all the Courts.

Appeal allowed; Suit dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 727 OF 1913.

August 5, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Tyabji.

MUTHAN *alias* MUTHUKRISHNA

MUDALI—PLAINTIFF—APPELLANT

versus

PUNIAKOTI MUDALIAR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Self-acquisition by one member—Presumption.

Where one member of a joint Hindu family acquires property without the aid of ancestral or joint family funds, the property acquired will, in the absence of any indication of intention to the contrary, be owned by all as joint family property. But it may be shown that the person acquiring it treated it as his separate property. [p. 19, col. 1.]

Sa. Narasimham Maistri v. Narasimham Maistri, 25 M. 149 at p. 156; 11 M. L. J. 353; *Gopalasami Chetty v. Arunachalam Chetty*, 27 M. 32; *Muniswami Chetty v. Maruthammal*, 7 Ind. Cas. 176; 34 M. 211; 8 M. L. T. 124; 20 M. L. J. 687; (1910) M. W. N. 233; *Madhavaiya Chetty v. Damodaram Chetty*, 17 Ind. Cas. 347; 12 M. L. T. 240; (1912) M. W. N. 972, followed.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 497 of 1912 preferred against that of the District Munsif of Ranipet, in Original Suit No. 5 of 1912.

Mr. V. Narasimha Aiyangar, for the Appellant.

Messrs T. Narasimha Aiyangar and A. Srirangachariar, for the Respondents.

This second appeal coming on for hearing on the 21st October 1914 before Ayling and Hannay, J., the Court delivered the following

(5) 11 W. R. 231; 2 B. L. R. 317.

(6) 5 Ind. Cas. 783; 14 C. W. N. 372.

(7) 20 Ind. Cas. 332; 17 C. L. J. 411.

ABDUL GANI C. MAKBUL ALI.

JUDGMENT.—The aspect of the case presented to us on appellant's behalf is that dealt with by the District Judge in paragraph No. 4 of his judgment. He finds that the Manthangal lands were the self-acquisitions of Rajagopala Mudali (brother of the 1st defendant) and that the other suit lands were acquired by Rajagopala Mudali and the 1st defendant out of the profits of their contracts after their father's death without the aid of ancestral or joint family funds. This finding cannot be questioned in second appeal, but the appellant's Vakil argues that the District Judge is wrong in assuming that the lands thus acquired are not part of the joint family estate.

Bhashyam Ayyangar, J., in *Sudorsanam Maisiri v. Narasimulu Maistri* (1) says: "But, if, as supposed, the property was acquired by all the members of the undivided family by their joint labour, it would, in the absence of any indication of intention to the contrary, be owned by them as joint family property and in that case, their male issue, who, by their birth, become members of such undivided family, necessarily acquire a right by birth in such property". This proposition of law has been accepted in *Gopalasami Chetty v. Arunachalam Chetty* (2), *Muniswami Chetty v. Maruthammal* (3) and in *Madharaiya Chetty v. Damodaram Chetty* (4) and cannot now be questioned.

It is, of course, open to the respondents to show that the property was treated by the persons acquiring it as their separate property; and any indications either way would have to be considered. But this is a question of fact which has not been gone into by either of the lower Courts.

The presumption is in the opposite direction to that indicated by the learned District Judge.

We must call for a finding on the following issue:—

"Were the plaint properties treated as their separate property by the 1st defendant and

Rajagopala Mudali or were they thrown into the family joint stock?"

Additional evidence may be adduced; the finding should be submitted within two months and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment of the Court, the District Judge of North Arcot submitted a finding negative on the first part and affirmative on the second part of the issue.

This second appeal coming on this day for final hearing after the return of the above finding of the lower Appellate Court upon the issue referred to it for trial, the Court delivered the following

JUDGMENT.—We accept the finding, set aside the decree of the District Judge and remand the appeal for disposal according to law after deciding the other issues. Costs will be provided for in the revised decree.

Appeal allowed; Suit remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 636 OF 1912.

July 28, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

ABDUL GANI CHAUDHURY—PLAINTIFF
APPELLANT

versus

MAKBUL ALI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Revenue Sale Law (Act XI of 1859), s. 37 Proviso—Bengal Tenancy Act (VIII of 1885)—Raiyats at fixed rates—Ordinary occupancy raiyats—Enhancement of rent—Protection, nature of.

Raiyats holding at fixed rates are primarily the persons referred to in the proviso to section 37 of Act XI of 1859, and the protection provided by the section is extended under the Bengal Tenancy Act to all classes of occupancy raiyats. [p. 20, cols. 1 & 2.]

A person who takes the tenancy originally as a raiyat at fixed rates may not thereby acquire an occupancy right but a man who has already obtained occupancy rights cannot, by obtaining a grant of fixed rent, lose that occupancy right. [p. 20, col. 2.]

Quere:—Whether, in view of the protection offered by section 37 of Act XI of 1859, a purchaser at a sale for arrears of revenue can enhance the rent of an occupancy raiyat? [p. 20, col. 2.]

(1) 25 M. 149 at p. 156; 11 M. L. J. 353.

(2) 27 M. 32.

(3) 7 Ind. Cas. 176; 34 M. 211; 8 M. L. T. 124; 20 M. L. J. 687; (1910) M. W. N. 233.

(4) 17 Ind. Cas. 347; 13 M. L. T. 240; (1912) M. W. N. 972.

ABDUL GANI V. MAKBUL ALI.

Appeal against the decree of the Subordinate Judge, 1st Court of Chittagong, dated the 11th January 1912, reversing that of the Munsif, 3rd Court of Chittagong, dated the 10th July 1911.

Babus *Probodh Kumar Das* and *Khitish Chandra Chuckerbutty* (for Babu *Amulya Charan Chatterjee*), for the Appellant.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff to have the holding of the defendant declared such a holding as can be annulled under section 37 of Act XI of 1859.

It appears that the plaintiff is the purchaser of the rights of defendant No. 5, who purchased the *taraf* at a sale for arrears of revenue. The defendants Nos. 1 and 2 are persons whom the Judge found to have cultivated the land themselves for 30 years before 1895, when they obtained *pottah* as *raiya*s at fixed rates. That *pottah*, of course, conferred upon them higher privileges than that of ordinary occupancy *raiya*s, but it certainly did not take away the occupancy right which they had already acquired, for they must have acquired that right prior to the Bengal Tenancy Act, not that in our opinion it would make any difference. The protection of occupancy *raiya*s at fixed rates which is referred to in section 37 of Act XI of 1859 is not one of the ordinary exceptions in that section. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation of the soil and are cultivating it. The term occupancy *raiya*s at fixed rent meant in the year 1859 apparently the successors of *kademi khud kasht raiya*s in the Regulations, while the ordinary *khud kasht raiya*s became occupancy *raiya*s. The intention of the Legislature, therefore, was that these *kademi khud kasht raiya*s should not only not be liable to ejectment, but should not be liable to any enhancement of rent; and to these persons have succeeded what the Bengal Tenancy Act now classes as "*raiya*s holding at fixed rates." *Raiya*s holding at fixed rates, therefore, are primarily the persons referred to in the proviso to section 37 of Act XI of 1859. But this doctrine of protection has been extended by

recent rulings of this Court to ordinary occupancy *raiya*s, and the judgment of Mr. Justice Mitra which is the leading case [*Sarat Chandra Roy Chowdhry v. Asiman Bibi* (1)] on this point is frequently followed in this Court and has never been dissented from. The protection, therefore, is extended under the Bengal Tenancy Act from these *kademi khud kasht raiya*s or *raiya*s at fixed rates to all classes of occupancy *raiya*s; and the decision of Mr. Justice Mookerjee upon which the Chief Justice did not express any opinion in the case of *Bhutnath Naskar v. Monmotho Nath Mitra* (2), which is based upon a technical interpretation of section 160 of the Bengal Tenancy Act, can have nothing whatever to do with the question before us.

It may be argued that a person who takes the tenancy originally as a *raiya* at fixed rates does not thereby acquire an occupancy right. But that does not imply that a man who has already obtained occupancy rights can by obtaining a grant of fixed rent lose that occupancy right. That appears to us to be neither in accordance with equity or common sense nor the wording of the law.

We must, therefore, hold that the defendants were precisely in the position of those tenants who are mentioned in the proviso to section 37, and that not only are they protected but nothing in the law can be construed to entitle the purchaser to eject them or to enhance their rent. That is the law, and to argue that the purchaser loses a valuable right, namely, the right of enhancement which he would have in the case of ordinary occupancy rights is to misconstrue the whole effect of the section itself, which is in terms directed against enhancement. If the ruling of Mr. Justice Mitra is correct, an occupancy *raiya* in the ordinary sense of the word is also protected by that section. It is doubtful whether in that case the purchaser can enhance his rent, although the Bengal Tenancy Act itself provides for the enhancement of the rent of an ordinary occupancy *raiya*. However, this is not the question which we have to deal with here.

Another question which was argued was

(1) 8 C. W. N. 601; 31 C. 725.

(2) 2 Ind. Cas. 675; 11 C. L. J. 98; 13 C. W. N. 1026.

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with regard to the Judge's view of the *khatian* of 1898, in which the defendants are recorded as *kaimi madhya satyadhikari* or intermediate tenure-holders at fixed rent. It was faintly urged that the presumption arising from this record could not be rebutted by evidence of what happened before the record was made. It appears to us that the findings of the Judge as to what happened before the record was made, prove conclusively that the record was wrong; for these men had been cultivating this land with their own hands for 30 years when they obtained the *pottah* describing them as *kaimi* rights. The area of the land was only $\frac{1}{4}$ *kanis* and odd and there was no indication whatever that this holding was a tenure. It can only be a tenure if it is proved that it was demised for the purpose of settling cultivators upon it and for collecting rent, and not for the purpose of being cultivated by the *raiya* or his family and servants. The facts of the case, which extend up to 1895 and are not altered in any way by the *pottah* of that date except in respect of giving the defendants fixed rent, conclusively prove that at the time of the Settlement they could not have been tenure-holders within the meaning of section 5 (1), Chapter III, of the Bengal Tenancy Act.

The third contention was that we ought to have the *pottah* before us to construe it. As the defendants have not chosen to appear in answer to this appeal, it is suggested that we ought to give the appellant further time to get this *pottah* produced. We have always understood that when a decree has been passed against a person who desires to appeal, it is for him to put forward all necessary materials for the purpose of getting the presumption which is against him on the lower Court's judgment set aside. He could easily have made a prayer in the petition of appeal that the defendants be called upon to produce this *pottah*, or that the lower Court be directed to obtain it and forward it to this Court. We cannot either wait for it now or construe it. The finding, however, of the learned Judge and the arguments of the learned Vakil indicate quite sufficiently what were its contents and the arguments which are based upon it, with which we have already dealt.

As regards the plaintiff's prayer for assessment of fair and equitable rent we cannot see how that can arise in a suit under section 37 of Act XI of 1859, since the very basis of the protection offered by that section is against any enhancement, and enhancement is really what the plaintiff is seeking for. It is not within the scope of the suit; if it were, fair and equitable rent of an occupancy *raiya* at fixed rates would obviously be the rent which had been fixed for his holding.

The result is that the appeal is dismissed, but without costs as the respondents do not appear.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1455 OF 1914.

September 3, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.

YELAMPATI KANNAYYA AND ANOTHER—
DEFENDANTS NOS. 3 AND 4—APPELLANTS
versus
YELAMPATHI RAMANNA—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Decree passed in accordance with agreement of parties not appealed against—Decree, if binding in subsequent suit.

In a suit brought to establish the plaintiff's title to the land which he had got by virtue of a decree passed in a prior suit for specific performance of a contract to sell, the defendants alleged that they were not bound by that decree on the ground that it was a decree upon a compromise to which they were not parties. It appeared that what had happened was that the 1st defendant had made a statement on oath that he and other defendants had agreed to execute a sale-deed in favour of the plaintiff who also had made a statement on oath confirming this, and the Court had, thereupon, directed a decree to be made in accordance with the agreement of the parties:

Held, that the order was apparently passed under Order XXIII, rule 3 of the Civil Procedure Code and no appeal having been preferred against it the decree passed therein became final and binding on the defendants. [p. 22, cols. 1 & 2.]

Second appeal against the decree of the District Court of Guntur, in Appeal Suit No. 313 of 1913, preferred against that

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of the Court of the District Munsif of Guntur, in Original Suit No. 1071 of 1911.

Mr. K. V. L. Narasimham, for the Appellants.

Mr. Sarvagopali Aiyangar for Mr. V. Ramadoss, for the Respondent.

JUDGMENT.

SPENCER, J.—This suit was brought to establish the plaintiff's title to the land, which he got by virtue of a decree passed in a prior suit brought for specific performance of a contract to sell.

Defendants Nos. 3 and 4, who are appellants in this second appeal, allege that they are not bound by the decree in Original Suit No. 51 of 1907, on the ground that it was a decree upon a compromise to which they were not parties. This appeal has been argued to a great length on the assumption that it was a decree passed with the consent of parties to which section 96 (3) of the Code of Civil Procedure would apply. But it appears that what happened was that the 1st defendant made a statement on oath in the presence of the Pleader for defendants Nos. 1 to 4 that he and defendants Nos. 2 to 4 had agreed to execute a sale deed in favour of the plaintiff according to the prayer in the suit. The plaintiff also made a statement on oath confirming this. The Court thereupon directed a decree to be made in accordance with the agreement of the parties by which the suit was thus proved to have been adjudicated. The order passed by the Court was apparently passed under Order XXIII, rule 3. The defendants, though they must through their Pleader, have been aware of the result of the suit, did not prefer an appeal under Order XLIII, rule 1 (m), or take any other step to have the order which affected them adversely, set aside. It is not now urged that the plaintiff obtained the decree by fraud or collusion. It is simply argued that these defendants are not bound by a compromise to which they were not parties. With this, I cannot agree. They were parties to the prior suit and the decree passed therein having become final, they are debarred from questioning it. In this view the second appeal fails and is dismissed with costs.

PHILLIPS, J.—This second appeal has been argued at great length on the ground that

the decree which appellants wish to avoid was a decree passed in terms of a compromise. From the judgment in the suit and the decree (Exhibits VII and V) and 1st defendant's statement (Exhibit IV) it is clear that the decree was passed under Order XXIII, rule 3, and consequently the arguments to show that the appellants are not bound by the decree because they were not parties to the compromise, are useless. The language of the District Judge, *i. e.*, 'if the adjudication made against them on the basis of the consent given by their father was illegal', shows that he also treated the decree as one under Order XXIII. Appellants not having appealed against the order recording the compromise under Order XXIII, rule 3, allowed the decree to become final and consequently the District Judge was justified in his finding that the appellants were estopped. I agree that the second appeal should be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2757 OF 1912.

March 25, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Richardson.

HAR SHYAM CHOWDHURY—DEPENDANT
No. 5—APPELLANT

versus

SHYAM LAL SAHU—PLAINTIFF—

RESPONDENT.

Mortgage—Subrogation—Satisfaction of charge undertaken to be satisfied—Fraud committed in respect of existence or satisfaction of prior charge—Contract, stranger to, when can claim performance of.

The doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge which he has undertaken or is bound to satisfy. If a person purchases a property subject to two mortgages, retains a portion of the purchase-money for payment to the mortgagees, but pays the first incumbrancer alone and not the second, he cannot treat the first mortgage as kept alive for use as a shield against the second; nor can he claim to be subrogated to the position of the mortgagee whose debt he has satisfied. [p. 23, col. 2.]

If A purchases property subject to three successive charges X, Y and Z with full knowledge of their existence, and retains a portion of the purchase-money in his hands with a view to satisfy the

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mortgages Y and Z, but subsequently discharges the security Z, he cannot, on satisfaction of the mortgage X, use it as a shield against the mortgage Y. But if the acceptance of the mortgage-deed with an untrue recital as to the satisfaction of the mortgage X by the mortgagee Y enabled the mortgagor to commit a fraud upon the purchaser, the latter can, on discovery and satisfaction of the mortgage X use it as a shield against the mortgagee Y. [p. 24, col. 1; p. 25, col. 1.]

Although a stranger to a contract may sometimes be entitled to claim the benefit of the performance thereof, the doctrine cannot be allowed to be invoked to defeat the ends of justice [p. 25, col. 1.]

Appeal against the decree of the District Judge of Darbhanga, dated the 2nd February 1912, modifying that of the Subordinate Judge of Darbhanga, dated the 21st April 1911.

Babu Narendra Kumar Bose, for the Appellant.

Babu Lakshmi Narain Singh, for the Respondent.

JUDGMENT.—This is an appeal by the fifth defendant in a suit to enforce a mortgage security. The property in dispute has been the subject of three mortgage transactions. The first mortgage was created on the 29th March 1888 for a sum of Rs. 700 which carried interest at the rate of 24 per cent. per annum; the second was on the 22nd July 1895 to secure a loan of Rs. 500 on interest at 18 per cent per annum. The third mortgage, now sought to be enforced, was created on the 27th December 1897 to secure a loan of Rs. 700 which bore interest at 18 per cent. per annum. On the 15th October 1901, the mortgagors transferred the equity of redemption to the appellant for a sum of Rs. 2,238. The conveyance recited that there were only two mortgages on the property, namely, those of 1895 and 1897. The purchaser, who was allowed to retain in his hands the entire consideration, agreed to apply the money in satisfaction of the dues on these two mortgages. He subsequently discovered that there was a prior mortgage on the property purchased by him, namely, the mortgage of 1888. He accordingly satisfied the mortgages of 1888 and 1895. The mortgagee of 1897 then commenced this action on the 21st June 1910 to recover his dues. The suit has been contested by the appellant, the purchaser under the conveyance of 1901, who argues that he is entitled to priority to the extent of the mortgages of 1888 and 1895. The District Judge has overruled this contention

and has made the usual mortgage decree in favour of the plaintiff. On the present appeal by the purchaser of the equity of redemption, it has been urged that as he has satisfied the mortgages of 1888 and 1895, he is entitled to use them as shields against the mortgagee of 1897.

In so far as the mortgage of 1895 is concerned, it is plain that this contention cannot prevail. It was ruled by this Court in the case of *Surjiram Marwari v. Barhamdeo Pershad* (1), that the doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge which he has undertaken or is bound to satisfy. If a person purchases a property subject to two mortgages, retains a portion of the purchase-money for payment to the mortgagees, but pays the first incumbrancer alone and not the second, he cannot treat the first mortgage as kept alive for use as a shield against the second; he cannot claim to be subrogated to the position of the mortgagee whose debt he has satisfied. The same principle was applied in the cases of *Bhiseswar Prosad v. Lala Sarnam Singh* (2) and *Sat Narain Tewari v. Sheobaran Singh* (3). The cases of *Tara Sundari Debi v. Khedon Lal Sahu* (4) and *Prayag Narain v. Cheli Rai* (5) are not in principle opposed to this view; they merely furnish illustrations of cases which, the Court thought, (whether rightly or wrongly, it is needless to discuss for our present purpose) fall outside the scope of the rule enunciated in *Surjiram Marwari v. Barhamdeo Pershad* (1). In respect of the mortgage of 1895, it is clear that the appellant discharged an obligation which he had undertaken to fulfil, namely, to satisfy the mortgage, not with his own money, but with money which belonged to his vendors and had been placed at his disposal for that specific purpose. If his vendor had satisfied the mortgage of 1895, as he might well have done, it is plain that he, as mortgagor, could not have treated the mortgage satisfied by him as available by way of defence against the mortgagees of

(1) 2 C. L. J. 288.

(2) 6 C. L. J. 134.

(3) 11 Ind. Cas. 847; 14 C. L. J. 507.

(4) 7 Ind. Cas. 910; 14 C. W. N. 1089.

(5) 7 Ind. Cas. 979; 14 C. W. N. 1093a.

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1897. It follows consequently that the appellant is not entitled to priority on the basis of the payment made by him to satisfy the mortgage of 1895.

A question of some nicety, however, arises in respect of the mortgage of 1888. The appellant had undertaken to satisfy the mortgage of 1897; he did not fulfil his obligation, but chose to satisfy the mortgage of 1888. Is he then entitled to use the mortgage of 1888 as a protection against the mortgage of 1897? There can be no room for doubt that if A purchases property subject to three successive charges X, Y and Z with full knowledge of their existence, and retains a portion of the purchase-money in his hands, with a view to satisfy the mortgages Y and Z, but subsequently discharges the security Z, he cannot, on satisfaction of the mortgage X, use it as a shield against the mortgage Y. This follows from the case of *Bisheswar Prasad v. Lala Sarnam Singh* (2), where reference is made to the decision in *Heim v. Vogel* (6). In that case, A obtained title to a property subject to two prior charges, and at the same time undertook to satisfy the second charge. He did not fulfil his obligation, but subsequently, when he had acquired rights under the first charge, took his stand thereon as protection against the second charge. His contention was overruled on the ground that he was bound to satisfy the second charge with the money at his disposal; and so long as that money was retained by him, he could not be allowed to prejudice the position of the second encumbrancer by means of title acquired under the first charge. If, consequently, nothing else was known in this case except that there were the three successive charges of 1888, 1895 and 1897 and that the appellant had undertaken to pay the charges of 1895 and 1897 with money placed at his disposal by the mortgagor, the mere fact that he had satisfied the prior charge of 1888 would not entitle him to use it as a shield against the mortgagee of 1897. The latter would *prima facie* be entitled to contend that as the appellant had in his hands money placed at his disposal by the mortgagor for the satisfaction of his dues, he could not be prejudiced by reason of the payment made by the appellant to satisfy the debt of 1888.

There are, however, special circumstances in this case which, as we shall presently see, take it out of the general rule already explained.

The mortgage of 1897 recited that Rs. 400 out of the Rs. 700 secured thereby had been applied by the mortgagor to satisfy the mortgage of 1888, that the mortgagor had redeemed the mortgage and had obtained the mortgage instrument which he had made over to the new mortgagee as evidence of his title. This was, it is now conceded, an entirely false recital. The sum of Rs. 400 had not been applied to discharge the mortgage of 1888; the mortgage instrument had not been taken back from the mortgagee but was still in his custody. The appellant contends that he was misled by this recital and purchased the property from the mortgagor in the belief that it was subject to two charges only, namely, those of 1895 and 1897. It is indisputable that the acceptance of this instrument with an untrue recital by the mortgagee of 1897 enabled the mortgagor to commit a fraud on the appellant. He intended to acquire a clear title to the property free of all prior charges thereon; he found on enquiry that there were only two subsisting charges to be satisfied, namely, those of 1895, and 1897. He discovered after his purchase that there was a prior charge of 1888 which was falsely described as satisfied in the mortgage instrument of 1897 held by the respondent. Consequently, if we apply the test of intention of the person who satisfies the prior charge, as ruled in the cases of *Moresh Lal v. Mohant Bawan Das* (7), *Gokaldas Gopaldas v. Puranmal Prem-sukhdas* (8), *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (9), *Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh* (10), *Liquidation Estates Purchase Co. Ltd. v. Willoughby* (11), *Thorne v. Uann* (12), *Whiteley v.* (7) 10 I. A. 62; 9 C. 961; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424.
(8) 11 I. A. 126; 10 C. 1035; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543.
(9) 29 I. A. 9; 29 C. 154; 6 C. W. N. 209; 12 M. L. J. 73; 4 Bom. L. R. 238.
(10) 14 Ind. Cas. 496; 39 I. A. 68; 39 C. 527; 11 M. L. J. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468.
(11) (1898) A. C. 321; 67 L. J. Ch. 251; 78 L. T. 329; 14 T. L. R. 295; 46 W. R. 589.
(12) (1895) A. C. 11; 64 L. J. Ch. 1; 11 B. 67; 71 L. T. 852.

(6) (1879) 69 Missonri 529.

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Delaney (13), *Shib Narain v. Baikuntha Nath Santra* (14), the answer must be in favour of the appellant, for there is no shadow of a doubt that when he satisfied the mortgage of 1888, he intended to keep the security alive for use as a protection against the mortgage of 1897. On the other hand, if as explained in *Gurdee Singh v. Chandrika Singh* (15), we treat the doctrine of subrogation as based on equitable grounds, to be applied only where needed to accomplish the ends of justice, it is equally plain that the plaintiff has no claim to consideration as against the appellant; for it was the conduct of the plaintiff which enabled his mortgagor to commit a fraud on the appellant. The plaintiff has also no claim as against the appellant on any contractual basis; he is in no sense privy to the agreement between the appellant and his vendor; and although it has recently been held that a stranger to a contract may sometimes, as explained in *Jahandar Baksh v. Ram Lal* (16), be entitled to claim the benefit of the performance thereof, as in *Nawab Khwaja Muhammad Khan v. Nawab Husaini Begum* (17) and *Deb Narain Dutt v. Ram Sadhan Mundal* (18), that doctrine cannot be allowed to be invoked to defeat the ends of justice. From whatever point of view the case may be considered, it is consequently plain that the appellant is entitled to priority in respect of the payment made by him to satisfy the mortgage of 1888.

The result is that this appeal is allowed in part and the decree of the District Judge modified. The appellant is entitled to priority in respect of a sum of Rs. 344, proportionate to the share of the property now in suit. We direct that the property covered by the mortgage of 1897 be sold in execution of the decree made by the District Judge free of the charges of 1888, 1895 and 1897.

(13) (1914) A. C. 132; 83 L. J. Ch. 349; 110 L. T. 434; 58 S. J. 218.

(14) 20 Ind. Cas. 864; 19 C. L. J. 200.

(15) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.

(16) 5 Ind. Cas. 565; 11 C. L. J. 364 at p. 368; 14 C. W. N. 470; 37 C. 449.

(17) 7 Ind. Cas. 237; 37 I. A. 152; 12 C. L. J. 205; 32 A. 410; 14 C. W. N. 865 (P. C.); 7 A. L. J. 871; 8 M. L. T. 147; 12 Bom. L. R. 638; 12 C. L. J. 205; 20 M. L. J. 614; (1910) M. W. N. 313.

(18) 20 Ind. Cas. 630; 41 C. 137; 18 C. L. J. 603; 17 C. W. N. 1143.

Out of the sale-proceeds, the appellant will be first entitled to Rs. 344 and the costs of this suit; from the balance left, the plaintiff decree-holder will be entitled to his dues; the surplus, if any, will belong to the appellant. The appellant is entitled to his costs as against the plaintiff throughout this litigation.

Appeal allowed in part.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2659 OF 1913.

July 22, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

M. SADAGOPACHARIAR—PLAINTIFF—

APPELLANT

versus

RAMA TIRUMALA CHARARIAR AND

ANOTHER—DEFENDANTS NOS. 1 AND 2

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 10, scope of—Later suit disposed of earlier—Parties in two suits claiming under different titles—Pleadings in later suit, if can be urged as bar to previous suit.

After the plaintiff had brought a suit against the defendant, both of them were made defendants in another suit which was decided while the plaintiff's suit against the defendant was still pending. In his defence in the first suit the defendant relied upon the plaintiff's pleadings as defendant in the second suit. The plaintiff contended that as the trial of the second suit was without jurisdiction by reason of section 10 of the Civil Procedure Code, his pleadings in that suit could not be relied upon by the defendant:

Held, that, as the later suit was not between the parties under whom the parties to the earlier suit claimed litigating under the same title, the plaintiff's contention was untenable. [p. 26, col. 1.]

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 197 of 1912, preferred against that of the Court of the District Munsif of Poonamallee, in Original Suit No. 149 of 1911.

Mr. K. R. Narayanasawmy Aiyar, for Mr. I. Narasimha Aiyangar, for the Appellant.

Mr. M. N. Dorasawmy Aiyangar, for the Respondents.

JUDGMENT.—The foundation of the lower Courts' decision was plaintiff's pleading the judgment in Original Suit No. 170 of 1911, in which plaintiff and 1st defendant were

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2nd and 1st defendants. Original Suit No. 170 was instituted after the present suit, though it was decided before it. It is argued first that in these circumstances the Court was debarred by section 10, Civil Procedure Code, from trying Original Suit No. 170 until this, the earlier suit, had been disposed of, that the trial was consequently held without jurisdiction and that, therefore, defendants cannot rely on plaintiff's pleading during it or on the decision which ended it.

We cannot accept this. Section 10 requires that the earlier suit shall be between the same parties as the later or, the portion of it at present relevant, between parties under whom they or any of them claim litigating under the same title. But in Original Suit No. 170 the plaintiff relied, not directly on a title derived from 1st defendant, but on the title of certain alleged vendees from him, whom he repudiated. The title under which the plaintiff in Original Suit No. 170 litigated was, therefore, not that now in question, and the section cannot be applied.

We have been shown no valid reason for holding that the decision in Original Suit No. 170 is not *res judicata* in the present suit or that the present plaintiff is not now estopped by his pleading there. We have been informed that the decision in Original Suit No. 170 is under appeal, but the fact is not admitted, and nothing to satisfy us regarding it has been produced. In these circumstances the second appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 4257 OF 1913.

February 10, 1915.

Present:— Mr. Justice Richardson and
Mr. Justice Mullick.

ALEJAN BIBI AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

RAHAM ALI AND OTHERS—DEFENDANTS—
RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), ss. 49 (b), 85
—Under-raiyat—Holding for a term—Devolution of
interest—Heirs, whether can be ejected without notice.*

There is nothing in the Bengal Tenancy Act which expressly takes away the right of the heirs of an under-raiyat to succeed to the remainder of the term granted by the raiyat within the powers conferred on the latter by section 85, and apart from custom or express enactment there is no doubt that a lease for a term devolves upon the heirs of the original lessee. On the expiry of the term the heirs may be ejected without notice under section 49 (b) of the Bengal Tenancy Act. [p. 27, col. 1.]

Arip Mandal v. Ram Ratan Mandal, 31 C. 757; 8 C. W. N. 479. *Jamini Sundari Dasi v. Rajendra Nath Chakrabarty*, 11 C. W. N. 519, distinguished.

Appeal against the decision of the Subordinate Judge of Chittagong, dated the 5th September 1913, reversing that of the Munsif of North Roazan, dated the 30th April 1912.

Babu Dharendra Kastgir, for the Appellants.

Moulvie Abdul Jawwad, for the Respondents.

JUDGMENT.

RICHARDSON, J.—The defendants in this suit are the heirs of an under-raiyat to whom the plaintiffs, as raiyats of the holding in which the land in suit is situated, granted by a written and registered instrument a lease for a term of nine years. The under-raiyat died some years ago and it has been found that the defendants have since been in possession of the land leased to them and have been paying rent therefor to the plaintiffs. The term of nine years has now expired and the suit was brought by the plaintiffs for the purpose of ejecting the defendants from the land comprised in the sublease. In the first Court the plaintiffs obtained a decree, that decree was reversed by the learned Subordinate Judge in the Court of Appeal below and the suit was dismissed. The learned Subordinate Judge held that the subtenancy granted to the original under-raiyat came to an end with his death, that the payment by and acceptance of rent from his heirs, the defendants, created a new tenancy as between them and the plaintiffs and that the defendants cannot be ejected unless and until notice to quit has been served upon them in accordance with clause (b) of section 49 of the Bengal Tenancy Act.

The question before us in this second appeal, which is preferred by the plaintiffs, is whether the learned Subordinate Judge was right in the view which he took of the case and of the respective rights of the parties. For the appellants it has been urged that a raiyat is empowered by section 85 of the Bengal Tenancy Act, if not expressly

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at any rate by necessary implication, to grant an under-raiyat by means of a written and registered instrument a sub-lease for a term not exceeding nine years. It is further argued that there is nothing in the Act which has the effect of cutting down a sub-lease for such a term to a sub-lease for the term of the under-raiyat's life if he should die before the expiry of the nine years. This reasoning is in some respects analogous to the reasoning adopted by the Full Bench in deciding the case of the *Midnapore Zemindari Company, Ltd. v. Hrishikesh Ghosh* (), where the question was whether the holding of a non-occupancy raiyat was or was not heritable. It may fairly be said that there is nothing in the Bengal Tenancy Act which expressly takes away the right of the heirs of an under-raiyat to succeed to the remainder of a term granted by the raiyat within the powers conferred on the latter by section 85 and apart from custom or express enactment, there is no doubt that a lease for a term devolves upon the heirs of the original lessee. On behalf of the defendants, the respondents before us, our attention has been directed to the Full Bench case of *Arip Mandal v. Ram Ratan Mandal* (2) and also to the decision of Mr. Justice Mookerjee in *Jamini Sunari Dasi v. Rajendra Nath Chakrabutty* (3). These cases, however, deal with the position which arises upon the death of an under-raiyat who holds under an annual holding or a tenancy from year to year. In such a case, no doubt the only right which the Full Bench recognises as belonging to the heirs of the under-raiyat upon his death is a right to remain in possession of the land until the end of the then agricultural year for the purpose, if the land has been sub-let, of realising the rent which might accrue during the year or, if not sub-let, for the purpose of tending and gathering in the crops. The decision of the Full Bench seems, therefore, to deny to the heirs of the under-raiyat under an annual holding any right of succession properly so called to the tenancy and so the decision was understood by Mr. Justice Mookerjee, who observes: "It follows, therefore, that the Full Bench held that the heirs of an under-raiyat under an

(1) 25 Ind. Cas. 564; 41 C. 1108; 18 C. W. N. 828; 19 C. L. J. 505.

(2) 31 C. 757; 8 C. W. N. 79

(3) 11 C. W. N. 519.

annual holding do not acquire any interest in his holding by inheritance." That being so, it is contended for the defendants that there is no real difference between the case of a tenancy for a term of years and the case of a tenancy from year to year and that if a tenancy of the latter sort is not heritable, a tenancy for a term should also be held to be not heritable. In my opinion, weighing the arguments of both sides the balance inclines in favour of the view propounded on behalf of the plaintiffs. It seems to me that inasmuch as under the Act a raiyat is clearly at liberty to grant a sub-lease for a term not exceeding nine years, the lease so granted, in the absence of anything to the contrary in the Act, carries with it the ordinary incidents of a lease for a term of years. One of the incidents of such a lease is that if the lessee dies before the end of the term, his heirs are entitled to succeed him in the tenancy. I do not say that there is no force in the arguments pressed upon us on behalf of the defendants but as I have said, on the whole it seems to me that the view suggested on the other side should prevail.

I am, therefore, of opinion that this appeal should be allowed, the decree of the Subordinate Judge should be set aside and the decree of the Munsif should be restored.

The plaintiffs will be entitled to their costs throughout.

MULLICK, J.—I agree.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 899 of 1912.

June 25, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Shadi Lal.

SUNDAR SINGH—DEFENDANT—
APPELLANT

versus

Musammât GURDEVI AND OTHERS —
PLAINTIFFS AND ANOTHER—DEFENDANT—
RESPONDENTS.

Hindu Law—Mitakshara—Father's sister's sons, whether can inherit as bandhus—Third party, whether can be impleaded at final stage—Civil Procedure Code (Act V of 1908), O. I, r. 10.

Where the father's sister of the last male owner and her sons sued for a declaration that the alienation made by the mother of the last male owner in favour of the defendant shall not affect their reversionary rights:

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Held, that under the Mitakshara School of Hindu Law the plaintiffs were entitled to inherit as *bandhus* and could contest the alienation.

Narasimma v. Mangammal, 13 M. 10; *Chinnammal v. Venkatachala*, 15 M. 421; 2 M. L. J. 86 *Nanhi v. Gauri Shankar*, 28 A. 187; 2 A. L. J. 654; A. W. N. (1905) 242, referred to.

A person who has not been impleaded either as a plaintiff or a defendant in the Courts below cannot claim to be made a party at the final stage of the case.

Second appeal from the decree of the Additional Divisional Judge, Amritsar Division, at Jullundur, dated the 1st April 1912, varying that of the Subordinate Judge, 2nd class, Amritsar, dated the 30th March 1911, decreeing claim.

Mr. Nanak Chand, for the Appellant.

Chaudhri Ram Bhai Datt and Mr. Mukand Lal Puri, for the Respondents.

JUDGMENT.—One Gurmukh Singh, an Arora of the town of Amritsar, was the last male owner of the property in dispute. After his death, his mother, *Musammam* Maya Devi, succeeded to his estate on the usual life tenure, and in January 1908 she effected a sale of the property in favour of the defendant Sunder Singh, who is the appellant before us. The plaintiffs, who are Gurmukh Singh's father's sister and her three sons, have obtained a declaratory decree from the Divisional Judge that the alienation shall not affect their reversionary rights on the death of *Musammam* Maya Devi, and the vendee has preferred to this Court a second appeal against that decree.

It is quite clear that the decision of the lower Appellate Court that the alienation was not for necessity proceeds upon the evidence adduced by the parties and the finding being one of fact cannot obviously be impeached in second appeal. The Court has considered the facts and circumstances of the case and arrived at a conclusion adverse to the appellant and we see absolutely no reason for interference in second appeal with its decision.

The sole question for determination is whether the plaintiffs are heirs under the Mitakshara School of the Hindu Law, by which the deceased Gurmukh Singh was admittedly governed. Upon that point we have no hesitation in expressing our opinion in the affirmative. It will be observed that the sons of the paternal aunt are expressly mentioned as *bandhus* in the original text of the Mitakshara and it is manifest that

the position of the plaintiffs as *bandhus* has been affirmed in a series of judgments, *vide, inter alia, Narasimma v. Mangammal* (1), *Chinnammal v. Venkatachala* (2) and *Nanhi v. Gauri Shankar* (3). There is not a single judgment which lays down the contrary rule. We are fully aware of the fact that there was at one time considerable divergence of judicial opinion as to the right of the sister's son as a *bandhu* under the Mitakshara, but even that matter has now been settled in his favour and his right to inherit as a *bandhu* has been recognized in a large number of cases decided by the High Courts.

The right of succession of the paternal aunt and her sons has never been doubted and we, therefore, consider it unnecessary to deal with the principles of Hindu Law upon which that right is founded. We accordingly hold that the plaintiffs have *locus standi* to contest the alienation made by *Musammam* Maya Devi.

Before concluding, we may mention that Mr. Mukand Lal Puri, on behalf of a person who claims to be the *sapinda* of Gurmukh Singh, applied at the commencement of the hearing that his client might be impleaded as a party to the appeal, but we declined to accede to the request for the simple reason that the applicant had not been impleaded as a plaintiff or a defendant in the Courts below and had consequently no right to intervene at the final stage of the case. Further, the declaratory decree enures for the benefit of all the heirs, and he will be entitled to avail himself of it, if he establishes his right to succeed to the property in preference to the plaintiffs.

Our decision upon the only point which arises in the appeal is against the appellant. We accordingly affirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(1) 13 M. 10.

(2) 15 M. 421; 2 M. L. J. 86.

(3) 28 A. 187; 2 A. L. J. 654; A. W. N. (1905) 242.

MOHES CHANDRA GUHA V. RAJANI KANTA DUTT.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1138 OF 1914.

May 7, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.

MOHES CHANDRA GUHA—PETITIONER

versus

RAJANI KANTA DUTT AND ANOTHER—
OPPOSITE PARTY.*Contract Act (IX of 1872), s. 2 (i)—Consideration—
Release of debtor and acceptance of another in his place.*Where the creditor releases his debtor and accepts
a new debtor in his place, the release of the original
debtor furnishes good consideration for the new
contract.Civil Rule against the decision of the Small
Cause Court Judge of Barisal, dated the 11th
July 1914.Babu Asitranjan Chatterjee, for the Peti-
tioner.Babu Bepin Behari Ghose, for the Opposite
Party.

JUDGMENT.—This Rule was granted under section 25 of the Provincial Small Cause Courts Act, on the application of the plaintiff in the Court below. He sued to recover money due on a bond for Rs. 100 executed in his favour on the 28th July 1910 by one Tilak Chandra Dutt and his two sons, Rajani Kanta Dutt and Mohesh Chandra Dutt. The bond recited that on the 28th May 1904 the plaintiff advanced Rs. 50 to Tilak Chandra Dutt and Mohesh Chandra Dutt and took a bond on the basis whereof payments had been made from time to time, that a considerable sum was still due on account of principal and interest, and, that inasmuch as Mohesh Chandra Dutt was not present and could not renew the bond, Rajani Kanta Dutt joined his father Tilak Chandra Dutt in the execution of the second bond. The Small Cause Court Judge has dismissed the suit as against the two sons on the ground that in so far as they were concerned, the bond was executed without consideration and was not binding on them as it was not registered. We are now invited by the plaintiff to set aside the decree of dismissal in favour of the two sons.

It is indisputable that the suit has been rightly dismissed as against Mohesh Chandra Dutt, as the suit has been brought on the renewed bond and he was not a party thereto. On the other hand, if the suit were treated as brought for enforcement of the original

obligation, the claim as against him would clearly be met by the plea of limitation. But in respect of the liability of Rajani Kanta Dutt, it is plain that the Subordinate Judge has taken an erroneous view. One of the witnesses for the plaintiff stated in cross-examination that no cash consideration was paid for the bond in suit. The Subordinate Judge has inferred from this that the bond was without consideration, and his observation that the bond was not binding because unregistered seems to indicate that he had the provisions of section 25 of the Indian Contract Act in view, which, it cannot be disputed, have no bearing on the case. The Subordinate Judge is clearly wrong in his view that a bond cannot be operative unless supported by cash consideration: See Indian Contract Act, section 2 (d). What happened was that the creditor required that the bond should be renewed by the original executants; one of them was absent and could not comply with his demand. The creditor agreed to release the absent debtor from liability, if his brother would make himself responsible in his place. Rajani accordingly executed the renewed bond. This, then, is a case where the creditor released his debtor and accepted a new debtor in his place. The release of the original debtor furnishes good consideration for the new contract: *Alliance Bank v. Broom* (1), *Fullerton v. Provincial Bank of Ireland* (2), *Glegg v. Bromley* (3). The view taken by the Subordinate Judge cannot consequently be supported. But it is necessary to remand the case for investigation of one question and one question only, namely, whether Rajani really executed the bond. He denied in his written statement that he did so, but this point has not been determined by the Subordinate Judge.

The result is that this Rule is discharged in so far as Mohesh Chandra Dutt is concerned; it is made absolute against Rajani Kanta Dutt and the case is remitted to the Subordinate Judge in order that he may re-try the case against him in view of the observations made in this judgment. There will be no order for costs in this Court.

Rule partly discharged; Case remanded.

(1) (1864) 2 Drew. & Sm. 289; 13 W. R. 127; 5 N. R. 66; 34 L. J. Ch. 256; 10 Jur. (N. S.) 1121; 11 L. T. 332; 62 E. R. 631; 143 R. R. 120.

(2) (1903) A. C. 309; 72 L. J. P. C. 79; 89 L. T. 79; 52 W. R. 238.

(3) (1912) 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825.

HAR PROSAD DASS v. BAKSHI BINDESWARI PROSAD SINGH.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 437
OF 1912.

April 15, 1915.

Present:—Mr. Justice Fletcher and
Mr. Justice Teunon.

HAR PROSAD DASS *alias* DEWAN DASS
—PLAINTIFF—APPELLANT

VS.

BAKSHI BINDESWARI PROSAD SINGH
alias LALLUJI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Karta of joint Hindu family, acknowledgment by, if valid—Other members, if bound—Promissory note filed with plaintiff missing from Court records—Copy filed—Suff. of facts—Evidence Act (I of 1872), s. 65.

S, the karta of a joint Hindu family, executed certain promissory notes. S died leaving a brother H and a minor son. H succeeded to the *ku* *hish* and renewed one of the hand notes executed by S. In a suit on the notes the plaintiff alleged to have filed the notes with the plaintiff but they were missing from the Court's records. Copies of the notes were filed and admitted by the lower Courts. The debt was not proved to have been contracted for any immoral purpose.

Held, that the plaintiff's claim could not fail by reason of the theft or his inability to produce the original documents before the Courts. [p. 31, col. 2.]

Held, further, that the debt not being for immoral purposes H as the karta of the family was an agent duly authorized in this behalf so as to give an acknowledgment under section 19 of the Limitation Act and that the son of S was bound by the acknowledgment. [p. 32, col. 1.]

Appeal against the decree of the Subordinate Judge, first Court, Shahabad, dated the 9th September 1912.

Babus *Maxmothanath Mukerjee, Sateendra-nath Palit* for Babu *Umakali Mukerjee, Babus Sateendra Nath Mukerjee and Sudhansa Sekhar Mukerjee*, for the Appellant.

Babus *Mohendra Nath Roy and Raghu Nath Singh*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Shahabad, dated the 9th September 1912. The plaintiff sued to recover certain sums that were alleged to be due to him from the defendants. The first defendant, Bakshi Harihar Prosad Singh, had a brother, Bakshi Sheo Prosad Singh. In the year 1907 Sheo Prosad Singh died leaving the second defendant, his only son. In his life-time, Sheo Prosad had executed certain promissory notes and, on the 30th April 1906, he executed a fresh hand-note for Rs. 6,000 in favour of the plaintiff in

lieu of all the notes that had been executed by him down to that date. On the 22nd November 1906, Sheo Prosad executed a further hand-note for the sum of Rs. 1,000. Sheo Prosad was the *karta* of this joint Hindu family and the defendant No. 2, his infant son, was a member of that family which was undivided at all times material for the purposes of the present case. On the death of Sheo Prosad, the first defendant succeeded to the office of the *karta* and he executed five promissory notes in favour of the plaintiff, two being dated the 5th April 1908 and the 12th November 1908 respectively, each of them being for Rs. 1,000, another one dated the 26th December 1908 for Rs. 300 and the two remaining ones being dated the 28th April 1909 and the 15th May 1909, the first one being for Rs. 1,400 and the last one being for Rs. 1,000. Harihar Prosad Singh, the first defendant, also on the 30th April 1909, renewed the hand-note for Rs. 6,000 which had been given by Sheo Prosad Singh by giving a note for Rs. 7,720-2-9. On the original note there was endorsed "executed another hand-note in its stead of the value of Rs. 7,720-2-9 up to date," and it was signed by the defendant No. 1. Default having been made in paying the amount covered by these notes as well as the note for Rs. 1,000 executed by Sheo Prosad on the 22nd November 1906, the plaintiff brought the present suit. The learned Judge of the Court below has given a decree to the plaintiff against the defendant No. 1 alone for the whole amount sued for, except the Rs. 1,000 covered by the hand-note dated the 22nd November 1906. He has dismissed the suit as against the defendant No. 2. The plaintiff has appealed against that decision.

It will be convenient to deal with the five notes that were given by the defendant No. 1 himself after the death of Sheo Prosad in the first place, and then to deal with the renewed note for Rs. 7,720-2-9 that was given by the defendant No. 1 in renewal of the note for Rs. 6,000 executed by Sheo Prosad. No argument was advanced before us as regards the amount covered by the note dated the 22nd November 1906 executed by Sheo Prosad Singh, the claim as regards that being evidently barred by limitation.

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The learned Judge has made this finding with reference to the five notes that were given by the defendant No. 1 himself: "There is nothing to show that the moneys were borrowed for family purposes or for the benefit of the minor. On the other hand, there is evidence adduced by the defendant No. 2 to show that the defendant No. 1 has been leading an extravagant and dissipated life, which renders it highly probable that he borrowed the moneys for his own personal use." The evidence on which the learned Judge came to that conclusion is ample to warrant the conclusion that he came to. The evidence is not very much one way or the other, but it seems to me that, on these five notes, the evidence is not sufficient to establish the liability of the infant, that is the defendant No. 2, with respect to the moneys so advanced. I think, with regard to the amounts due on those five notes, we ought to affirm the decision of the learned Subordinate Judge.

The case on the note for Rs. 7,720-2-9 is not so easy. The first point that was objected to was that the learned Judge of the Court below admitted a copy of this note in evidence and also copies of the notes in respect of which it was a renewal, on the ground that the original documents had been stolen from the Court records. It is said that the whole of that story about the documents having been stolen is a false story. There does not seem to be any reason why the plaintiff who appears to be a man of substance should have set up a bogus story as to these documents having been stolen, so that he could give false copies in evidence. The learned Judge remarks that "it is not altogether improbable that the hand-notes alleged to have been filed with the plaint were stolen about the same time. However this may have been, it cannot be doubted that the hand-notes, or at least, those detailed in paragraph 5 of the plaint were really executed and that the debts have not been repaid." The objection of the respondents to this appeal is that the learned Judge of the Court below admitted secondary evidence of these notes without coming to a definite finding that the document had been stolen or lost. I think the learned Judge, when he remarked that it was not altogether improbable that the hand-notes

were stolen, meant to come to the conclusion that whether those documents had been actually stolen or not, at any rate they had been mislaid or had not been found at that time and further, that there was no doubt that the documents had been in existence and that the copies filed were the true copies of those documents. I think the learned Judge was clearly right in holding that the plaintiff's claim should not fail by reason of the theft or his inability to produce the original documents before the Court.

Then the next point is—"Is the defendant No. 2 liable for this amount?" It cannot be denied that the defendant No. 2 was liable to repay the six thousand rupees which was secured by the promissory note of the 30th April 1908. The maker of that promissory note was the father of the defendant No. 2 and, unless it was for an immoral consideration, the defendant No. 2 was liable to pay his father's debt. So far from this debt being given for an immoral consideration, the evidence shows that the moneys were borrowed with reference to a hosiery business that Shoo Prasad was carrying on for the benefit of the joint family. There is no doubt that the defendant No. 2 was liable to pay the amount secured by that note. There are, therefore, only two questions with reference to this matter. *First* of all "Had Harihar Prasad, that is, the defendant No. 1, power to give an acknowledgment of the debt secured by the note for Rs. 6,000 so as to prevent it from being barred by limitation?" and, *secondly*, "If he had, whether the acknowledgment in this case is sufficient to answer the purpose of the Statute?" There has been a good deal of conflict of judicial authorities on the question as to whether the persons acting for those under disability are entitled to give an acknowledgment or not. The balance of judicial authorities appears to me to have held that they are able to do so, provided that the debt is not barred by limitation on the date when the acknowledgment is given. That was decided in the Full Bench case of *Chinnaya v. Gurunatham Chetti* (1) of the Madras High Court. That case was followed and

(1) 5 M. 169.

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approved of in the case of *Blasker Tatya Shet v. Vijalal Nathu* (2). Whatever conflict there was in the various decisions, it was set at rest by the 21st section of the Indian Limitation Act of 1908, which provides that "the agent duly authorized, as is mentioned in sections 19 and 20 of the Act shall in the case of a person under disability include his lawful guardian, committee or manager." The decisions that the learned Vakil for the respondents relied upon, namely, in the cases of *Wajibun v. Kadir Buksh* (3) and *Chhato Ram v. Bilto Ali* (4), can no longer be considered to be good law. These decisions are inconsistent with the statutory provision that now appears in section 21. I think that there is no doubt that the defendant No. 2 being a person liable to pay this debt contracted by his father the defendant No. 1, as the *karta* of the family, was an agent duly authorized in this behalf so as to give an acknowledgment under section 19 and thus to give a new period of limitation with regard to the amount remaining due on the promissory note for Rs. 6,000. If that is so, the only other question is "Is the acknowledgment in this case sufficient to bind the defendant No. 2?" The learned Vakil for the defendant No. 2, respondent, has tried to limit the acknowledgment to the promissory note for Rs. 7,720-2-9. He says that that does not show any connection between the original hand-note for Rs. 6,000 and this renewed note and that, therefore, as there is no connection between the two documents, it cannot be taken to be an acknowledgment of the liability that existed on the defendant No. 2 to pay the amount which his father was liable to pay on the note for Rs. 6,000. As a matter of fact, that is not strictly so, because the hand-note for Rs. 7,720-2-9 is expressed to be given in lieu of the hand-note dated the 30th April 1906. That certainly established a connection between that hand-note and the hand-note for Rs. 6,000. But, in addition to that, there is the endorsement upon the hand-note for Rs. 6,000 itself in these terms:—"Executed another hand-note in its stead of the value of Rs. 7,720-2-9 up

to date." It is quite clear that it was an acknowledgment in respect of the amount due on the former hand-note. It is said that the defendant No. 1 did not express to have made the acknowledgment as the *karta* of joint family. There is not much authority on that point, but in the case that I have referred to, namely, the Full Bench case reported as *Chinnaya v. Gurunatham Chetti* (1), the acknowledgment did not express that it was made as binding the family and notwithstanding that the Full Bench considered that the acknowledgment bound the family, on the ground that the *karta* having power to borrow money for proper purposes had power to give a proper acknowledgment of the existing debt. During the course of the argument it was somewhat faintly suggested that the infant was not liable on this note at all on the ground that he was not a party to the present note. The claim in this suit is not limited to suing on the promissory note itself. There is an obligation to pay outside the note and that obligation bound the other members of the joint family, notwithstanding that they could not be sued upon the note. As a matter of fact presumably the second defendant is bound to pay his father's debt if not contracted for immoral purposes, whether it is a debt on a promissory note or in any other form. In this case, the obligation to repay the money remains on the defendant No. 2. That liability has been, to my mind, properly acknowledged by an agent duly authorized to make the acknowledgment under section 19 of the Limitation Act and the second defendant is, therefore, liable to pay to the plaintiff out of his share of the family estate the amount so due upon that promissory note. I think that we ought to set aside the judgment and decree passed by the learned Subordinate Judge in so far as it relates to the liability of the defendant No. 2 under the promissory note for Rs. 7,720-2-9 and in lieu thereof direct that the defendant No. 2 is liable along with the defendant No. 1 to pay that amount together with interest thereon at the contractual rate down to the institution of the suit out of his share of the joint family property. In other respects the decree of the lower Court will stand. As both parties have partially succeeded in this Court, we

(2) 17 B. 512.

(3) 13 C. 292.

(4) 26 C. 53; 3 C. W. N. 313.

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make no order as to the costs of this Court. Similarly we think we ought to direct that the plaintiff and the defendant No. 2 should bear their own costs in the lower Court, the plaintiff having succeeded against the defendant No. 2 on one claim and having failed on the other. The order passed by the lower Court for costs as against the defendant No. 1 will stand.

TEUNON, J.—I agree.

Decree modified.

CALCUTTA HIGH COURT.

CIVIL RULE No. 161 OF 1915.

May 24, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.

JUGGOBUNDHU SAHA—DEPENDANT No. 2

—PETITIONER

versus

CHAND MOHAN SAHA—PLAINTIFF—

OPPOSITE PARTY.

Arbitration—Delegation of functions—Judicial misconduct—Material irregularity—Award—Dealing with matters not covered by submission—Illegal parts of award severable—Legal part, effect on

An arbitrator has no authority to delegate his functions, except possibly the performance of what are called 'ministerial acts', and if he does so, he is guilty of judicial misconduct and his award is invalid. [p. 33, col. 2.]

It is permissible to an arbitrator to take assistance in technical matters, in so far as such assistance is necessary for the discharge of his duties. The decision, however, must ultimately be his own judgment in the matter, although in the process of formation of that conclusion he may take the assistance of experts. [p. 33, col. 2; p. 34, col. 1.]

A Court acts with material irregularity in the exercise of its jurisdiction, if it overrules the objection of judicial misconduct on the part of the arbitrator, without inquiry and without reception of evidence material for the determination of the issue. [p. 34, col. 1.]

A submission furnishes the source and prescribes the limits of the arbitrator's authority and the award both in substance and in form must conform to the submission, and if the award extends to matters not within the scope of the submission, it is void as regards the portion in excess of the submission. [p. 34, col. 1.]

Where the different parts of an award are severable and not dependent on each other, the illegal portion may be cancelled and effect given to the remainder. [p. 34, col. 2.]

Civil Rule against the decision of the Subordinate Judge of Dacca, dated the 6th July 1914.

Babus Biraj Mohan Mojumdar and Rajendra Chunder Guha, for the Petitioner.

Babus Dwarka Nath Chuckerbutty, Upendra Lal Roy, Sures Chunder Das and Prokas Chunder Pakrasi, for the Opposite Party.

JUDGMENT.—This Rule was granted on the application of the second defendant in a suit for partition to set aside the decree made therein by the Court below on the basis of an arbitration award. The petitioner impugns the decree on two grounds, *first*, that the Subordinate Judge acted with material irregularity in the exercise of his jurisdiction when he declined to examine the arbitrator at the request of the second defendant, who alleged that the arbitrator had been guilty of judicial misconduct; and *secondly*, that the decree made by the Subordinate Judge in conformity with the award is, in part, made without jurisdiction, because it affects immoveable property which is not the subject-matter of the litigation.

As regards the *first* ground, it appears that when the award had been submitted, objection thereto was taken by the petitioner on the allegation that the arbitrator had delegated his authority to a stranger and that the award was in essence not the act of the arbitrator, but of that person. This was a serious charge of judicial misconduct, and, if established, would invalidate the award for it cannot be disputed that an arbitrator has no authority to delegate his functions, except possibly the performance of what are called "ministerial acts": *Lingood v. Eade* (1), *Emery v. Wase* (2); *Little v. Newton* (3); *Tandy, In re* (4), *Whitmore v. Smith* (5), *Eads v. Williams* (6). The Subordinate Judge states in his judgment that the arbitrator was authorised to take assistance in technical matters; that, indeed, was permissible to him, in so far as such assistance was necessary for the discharge of his duties: *Caledonian Ry. Co. v. Lockhart* (7), *Emery v. Wase* (2), *Hopcraft v.*

(1) (1742) 2 Atk. 501 at p. 504; 26 E. R. 702.

(2) (1801) 5 Ves. 846 at p. 848; 31 E. R. 889; 5 R. R. 181; on appeal 8 Ves. 505; 7 R. R. 109; 32 E. R. 451.

(3) (1841) 9 D. P. C. 437; 2 Scott. (N. R.) 159; 2 Man. & G. 351; 10 L. J. C. P. 88; 5 Jur. 246; 133 E. R. 627; 58 R. R. 436.

(4) (1841) 9 D. P. C. 1044; 5 Jur. 726.

(5) (1861) 7 H. & N. 509; 31 L. J. Ex. 107; 8 Jur. (N. S.) 514; 5 L. T. 618; 10 W. R. 253; 126 R. R. 551.

(6) (1854) 4 De G. M. & G. 674; 24 L. J. Ch. 531; 1 Jur. (N. S.) 193; 43 E. R. 671; 3 W. R. 98; 102 R. R. 326.

(7) (1860) 3 Macqueen H. L. 808; 6 Jur. (N. S.) 1311; 3 L. T. 65; 8 W. R. 373; 119 R. R. 1101.

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Hickman (8); *Anderson v. Wallace* (9). But this would not entitle him to delegate his powers practically to another person. The decision must ultimately be his own judgment in the matter, although in the process of formation of that conclusion he may take the assistance of experts: *Nanjappa v. Nanja Rao* (10). When a charge of judicial misconduct of this description was made against the arbitrator, it was incumbent upon the Court to examine him to ascertain whether the allegation was well founded or not. This is obviously good sense; but if authority is needed for this elementary proposition, reference may be made to the decision of the Judicial Committee in *Amir Begam v. Badruddin Husain* (11). There is consequently no escape from the position that the Subordinate Judge has acted with material irregularity in the exercise of his jurisdiction, inasmuch as he as overruled the objection of judicial misconduct on the part of the arbitrator, without enquiry and without reception of evidence material for the determination of the issue.

As regards the *second* ground, it is not disputed that the arbitrator did, by his award, impose restrictions upon the use of immoveable property which did not form the subject-matter of the litigation and of the reference. The decree of the Subordinate Judge, in so far as it confirms that award in this respect, is consequently made without jurisdiction. It is an elementary rule that the submission furnishes the source and prescribes the limits of the arbitrator's authority and the award both in substance and in form must conform to the submission. Consequently, as the arbitrators are inflexibly limited to a decision of the particular matters referred, if the award extends to matters not within the scope of the submission, it is void as regards the portion in excess of the submission: *Hill v. Thorn* (12); *Hids v. Petit* (13); *Price v.*

Popkin (14); *Pascoe v. Pascoe* (15); *Baillie v. Edinburgh Oil Gas Light Co.* (16); *Buccleuch v. Metropolitan Board of Works* (17); *Moshahel v. Konomutty* (18); *Narsingh Narain Singh v. Ajodhya Prosad Singh* (19); *Mohammad Muntaz Ali Khan v. Sakhawati Ali Khan* (20). At the same time upon the materials placed before us, it seems that the award might have been amended so as to meet the objection taken on this ground; for as laid down by the Judicial Committee in *Amir Begam v. Badruddin Husain* (11) where the different parts of an award are severable and not dependent on each other, the illegal portion may be cancelled and effect given to the remainder. See also *Buta v. Municipal Committee* (21); *Buccleuch v. Metropolitan Board* (17). The Subordinate Judge will deal with this matter, when the case goes back to him.

The result is that this Rule is made absolute, the decree of the Subordinate Judge set aside and the case remanded to him in order that it may be re-heard upon these two points. If the first objection succeeds, the award will be set aside and the Court will itself proceed to try the suit. If the first ground fails, the Court will proceed to consider how the award can be amended so that no restriction may be imposed upon the user of property which is not the subject-matter of the litigation. The costs of this Rule will abide the result. We assess the hearing fee at two gold mohurs.

Rule made absolute; Case remanded.

(14) (1839) 10 A. & E. 139; 2 P. & D. 304; 8 L. J. Q. B. 198; 3 Jur. 433; 113 E. R. 53; 50 R. R. 362.
(15) (1837) 3 Bing. (N. C.) 898; 5 Scott. 117; 3 Hodg's 18; 6 L. J. C. P. 322; 132 E. R. 656; 43 R. R. 847.

(16) (1835) 3 Cl. & F. 639; 6 E. R. 1577.
(17) (1870) 5 Ex. 221; 41 L. J. Ex. 137; 27 L. T. 1; 5 H. L. 418.
(18) 15 W. R. 172.
(19) 13 Ind. Cas. 118; 15 C. L. J. 110; 16 C. W. N. 256.
(20) 28 I. A. 190; 23 A. 394; 5 C. W. N. 581.
(21) 29 I. A. 168; 29 C. 854; 7 C. W. N. 52; 4 Bom. L. R. 673.

(8) (1824) 2 S. & S. 120; 3 L. J. Ch. 43; 57 E. R. 295.
(9) (1835) 3 Cl. & F. 26; 6 E. R. 1347.
(10) 16 Ind. Cas. 478; 23 M. L. J. 290; 12 M. L. T. 133; (1912) M. W. N. 1051.
(11) 23 Ind. Cas. 625; 18 C. W. N. 755; 19 C. L. J. 494; 36 A. 336; 1 O. L. J. 249; 12 A. L. J. 37; 17 O. C. 120; 16 Bom. L. R. 413; (1914) M. W. N. 172; 16 M. L. T. 35; 27 M. L. J. 181; 1 L. W. 1015.
(12) (1680) 2 Modern 319; 86 E. R. 1080.
(13) (1670) 1 Ch. Cas. 185; 2 Freeman 133; 22 E. R. 754.

KRISHNASWAMI PILLAI V. MOOKAYI AMMAL.

MADRAS HIGH COURT.

CIVIL APPEAL No. 79 OF 1914.

August 10, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Srinivasa Aiyangar.

KRISHNASWAMI PILLAI—DEFENDANT

No. 1—APPELLANT

versus

MOOKAYI AMMAL AND OTHERS—PLAINTIFF
AND DEFENDANTS NOS. 2 TO 14—RESPONDENTS.

Hindu Law—Charity owned by joint family—Agreement among members re management—Intention.

Where the members of a joint Hindu family, while dividing the family properties agreed that the charities should be managed by the head of the family in each branch for the time being, and where on the death of such a member his widow claimed to succeed him in the management as against a male descendant of the founder by one of his grand-daughters:

Held, that the language of the agreement clearly pointed to the intention that the management should be in the hands of the male heads and not in the hands of females; and that the widow could not claim to manage the charity even though it appeared that some females had previously asserted the right.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, in Original Suit No. 11 of 1913.

FACTS.—One Naga Pillai instituted certain Kattalais and Ubbayams in the Srirangam temple. In 1866 his sons, while dividing the family properties, made also a provision for the conduct of the charity, *viz.*, that the head for the time being of the various branches of the family should manage the charity according to seniority. Plaintiff's husband was managing it till his death in 1907, when the plaintiff claimed to succeed him in the management of the said charity. The defendant, a descendant of the founder by one of his grand-daughters, claimed to be the sole trustee, and asserted his right to manage the charity on the ground that the plaintiff, being a female, was not entitled under the *karar* to take part in the management. The Sub-Judge gave a decree for the plaintiff, and the present appeal is against that decree.

Mr. S. Srinivasa Iyengar, for the Appellant:—The term "head of the family for the time being" refers only to males, and females are excluded.

INDIA GENERAL S. N. & R. CO. V. LAL MOHAN SAHA.

Mr. S. Venkatachariar, for the Defendant:—Instances of management by females have also occurred in this family, and the term must be understood to include females.

JUDGMENT.—In Exhibit B, to which all the members of the branch to which the plaintiff's husband belonged were parties, it was agreed that the charities were to be managed by the head of the family in each branch for the time being. We think the language clearly points to the intention that the management should be in the hands of the male head and not in the hands of females like the plaintiff. It is true that subsequently one of the widows asserted her right of management against the plaintiff's husband, but after obtaining a decree she gave up her right for a money compensation. The other fact relied on is that in Exhibit D series the leases were made out in the names of the female as well as the male members; but this appears to be accounted for by the fact that the branches were improperly dividing the trust properties among themselves and making payments for the performance of the charities, whereas it is now admitted that they had no beneficial interest in the charity properties. On the whole we are unable to agree with the Subordinate Judge that the plaintiff has proved her right of management. On this ground, the suit fails, and the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 689 OF 1914.

June 9, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.

INDIA GENERAL S. N. & R. CO. AND
ANOTHER—DEFENDANTS—PETITIONERS

versus

LAL MOHAN SAHA AND OTHERS—
PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIX, rr. 1, 2—Companies, suit against—Proper framing of suit—Amendment of plaint—Service of notice after amendment.

INDIAN GENERAL S. N. & R. CO. v. LAL MOHAN SAHA.

In a suit against the India General Navigation and Railway Company and the River Steam Navigation Company for the recovery of damages on account of short delivery of goods committed to their care for transmission by them as public carriers, the plaintiff described the defendants in the plaint as the India General Navigation and Railway Company and the River Steam Navigation Company by their joint agent Mr. A. E. Rogers. When the case came on for trial, it was represented to the Court on behalf of Mr. Rogers that he had retired from the service of the Companies mentioned and had in fact left the country. The plaintiff thereupon applied to the Court for leave to omit the name of Mr. Rogers from the plaint. This application was granted and the suit was decreed *ex parte* as if it had been instituted properly against the two Companies:

Held, (1) that the plaint as originally framed was in contravention of rule 1 of Order XXIX, as the suit should have been framed against the two Companies, described by their proper names; [p. 56, col. 2.]

(2) that, as no question of limitation arose, the amendment of the plaint might stand, but the plaintiffs were bound to serve notices of the suit in the manner provided in rule 2 of Order XXIX after the amendment had been made and the suit properly constituted. [p. 56, col. 2.]

Civil Rule against the decision of the Small Cause Court Judge of Dacca, dated the 25th March 1914.

Babu Manmatha Nath Mukherjee, for the Petitioners.

Babu Prokas Chandra Majumdar, for the Opposite Party.

JUDGMENT.—This Rule was issued on the application of two of the defendants in the suit tried by the Court below. The plaintiffs opposite party instituted this suit against the India General Navigation and Railway Company and the River Steam Navigation Company for the recovery of damages on account of short delivery of goods committed to their care for transmission by them as public carriers. The third defendant, who was the consignor of the goods, was joined as a matter of form and no claim was made against him. The plaintiffs described the principal defendants as the India General Navigation and Railway Company and the River Steam Navigation Company by their joint agent Mr. A. E. Rogers. Mr. Rogers entered appearance and pleaded that the suit was not maintainable against him. When the case came on for trial, it was represented to the Court on behalf of Mr. Rogers that he had retired from the service of the Companies mentioned and had in fact left the country. The plaintiffs thereupon applied

to the Court for leave to omit the name of Mr. Rogers from the plaint. This application was granted and the suit was decreed *ex parte*, as if it had been instituted properly against the two Companies. We are now invited to set aside this decree on the ground that the suit as brought was framed in contravention of rule 1, Order XXIX of the Code of Civil Procedure; and that if the application for amendment of the plaint was properly granted, the two Companies should have been served in accordance with rule 2 of Order XXIX. In support of this view reliance has been placed upon the cases of *Ram Dase Sein v. Cecil Stephenson* (1), *Nubeen Chunder Paul v. Cecil Stephenson* (2) and *Campbell v. Jackson* (3).

There is no room for controversy that the plaint as originally framed was in contravention of rule 1 of Order XXIX. But on behalf of the opposite party, an ingenious argument has been put forward that the suit was in essence brought against the two Companies and that the plaintiffs mentioned the name of Mr. Rogers as the person upon whom the process was to be served. There is obviously no foundation for this theory. The suit was substantially against Mr. Rogers although he was sued in his capacity as joint agent of the two Companies mentioned. The suit, however, should have been framed as one against two Companies, described by their proper names, as is clear from the decisions mentioned. There is plainly no excuse for the mistaken course deliberately adopted by the plaintiffs. Even a casual examination of the forms of pleadings appended to the Code of Civil Procedure makes it manifest that the suit was not properly framed; this form is identical with what was contained in section 26 of the Code of Civil Procedure of 1859. In the circumstances of this case, as no question of limitation arises even if the suit be taken to have been instituted against the two companies on the date when the plaint was allowed to be amended, we are of opinion that the amendment may stand. But the plaintiffs were bound to serve notices of the suit in the manner provided in rule 2 of Order XXIX after the amendment had been made and the

(1) 10 W. R. 306.

(2) 15 W. R. 534.

(3) 12 C. 41.

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suit properly constituted. There is, moreover, nothing to show that Mr. Rogers was, in respect of each of the two Companies, a person entitled to receive notice under the provisions of that rule. It is needless, however, to deal with this aspect of the case in detail, because Mr. Rogers, it is conceded, is no longer connected with either Company.

The result is that this Rule is made absolute and the decree of the Small Cause Court Judge set aside. The case will be remitted to the Court below in order that the plaintiffs may proceed in accordance with law to serve the defendants, and then to have the suit tried afresh. We may add that a question has been raised before us as to the effect of the death of one of the plaintiffs during the pendency of the suit in the Court below; this will be determined by the Small Cause Court Judge when he takes up the case for final disposal. The petitioners are entitled to their costs in the Court. We assess the hearing fee at two gold mohurs.

Rule made absolute; Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 24 OF 1913.

April 28, 1915.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

KANAYARAM AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

TIRITHSING AND OTHERS—DEFENDANTS—
RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—Decree for sale by 1st mortgagee—Subsequent mortgage in favour of 2nd mortgagee—Sale in execution of decree of 1st mortgagee, effect of, on second mortgage—Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Second mortgagee, right of.

A mortgaged certain land with B in 1903. B got a decree for sale of the mortgaged property in 1905. After the decree A mortgaged the same land by way of second mortgage with C in 1906. In 1910 the land was sold by the Court in execution of B's decree and purchased by D. The surplus after paying B's claim was paid away to A. Subsequently C filed the present suit against A and D claiming to have the mortgaged property re-sold.

Held, (1) that C had no remedy against the land but was only entitled to a personal decree and that what was sold at the sale in execution of the 1st mortgagee's decree was the right, title and interest of the mortgagor as it existed at the time of the first mortgage; [p. 38, col. 1.]

Dadoba v. Arjunji Damodar Raghunath, 16 B. 486, referred to.

(2) that the second mortgage being subsequent to the decree the second mortgagee had no rights other than those of the mortgagor through whom he claimed and was bound by the decree; [p. 38, col. 1.]

(3) that the mortgagor's right of redeeming the first mortgage was determined by the decree and the effect of the sale was to deprive the second mortgagee of his security; [p. 38, col. 1.]

(4) that as the second mortgagee failed to save his security by paying the amount of the decree on the first mortgage into Court under Order XXI, rule 89, as representative of the judgment-debtor, the mortgagor, he had no remedy against the land. [p. 38, col. 1.]

Appeal against the decision of the District Judge, Sukkur.

Mr. Dipchand T. Ojha, for the Appellants.

Mr. Kimatrai Bhojraj, for the Respondents.

JUDGMENT.

PRATT, J. C.—The facts of the case are simple.

On the 19th April 1905 the first mortgagee obtained a decree for sale of the property in suit. On the 9th July 1906 the mortgagor, defendant No. 1, executed a second mortgage in favour of the plaintiffs who are appellants.

On the 9th March 1910 the property in suit was sold in execution of the first mortgagee's decree and was purchased by defendants Nos. 2, 3 and 4.

The plaintiffs sue to enforce their 2nd mortgage by sale of the mortgaged property. The lower Appellate Court gave them a personal decree against the mortgagor, defendant No. 1, only.

The plaintiffs appeal claiming a decree for the sale of the property.

The claim is clearly unascertainable. If the second mortgage had been prior to the first mortgagee's suit, they would only have been entitled to recover the amount of their second mortgage out of the surplus sale-proceeds after the sale in satisfaction of the first mortgage. See Form 7, Appendix D of the Civil Procedure Code.

No doubt in that case they would have been at liberty to redeem the first mort.

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gage and to step into his shoes, but here they have not that right for the second mortgage being subsequent to the decree of the first mortgagee, the second mortgagees can have no rights other than those of the mortgagor through whom they claim and the mortgagor's right of redeeming the first mortgage was determined by the decree.

Further, what was sold at the sale in execution of the 1st mortgagee's decree was the right, title and interest of the mortgagor as it existed at the time of the first mortgage, *Dadoba Arjanji v. Damodar Raghunath* (1). The second mortgage being subsequent to the decree these second mortgagees are bound by it and the effect of the sale was to deprive them of their security.

The second mortgagees as representatives of the judgment-debtor, *i. e.* the mortgagor might have saved their security by paying the amount of the decree on the first mortgage into Court under Order XXI, rule 89. But they did not choose to do this and have, therefore, now no remedy against the land.

I would confirm the decree of the lower Court and dismiss the appeal with costs.

CROUCH, A. J. C.—In this case plaintiffs sued for the recovery of Rs. 100, principal and interest, and sought for sale of certain land alleged to have been mortgaged to them by defendant No. 1. The lower Appellate Court has granted a personal decree against the defendants. Against this latter order plaintiffs appeal.

The facts of the case are as follows:—In 1903, the land in suit was mortgaged by Wasumal, defendant No. 1. The mortgagee instituted a suit to enforce his mortgage, and, in April 1905, a decree for sale was passed. In 1906 Wasumal purported to mortgage the land by way of second mortgage to plaintiffs. In 1910, the land was sold by the Court in execution of the mortgage decree for sale, and was purchased by Tirithsing, Ghanshamdas and Khubsing, respondents Nos. 1—3. The sale realised considerably more than the amount due to the mortgagee judgment-creditor and the surplus after satisfying

the decree was withdrawn by the judgment-debtor, Wasumal. The purchasers under the Court-sale entered into possession of the land, and were in possession at date of suit.

Under the old Common Law rule of *lis pendens*, embodied in section 52 of the Transfer of Property Act, the judgment-debtor could not, after the date of decree for sale, deal with the property so as to affect the rights under the decree of the judgment-creditor. At the sale, the property was sold not subject to the alleged second mortgage, and the purchasers took the property free of it. All that could be transferred to the second mortgagee was such right in respect of the land as the judgment-debtor still had, that is, a right to receive the surplus purchase-money after satisfying the decree. He could not, by executing a deed of mortgage, compel the judgment-creditor to sell subject to the claim of the second mortgage, or compel the judgment-creditor to obtain payment, if he could do so. The plaintiff had, undoubtedly, an equitable right against the surplus sale-proceeds, but this right he made no attempt to enforce. No right, title, or interest in the land itself was transferred, and plaintiff cannot now enforce his claim by a sale of land. Nor has he any right of redemption, for the mortgagor's equity of redemption was sold at the Court-sale.

I would dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 88 OF 1914.

September 7, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KYROON BEE AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

THE ADMINISTRATOR-GENERAL OF
MADRAS—DEFENDANT—RESPONDENT.

Letters Patent (Madras), cl. 15—Judgment—Appeal—Order setting aside abatement—Sufficient cause—Administrator-General's Act (II of 1834), ss. 17, 18—Civil Procedure Code (Act V of 1908) O. XXII, rr. 3,

KYROON BEE V. ADMINISTRATOR-GENERAL OF MADRAS.

9—*Abatement, order of, if necessary.*

An order passed by a single Judge of the High Court sitting on the original side, setting aside the abatement of a suit is a judgment within the meaning of clause 15 of the Letters Patent and is appealable. [p. 40 col. 1.]

Tuljaram Row v. Alagappa Chettiar, 8 Ind. Cas. 340; (1910) M. W. N. 696; S. M. L. T. 453; 35 M. 1; 21 M. L. J. 1, followed.

The sole plaintiff in a suit, a Muhammadan, died on 13th November 1911, leaving a widow, sons and daughters. On the 20th November 1911, the Administrator-General, Madras, was directed by the High Court to take possession of the estate, effects and assets of the deceased. On the 12th August 1913, an order was passed that the suit abated as no legal representative of the deceased had been brought on record. On the 2nd December 1913 the Administrator-General was directed to obtain Letters of Administration to the estate and this he did on 29th March 1914. On the 27th April 1914, he took out a Judge's summons praying that the abatement might be set aside and the suit restored to file and that he might be brought on record as the legal representative of the deceased plaintiff. The order of abatement was set aside on the ground that sufficient cause had been shown by the Administrator-General for the delay.

Held, on appeal, that though the Administrator-General, so far as he was personally concerned, had sufficient cause for not making the application before April 1914, he had not explained why the other persons, who were the legal representatives of the deceased till he became such, had not applied to set aside the abatement, that the mere allegation, that the legal representatives had been quarrelling among themselves being no sufficient reason for excusing the delay and that the order setting aside the abatement ought to be set aside. [p. 40, col. 2; p. 41, col. 1.]

Fulvahu v. Goculdas Talabdas, 9 B. 275, distinguished.

Quære.—Whether under the new Code of Civil Procedure an order that the suit shall abate is necessary before an abatement of suit takes place? [p. 41, col. 1.]

Appeal from the judgment and order of His Lordship the Officiating Chief Justice, dated the 30th September 1914, in the Ordinary Original Civil Jurisdiction of the Madras High Court, in Civil Suit No. 357 of 1911.

FACTS.—One A. G. Mahomed Ghouse instituted Civil Suit No. 357 of 1911 against the defendants on the Original Side of the High Court, Madras, upon an alleged equitable mortgage created in his favour by the defendants, by deposit of title deeds of certain immoveable property situated in Madras. He died on 13th November 1911, leaving behind him a widow, sons and daughters. By an order passed by the High Court, dated 29th November 1911, the Administrator-General, Madras, was directed by the High Court to take possession of the

estate, effects and assets of the deceased. As no legal representatives had been brought on record, the suit was on 12th August 1913 declared to have abated.

On 2nd December 1913 the Administrator-General was directed by the High Court to obtain Letters of Administration to the estate. This he applied for on 20th February 1914 and got the Letters of Administration on 29th March 1914. On the 27th April 1914 he took out a Judge's summons to show cause why the abatement should not be set aside and the suit restored to file and why such further or other relief should not be granted as to the Court may seem fit under the circumstances. In support of this Judge's summons he filed an affidavit which, in addition to the above facts, alleged that on 6th January 1912 he got information that the title-deeds (the subject of the equitable mortgage in suit) were with one Gulam Khadir, the father-in-law of one of the sons of the deceased, that in the correspondence which ensued between him and Gulam Khadir, the latter set up a sub-mortgage in his favour by the deceased, that on 3rd December 1912 plaintiff's Vakil intimated to him of the pendency of the present suit, that though the Vakil was written to on 6th December 1912 to go to him and though a reminder was sent on 16th January 1914 he failed to respond to the same, that in the meanwhile criminal proceedings had to be instituted against one of the sons of the deceased for having destroyed a valuable security when he had gone to the Administrator-General's office for inspecting the account books of the deceased, that as a consequence thereof and also owing to quarrels among the sons of the deceased none of the heirs of the deceased would go to him to instruct him regarding the estate, that in the interval there was also a prospect of the differences between the parties being settled amicably as the matters in dispute had been referred to arbitrators and that consequently there was reasonable cause for the delay in putting in that application. The defendants opposed the summons on the ground that there was no sufficient reason for excusing the delay, inasmuch as the Administrator-General was empowered so early as 29th November 1911 to take possession of the estate and there had been nothing to prevent him from continuing the suit. Wallis, Offg. C.J., who heard

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the summons, set aside the abatement. His order was as follows:—

"The deceased died in November 1911 and the Administrator-General did not obtain Letters of Administration till March 1914 and made his application on 27th April 1914. I think the application was made with reasonable promptitude after the grant. As regards the fact that the Administrator-General was authorised to collect and take possession of the estate of the deceased under section 17 of the Act, there was a similar order in *Fulvahu v. Goculdas Valabdas* (1), but that was not held to debar the Administrator-General from applying to set aside the abatement within a reasonable time after the grant. On a consideration of all the facts deposed to in the affidavit, I think there was reasonable cause and set aside the abatement. The Administrator-General to be brought as plaintiff. Costs in cause."

Against this order the defendants preferred this appeal.

Mr. *Mir Amiruddin* for Mr. *D. Chamier*, for the Respondent raised a preliminary objection that no appeal lay and relied on *Tuljaram Row v. Alagappa Chettiar* (2). This objection was overruled.

Mr. *T. R. Ramachandra Iyer* (with him Mr. *V. C. Seshachariar*), for the Appellants:—The learned Judges erred in setting aside the abatement. Either the Administrator-General was entitled to come in or he was not. If the former, there is no sufficient explanation for the delay from November 1911 to April 1914. The circumstances stated are insufficient in law. Vide *Kichilappa Naickar v. Ramannujam Pillai* (3). The order of the High Court, dated 29th November 1911, directing the Administrator-General to take possession of the estate of the deceased had the force of Probate. Vide *C. S. Hogg v. Hurry Doss Dutt* (4). If he was not entitled to come in, the widow, sons and daughters of the deceased were his legal representatives and no explanation has been offered as to why they failed to apply in time to come on record or to set aside the abatement.

Mr. *Mir Amiruddin*, for the Respondent, conceded that till the grant of the Letters of

Administration, the Administrator-General had no right to come in and argued that owing to disputes between the sons of the deceased nothing could be done earlier and that sufficient cause had been shown for setting aside the abatement.

JUDGMENT.—The respondent's learned Counsel took a preliminary objection that no appeal lay as the order appealed against was not a judgment. We overrule the preliminary objection as we are satisfied that an order setting aside the abatement of a suit is a judgment as interpreted by the Full Bench in the case *Tuljaram Row v. Alagappa Chettiar* (2), though it may be, to use the words of the learned Chief Justice in the above case, "an order on an independent proceeding which is ancillary to the suit."

The respondent's learned Counsel concedes that till his client (the Administrator-General of Madras) obtained Letters of Administration in March 1914, his client was not the legal representative of the deceased plaintiff and that the deceased's widow and his two sons and his other children were his legal representatives. The suit abated six months after the plaintiff's death, that is, in May 1912. The present application was made by the Administrator-General in April 1914, more than 20 months after an application to set aside the abatement became barred. Section 5 of the Limitation Act, read with Order XXII, rule 9, of the Civil Procedure Code, no doubt, empowers the Court to excuse this 20 months' delay if the applicant satisfies the Court that there was sufficient cause for not making the application before July 1912. The learned Judge holds that the Administrator-General, so far as he personally is concerned, has shown sufficient cause why he did not make this application before April 1914. But it seems to us that the long delay of those persons who were the deceased plaintiff's legal representatives till the Administrator-General became such legal representative, ought to have been also explained satisfactorily before the abatement could be set aside so as to prejudice the defendants, and we could see nothing in the affidavit filed in support of the application to explain such delay, except the allegation that two of the legal representatives of the plaintiff were quarrelling among themselves.

(1) 9 B. 275.

(2) 8 Ind. Cas. 340; 35 M. I.; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.

(3) 25 M. 116.

(4) 1 Boul. 654; 3 Ind. Dec. (o. s.) 394.

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As regards the case of *Fulrahu v. Goculdas Valabdas* (1), relied on by the learned Judge, that was decided under the old Civil Procedure Code of 1877. Sections 366 and 368 of the old Code contemplated the passing of an order of abatement by the Court before the suit abated and for the setting aside of such an order by a second order. In that case the order of the Court that the suit shall abate and the second order setting aside the order of abatement were passed on the same day and hence no question of limitation in respect of the application to set aside the abatement arose. In the present case the abatement took place in May 1912 and even if under the new Code a first order that the suit shall abate is necessary before the abatement takes place, that order also had been passed several months before the application to set aside the abatement was filed. The case of *Fulrahu v. Goculdas Valabdas* (1), therefore, seems to have no application.

We are, therefore, constrained to set aside the order of the learned Judge and to direct that the application of the Administrator-General do stand dismissed. Costs of all parties except the heirs of the plaintiff under the Muhammadan Law are to come out of the estate.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 166 OF 1911.

June 11, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

WILLIAM GRAHAM—DEFENDANT—APPELLANT

versus

PHANINDRA NATH MITTER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 13, 35, 83—Chittas, if admissible in evidence—Entry in public registers, relevancy of—Bengal Survey Act (V of 1875), ss. 41, 63.

Where chittas were prepared by Government as only part of and in explanation of proceedings which were regularly taken for the assessment of rent upon lands said to be improperly held rent-free and where the whole of the proceedings together with the petition, under which the proceedings were initiated,

and the reports of the Collector and the orders of the Board of Revenue were put in evidence:

Held, that all the papers taken together furnished a valuable evidence. [p. 43, col. 1.]

Held, also, that the chittas were admissible in evidence inasmuch as they were coupled with proceedings which were of the nature of resumption proceedings and the lands therein were identifiable. [p. 44, col. 1.]

An entry in a register prescribed by law and being a public register kept for the public benefit under the sanction of official duty is relevant under section 35 of the Evidence Act no matter whether the clerk who wrote the entry had any personal knowledge or whether the register was a copy of a previous register which had become untidy. [p. 44, cols. 1 & 2.]

A decision under the Survey Act based upon a survey map made behind the plaintiffs is not binding on the Civil Courts upon the question of title. [p. 44, col. 1.]

Appeal against the decree of the 1st Subordinate Judge of 24-Pargannahs, dated the 20th of December 1910.

Babus Charu Chandra Biswas, and Satyendra Nath Mitter, for the Appellant.

Babus Nilmadhab Bose and Rupendra Kumar Mitter (for Babu Hara Kumar Mitter), for the Respondents.

JUDGMENT.—In the suit out of which this appeal arises the plaintiffs claimed a plot of land roughly thirteen *kotas* in area in Kidderpore, suburb of Calcutta. The plaintiffs derived their title in the following way. At the beginning of the last century the Government constructed a new road in that locality. A survey was made in 1800 and again in 1801 for the purpose of assessing the compensation to be awarded to the persons from whom the lands for the road were taken. It appears that certain side-lands, which had been taken and might subsequently be required for the purposes of the road, were then noted as *dar-i-pin* lands: the lands which had been taken and which lay outside these *dar-i-pin* lands were noted as *be-darkari* or surplus lands and these latter surplus lands were settled with former holders under *lakheraj sanads*. In 1810 the plaintiffs' ancestor Ram Bhadra Mitra received such a *sanad* (Exhibit 11) in respect of seven *kotas* of this surplus land. In order apparently to regularise these settlements and to assess rent for land improperly held, a fresh survey was undertaken with the result that in 1837 the heirs of Ram Bhadra Mitra received a notice to the effect that

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they had been found in possession of 9 *kotas* 9 *chittaks* 10 *gundas* of land and were asked to prove their title to it. The heirs of Ram Bhadra Mitra were invited to take settlement of the excess land found in their possession. In 1840, however, there appears to have been yet another survey and measurement by an *amin*, Kalipada Chatterjee. The Board of Revenue were not satisfied and directed yet another survey. This was carried out by a Deputy Collector, Radha Nath Ganguly in 1846. He found the heirs of Ram Bhadra Mitra in possession of eight *kotas* 7 *chittaks* 12 *gundas* in two plots which were numbered 168 and 169 (Exhibit 8c). The Board of Revenue, however, eventually decided that no rent could reasonably be demanded for any of the excess lands reported to be in possession of tenants. The heirs of Ram Bhadra Mitra therefore remained in possession of their two plots Nos. 168 and 169 rent free as before. The plaintiffs claim, and we think reasonably, that their possession of plots Nos. 168 and 169 can be related back to the *sanad* granted to their ancestor Ram Bhadra Mitra in 1810 (Exhibit 11). It is not disputed that the plaintiffs are the heirs of Ram Bhadra Mitra, the grantee of that *sanad*.

The defendants do not now contest the facts above set forth, except to somewhat faintly suggest that the connection between the *sanad* of 1810 and the plots Nos. 168 and 169 had not been made out. We are satisfied, however, that the connection has been made out. The questions for our determination, therefore, are:—*First*, whether the land which has been decreed to the plaintiffs has been properly identified with the plots Nos. 168 and 169 above referred to? and *secondly* whether the plaintiffs have been in possession within 12 years of the suit?

It will be observed that 13 *kotas* were claimed in the plaint. But as the case was put before us the plaintiffs did not claim more than the land which had been identified with the said plots Nos. 168 and 169.

The immediate occasion of the suit was a decision under the Bengal Survey Act, 1875, affirmed by the Commissioner in appeal in July 1908 to the effect that the plaintiffs were in possession of two *kotas* odd only. We shall deal in the proper place with the bearing of this decision on the merits. The present suit was instituted in July 1909.

The suit was decreed in part, that is, a decree was given for the land identified as plots Nos. 168 and 169 above referred to. The defendants appealed to this Court, and the plaintiffs filed a cross-objection averring that they were entitled to the entire 13 *kotas* claimed by them. At the hearing of the appeal the learned Judges observed that the western boundary of the land had not been determined and remanded the case for a finding on this point. A finding has been come to and has been submitted. The whole case has been argued before us *de novo*. The cross-objection by the plaintiffs has not been pressed.

We proceed to consider the *first* question, namely, whether the land which has been decreed to the plaintiffs has been properly identified with plots Nos. 168 and 169 of the survey of 1846. No map of 1846 is forthcoming. What we have is a serial list of holdings (Exhibits 8a to 8c). The relation of each holding to the holding bearing the previous number is noted. The name of the possessor and a description of the boundaries of each holding is given. The length, breadth and area are also noted. It is also noted whether the land is '*dar-i-pin*', i.e., within the boundaries of the lands reserved as side-lands for the purposes of the road or whether it is surplus land. The results obtained by the *amin* in 1840 and by the Deputy Collector in 1846 are both given. These lists are called *chittas*. They are more than 30 years old, have been produced from proper custody and can be presumed to be genuine.

It has been argued that these *chittas* cannot be treated as evidence without proof of their accuracy. It is said that they are not public documents within the meaning of section 83 of the Evidence Act and that the *chittas* having been prepared by the Government for their own private use, they cannot in any case be used as evidence. Among other cases the case of *Ram Chunder Sao v. Bunseedhur Naik* (1) is relied on. But in the case now before us the *chittas* are only part of and in explanation of proceedings which were regularly taken for the assessment of rent upon lands said to be improperly held rent free. The whole of the proceedings have been put up in evidence

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including the petition under which the proceedings were initiated, the reports of the Collector and the orders of the Board of Revenue. All these papers taken together furnish valuable evidence that the Government recognised the right of the plaintiffs' predecessors to hold the land described in the *chittas* as rent free. In the case of *Ram Chunder Sae v. Bunsedhur Naik* (1) upon which the appellants relied Garth, C. J., was of opinion that the *chittas* in that case coupled with the resumption proceedings would have been admissible. Here the *chittas* are coupled with proceedings which are of the nature of resumption proceedings. The persons who made the measurements are dead, but there is evidence on the record that measurement was actually made. The appellants have not in fact had the temerity to contend that the *chittas* were prepared without any measurement at all. The report of the Commissioner leaves no doubt in our minds that there was actual measurement. Whether it was sufficiently accurate to make identification of the plots Nos. 168 and 169 possible is a question which we shall proceed next to determine. If that be determined in favour of the *chittas*, the remaining objection to their admissibility must fail.

We proceed then to consider in detail whether plots Nos. 168 and 169 of the *chittas* have been properly identified. For the preliminary consideration of this question the map recently prepared by Mr. Smart, Superintendent of Survey, may be referred to. A cursory examination of the *chittas* will reveal the fact that they assume that the Circular Garden Reach Road runs due north and that the directions of east and west and south are assumed to correspond. That this is the basis upon which the *chittas* have been prepared has now been conceded in argument. The next point to consider is that there are two landmarks on the map which can reasonably be assumed to have remained unaltered since the time of the *chittas*, one is the Panchanan Tola, an ancient shrine at the corner of Watgunge Street (plot No. 158 of the *chittas*), and the other is the Munshigunge Road (plot No. 166 of the *chittas*). Considerable argument was addressed to us regarding the location of plot No. 158 and the plots intervening between it and the Munshi-

gunge Road. We do not think it necessary to go into this in detail, as the result intended was only to indicate that the *chittas* of these plots were somewhat carelessly prepared. There is nothing to suggest that the location of the Munshigunge Road, plot No. 166, has altered except in the matter of two feet in breadth, which may be neglected. The plots which we are concerned with are on the other side of the Munshigunge Road and their identification is not affected by any carelessness in preparing *chittas* of the plots on the Panchanan Tola side.

The area between the Munshigunge Road and Tolly's Nala is comparatively small. Assuming, as we are entitled to do, that plots Nos. 168 and 169 of the *chittas* are the lands granted by the *sanad* of 1810, the area within which these plots must be found is still further restricted, for according to the *sanad* they must be within 250 feet of the Bridge Road.

Taking the plot next in number to the Munshigunge Road in *chittas* we come to plot No. 167. This is described in the *chittas* as at the corner of the Munshigunge Road and the Bridge Road. There are two plots now at this corner numbered in Mr. Smart's map No. 145 and 145/1. Plot No. 145/1 is at the corner but has been found to be *dar-i-pin* land, i.e., land included in the side-lands of the road. Plot No. 145 has thus been identified as plot No. 167 of the *chittas*. We are satisfied that the finding that plot No. 145/1 is *dar-i-pin* land is correct. From the configuration of the approaches to the road in Mr. Smart's map it is fairly obvious that it is *dar-i-pin*. It is so described in the official register and that it is *dar-i-pin* is in accord with the statement in an old official paper (Exhibit C) (referred to without objection) that 15 feet of *dar-i-pin* land was left on each side of the road after the drain. The actual width of plot No. 145/1 is about 18 feet. If No. 145/1 is *dar-i-pin* land, then plot No. 145 of Mr. Smart's map is certainly plot No. 167 of the *chittas*. The area of plot No. 145 differs from plot No. 167 by five *chittaks* odd only and this the Commissioner says can be accounted for, by the recently constructed drains. Plot No. 167 of the *chittas* being thus determined it follows that plots Nos. 168 and 169 must be where they have been located by the

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decree. The only argument that can be put forward to the contrary is to suggest that the words *purba dakshin* in the description of the boundaries of plot No. 167 in the *chittas* mean south and east, and not south-east as they undoubtedly do and that a portion of plots Nos. 168 and 169 lay directly to the so-called east of plot No. 67 and had been absorbed by the *thakurbari*. We are not prepared to accept the meaning sought to be put on the word *purba dakshin*. There is evidence that the area of the *thakurbari* plot has increased considerably since the time of the *chittas*, but there was room for considerable encroachment towards the road side. There is nothing to indicate encroachment towards plot No. 145; on the contrary, there is evidence that there was formerly a boundary wall on that side (defence witness No 8). We are satisfied that plots Nos. 168 and 169 have been properly located by the decree. We may say that in the argument in appeal the location of the western boundary was not seriously attacked, except upon general grounds such as those indicated above. Assuming our reasoning to be correct, nothing has been said to lead us to think that the western boundary has not been properly determined. We are satisfied with the grounds given by the Commissioner for his finding on this point.

The decision under the Survey Act was based upon a partition map made behind the backs of the plaintiffs. It is not, of course, binding upon us upon the question of title. And it does not preclude us from finding that during a period anterior to that decision the plaintiffs were in possession.

It has been argued that the extract from the official register (Exhibit 3), which as will be seen above we relied upon for proof that plot No. 145/1 was *dari-i-pin* land, was not admissible in evidence. The register was produced by a Government Survey Inspector (plaintiff's witness No. 1). It is a register of the Survey Office. Now the registers kept in the Survey Office are prescribed by the Board of Revenue under section 63 of the Bengal Survey Act, 1875. The register, therefore, appears to have been prescribed by law. In any event, it was a public register kept for the public benefit under

the sanction of official duty. It matters not whether the clerk who actually wrote the entries had any personal knowledge or whether the register was a copy of a previous register which had become untidy. The entry was clearly relevant under section 35 of the Indian Evidence Act.

As regards possession within 12 years of the suit we are satisfied that this has been made out. Defendant No. 2, Khetra Mohan Ghose and his father before him held the land (the plaintiffs say) under them. Khetra Mohan sub-let to defendant No. 3, Shayama Charan and under arrangement with Khetra, Shayama Charan paid Khetra's rent direct to the plaintiffs. The defence case was that only two *kotas* of the land were thus held by Khetra and Shayama Charan under the plaintiffs and that the remainder was held under the defendants. Khetra is in the service of the defendants and his evidence on the point is, therefore, wholly unreliable. The plaintiffs, after giving Khetra and Shayama Charan notice to produce the original rent receipts, themselves produced counterfoils showing that rent was paid to them till well within 12 years of the suit for the entire area in suit. This is supported by the following circumstances. The defendant No. 2 Khetra Mohan, says in his evidence that before Shayama Charan his mother, Hara Sundari was the tenant. In 1902 the principal defendants sued Hara Sundari in ejectment. The suit ended in a compromise in which the principal defendants agreed with Hara Sundari to pay "the rent and tax which is paid to Thakurdas Mitra" (the father of the present plaintiffs). The areas roughly correspond to the areas in dispute in the present suit and the inference is that the principal defendants then admitted that the father of the present plaintiffs was in possession in 1902. The suit, therefore, was not barred by limitation.

We agree with the finding that the attempt to deprive the plaintiffs of the property was engineered by the defendant No. 2, Khetra Mohan Ghose, who was in the service of the principal defendants when he became a tenant of the land under the plaintiffs.

We desire to acknowledge the assistance we have received from the Bar,

NARAIN DAS V. RALLI BROTHERS.

The appeal is dismissed with costs.
Hearing fee three hundred rupees.
The cross-objection is dismissed.
Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 469 OF 1912.

March 16, 1915.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

NARAIN DAS AND OTHERS—DEFENDANTS—
APPELLANTS

versus

RALLI BROTHERS—PLAINTIFFS—

RESPONDENTS.

Civil Procedure Code (Act I of 1908), O. XXXII, r. 3
—Appointment of guardian *ad litem*. Omission to make
formal order, effect of—Manager of joint family,
death of—Liability of sons for debts of the firm—
Contract Act (IX of 1872), s. 247.

Where the plaintiffs duly made an application for the appointment of a guardian *ad litem* of the minor defendants and the Court issued notices as required by Order XXXII, rule 3, sub-rule 4, and the guardian took all proper steps to defend the case:

Held, that the mere omission to pass a formal order to appoint him as guardian *ad litem* was a mere irregularity which could be condoned and did not amount to a defect vitiating all proceedings. [p. 45, col. 2.]

Walian v. Banke Behari Pershad Singh, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 882; *Dhanpat Mal v. Khazana*, 67 P. R. 1897, referred to.

Where the father of the minor defendants was a partner in a firm and as Manager of a joint Hindu family consisting of himself and his sons represented the whole family in the partnership:

Held, (1) that his death did not bring about a dissolution of the partnership and the family, which may be regarded as a *persona*, remained partners both before and after his death; [p. 45, col. 2.]

Maharaj Kishen v. Har Gobind, 27 Ind. Cas. 69; 101 P. R. 1914; 218 P. L. R. 1915, referred to;

(2) that the liability of the minors for the debts of the firm was limited only to their share in the firm. [p. 46, col. 1.]

Joykisto Cowar v. Nityanand Nundy, 3 C. 738; 2 C. L. R. 440; 3 Ind. Jar. 117, followed.

Second appeal from the decree of the Divisional Judge, Multan Division, dated the 26th December 1911.

Mr. Gobind Das, for the Appellants.

Mr. Morton, for the Respondents.

JUDGMENT.—This is an appeal preferred by Mussammatt Sita Bai on behalf of her minor sons. In the lower Courts their uncle, Than Ram, acted as their guardian *ad litem*, and it is alleged by the mother that he did not properly defend

the suit and that his action has prejudiced the minors. As the good faith of Than Ram has been impeached, we consider it desirable to remove him from the office of the guardian *ad litem* and appoint Mussammatt Sita Bai instead for the purpose of prosecuting the appeal (Vide Order XXXII rule 11).

Upon the merits we think that, with the exception of a slight modification in the form of the decree, the judgment of the learned Divisional Judge is quite correct and that this appeal must fail. We entertain no doubt whatever that the minors were effectively represented in the Court of first instance by Than Ram, for whose appointment as guardian *ad litem* an application was duly made by the plaintiffs and whereupon the Court issued notice as required by Order XXXII, rule 3, sub-rule 4. He engaged a Pleader to defend the case against the minors and took all proper steps to present their case to the Court. In these circumstances the omission to pass a formal order to appoint him as guardian *ad litem* is a mere irregularity which can be condoned and does not amount to a defect vitiating all proceedings; see, *inter alia*, *Walian v. Banke Behari Pershad Singh* (1) and *Dhanpat Mal v. Khazana* (2).

It is abundantly clear that Sita Ram, their father, was a partner in the firm of Sita Ram-Channu Ram and that he, being the Manager of the joint Hindu family consisting of himself and his sons, represented the whole family in the partnership. His death did not, therefore, bring about a dissolution of the partnership and the family, which may be regarded as a *persona*, remained partner both before and after his death [*Maharaj Kishen v. Har Gobind* (3)]. Even if there was a technical dissolution we are of opinion that the partnership was renewed on the old terms. The minors were consequently partners in the firm at the time when the contracts in dispute were entered into, and we fail to understand why the omission on the part of Than Ram to raise the false plea that they were not partners should be regarded as an act of negligence by the guardian.

(1) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 882.

(2) 67 P. R. 1897.

(3) 27 Ind. Cas. 69; 101 P. R. 1914; 218 P. L. R. 1915.

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As to the amount of damages and brokerage, the learned Judge of the Court of first instance has given very sound reasons for his conclusions, and it is noteworthy that at the time of the hearing of the appeal in the lower Appellate Court the findings of the District Judge were not challenged on behalf of the minors. We have considered the question and do not see any sufficient reason for taking a different view.

As regards the extent of the liability of the minors, the rule laid down in *Jaykisto Coorav v. Nittyanund Nundy* (4) and section 247 of the Indian Contract Act makes only the shares of the minors in the firm liable for the debts thereof and Mr. Morton for the respondents states that this is what the lower Appellate Court intended to do and has actually done. Mr. Gobind Das, on the other hand, contends that the decree as framed is ambiguous and capable of the construction that the entire ancestral property of the minors, whether forming part of the firm's assets or not, has been made liable for the decretal amount. We have considered the terms of the decree and are of opinion that they are not free from ambiguity.

We, therefore, modify it so as to direct that the minors' liability is confined to their shares in the assets of the firm and that neither their person nor their other property is liable for the amount decreed against them. In all other respects the appeal fails and is dismissed with costs.

Appeal partly allowed.

(4) 3 C. 738; 2 C. L. R. 440; 3 Ind. Jur. 117.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 2161
OF 1915.

September 24, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

AYYA RAGHUNATHA THATHA-
CHARIAR AND OTHERS—DEFENDANTS
—PETITIONERS

versus

THIRUMALAI ECHAMBADI THIRU-
VENGADACHARIAR AND OTHERS—
PLAINTIFFS—RESPONDENTS.

*Appeal—Privy Council appeal—Leave to appeal—
Case below appealable value—Test for certifying case fit
for appeal—Civil Procedure Code (Act V of 1908),
ss. 109 cl. (c), 110, O. XLV, rr. 2, 3, 8.*

Where a case is admittedly below the appealable value a certificate declaring it a fit one for appeal to His Majesty in Council ought not to be granted unless there is some substantial question of law of general interest involved. [p. 47, col. 2.]

Motichand v. Ganga Prasad Singh, 24 A. 174 (P. C.); 10 I. A. 40; 6 C. W. N. 362; 4 Bom. L. R. 156; *Bombay Hydraulic Traction Corporation v. Dorabji Cursetji Shroff*, 27 B. 415; 5 Bom. L. R. 348; *Sadagaya Chariar v. Krishnaswamy Row*, 4 A. L. J. 33; 11 C. W. N. 585; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204; 50 M. 185 at p. 188 (P. C.); 10 I. A. 93, followed.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to grant a certificate to enable the petitioners to appeal to His Majesty in Council against the decree of this Court, in Appeal No. 175 of 1910, preferred against the decree of the District Court of Chingleput, in Original Suit No. 10 of 1906.

Mr. T. Narasimha Aiyangar, for the Petitioners.

Mr. C. Narasimha Chariar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—This is an application for the grant of a certificate that the case is a fit one for appeal to his Majesty in Council from the judgment of this Court in Appeal No. 175 of 1910*. The application as amended is filed under section 109, clause (c), of the Civil Procedure Code read with Order XLV, rules 2, 3 and 8. I think the more accurate way of describing the application is that it is filed under Order XLV, rule 2 alone. The ground stated in the application is that though the case does not fulfil the requirements of section 110, it is otherwise a fit one for appeal to His Majesty in Council and hence comes within the last sentence of Order XLV, rule 3, clause 1, the power to appeal being given by section 109, clause (c). As was pointed out by my learned brother in the course of the arguments, there is no express section or Order in the Civil Procedure Code directing the Court to issue a certificate when it finds that an applicant under Order XLV, rule 2, has established grounds entitling the applicant to a certificate. Order XLV, rule 7 seems, however, to imply that the Court should grant a certificate where proper grounds are shown for such grant and where the opposite party to whom notice goes under Order XLV, rule 3, clause 2, has failed to

*See 28 Ind. Cas. 604—Ed.

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show cause against the grant of the certificate.

In *Motichand v. Ganga Prasad Singh* (1) their Lordships of the Privy Council state at page 177: "But then Mr. Mayne suggests that their Lordships ought to give special leave to appeal. Now, the practice of this Board in advising His Majesty to exercise His prerogative and to give special leave to appeal, is well known, and this Board does not advise His Majesty to exercise His prerogative in that manner unless there is some substantial question of law of general interest involved." Then at page 178 their Lordships say: "Their Lordships think it is a good rule to lay down that where a party comes for special leave to appeal, the case being under appealable value, and, therefore, not an appeal as of right, he should in the first instance apply to the High Court for leave to appeal, on the ground that it is otherwise a fit one for appeal to His Majesty in Council." It seems to me that when the High Court has to consider the question whether it is otherwise a fit one for appeal to "His Majesty in Council," it might legitimately look to the criterion of fitness laid down by the practice followed by their Lordships in advising His Majesty to give special leave to appeal, the Legislature in the Civil Procedure Code having itself given no indications as to the criterion of fitness to be adopted by the High Court under Order XLV, rule 3, clause 1. I do not, of course, mean that our powers are so wide as those exercised by the Board in granting special leave but that where the Privy Council states a guiding principle, we can safely adopt that.

Jenkins, C. J., seems to have followed that rule in the case in *Bombay Burmah Trading Corporation v. Dorabji Cursetji Shroff* (2). At page 418 he says: "It is, however, obvious that the financial and commercial position of the company may be seriously affected by the questions at issue, and having regard to that and to the importance to Indian Companies generally that these rights should be precisely defined in relation to the point that has arisen in this case, I think that we ought to certify that the case is a fit one for

appeal to His Majesty in Council." Though Sir Lawrence Jenkins does not refer in his judgment to *Motichand v. Ganga Prasad Singh* (1), that case was cited before him in the course of the arguments. (See the report at page 416.) Again in *Sadugopa Chariar v. Krishnamoorthy Row* (3), their Lordships of the Privy Council through Lord Macnaghten made the following pronouncement: "The High Court refused leave to appeal on the ground that the matter in dispute was below the appealable value. Special leave, however, was granted on the representation that the appeal raised questions of law of general importance touching the rights of religious bodies in India in regard to public processions, and the right of one religious body to prevent a rival sect and an alien deity from invading precincts apparently public but devoted or appropriated from time immemorial to the observance of its own peculiar ritual and worship; and at the same time involved the consideration of the effect of previous decisions on similar questions between members of different sects of one and the same community." At page 190 their Lordships say: "Their Lordships may observe that it (the suit) does not seem to involve such far-reaching issues as were put forward in the petition asking for special leave to appeal."

I am, therefore, clear that unless in this case there is some substantial question of law of general interest involved, we ought not to certify that this is a fit one for appeal to His Majesty in Council, it being admitted that the case is below the appealable value.

In coming to a conclusion on the above question, I might be permitted to remark in the first place that neither myself nor my learned brother was a member of the Bench (Sir C. Sankaran Nair and Oldfield, JJ.) who decided the case of *Tirumalai Eachambadi v. Royadurgam Krishnasami* (4). Both these learned Judges are now on leave and one of them is not returning to this Court. This is rather unfortunate, as the applicants' learned Vakil interpreted the judgment of this Court as imposing more stringent restrictions on the actions and the rights of the applicants (defendants

(3) 30 M. 185 at p. 188; 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204 (P. C.); 20 I. A. 93.

(4) 28 Ind. Cas. 604; (1915) M. W. N. 281.

(1) 24 A. 174; 29 I. A. 40; 6 C. W. N. 362; 4 Bom. L. R. 156.

(2) 27 B. 415; 5 Bom. L. R. 348.

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Nos. 2, 4, 5, 6 and 9) and of the Vadagalai sectarians represented by them than the law allows, while the respondents' Vakil argued that the said interpretation of the judgment by the applicants' learned Vakil was inaccurate.

After hearing full arguments, I think that the learned Judges' decision involved the following findings and issues:—

(a) The Vadagalai defendants are entitled to recite any portion of the Tamil Vedas, called Prabhandham either at the time of the processions within the temple or at other places in the temple of Varadarajah Swami at Conjeeveram where the Thengalais do not carry on the worship. There is nothing in the law to prevent any Vadagalai from worshipping the deities consistently with the equal rights of other worshippers. There is nothing to prevent any Vadagalai from reciting any portion of the Prabandham separately and as an act of personal devotion. But it would be an interference in the regular *poojah* or worship within the temple between the time of its commencement (with the ringing of the bells) and its close (with the distribution of Thirtham and Prasadham) and it would be a violation also of the Tengalai plaintiffs' *mirasi* Adyapakam office right if the Vadagalais form a *goshti* or a congregation of their own and repeat a portion of the Tamil Vedas which is different from that portion of the Tamil Vedas which is being recited as a part of the regular temple worship by the Tengalai *mirasidars* during the time of such worship within the temple.

(b) That when a procession is taken along the public streets outside the temple according to the temple customary practice, that procession is a compact organised procession from the front portion of that procession, which begins at the spot in front of the carved image of the deity where the Tengalai *miras* office-holders recite in a congregation the Tamil Vedas, up to the point behind the vehicle of the image where the Vadagalai office-holders recite the Sanskrit Vedas.

(c) That the Vadagalais are entitled to join the Tengalai *goshti* reciting the Tamil Vedas and join that chanting with the Tengalai office-holders but should not chant a different portion of the Tamil Vedas

(similarly as regards the right of the Tengalais to join the Vadagalais' Sanskrit Veda, reciting *goshti* in the rear-subject to similar restrictions).

(d) The Vadagalais should not, however, form an *organised congregation* or *ghosti* of their own between the front end and back end of the religious procession and chant the Tamil Vedas as a separate group, as that will be setting up a rival right as against Tengalai *miras* office-holders and will be an interference with such rights, whereas the recital by an individual Vadagalai devotee of a stanza or stanzas in the Tamil Vedas is a *bona fide* devotional act of private worship even when he has joined the procession as an individual worshipper, and it would not be an interference with the congregational recital led by the Tengalai *miras* officials.

(e) There is nothing to prevent the Vadagalais from even forming an organised *goshti* and reciting Tamil Vedas or anything they like at a reasonable distance in front of the Tengalai Tamil Veda-reciting *goshti* which begins the procession, or at a reasonable distance behind the temple procession which ends with the Sanskrit Veda-reciting *goshti*.

On these conclusions, the learned Judges (Sankaran Nair and Oldfield, JJ.) passed a decree modifying slightly the decree of the Court of first instance.

In this application for a certificate to appeal 28 grounds of attack are mentioned. But most of them are either general attacks or recitals of facts and repetitions and may be ignored. The only grounds, therefore, which need be set out are grounds S. 9, 18 and 20, which are as follows:

"8. The learned Judges have proceeded on the assumption that the right of any individual Vadagalai to worship the deity without interfering with others by the recital of any appropriate *mantras* or Prabhandams, &c., in a temple is very different from the right to form a *goshti* or congregation of his own sect and recite anything different from the Prabhandams which are recited by the *mirasidars*. The learned Judges have not explained in what the difference consists. There can in law or in fact be no such difference provided the recitation in combination of a set of individuals does not cause any physical interference

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to the Tungalais reciting, such recital stands on the same legal footing as recital by any single individual or separate recitals by several separate individuals.

"9. The learned Judges should have held that provided there is no physical disturbance to the performance by the Tungalais of Conjeeveram of their duty of reciting the Prabhandams, there is nothing in law to prevent Vadagalais or any others from reciting as ordinary worshippers the Prabhandams or any other hymns as they choose at any time.

"18. The learned Judges have dealt with the question as to the temple processions in the public streets as if they were Tungalai processions. They are clearly not Tungalai processions and it is not the Tungalais who carry the idol in the procession. On the other hand, they are temple processions common to all in which Tungalais are only entitled to join in Adhyapakam service.

"20. The learned Judges seem to consider that the question in regard to the street procession in this suit was something different from the one which came up for decision in *Vijayaraghava Chariar v. Emperor* (5), while in fact the question is in substance identical. The procession being a common procession in which both Vadagalais and Tungalais and also all Hindus take part, the question is whether any recitation at a particular part of the procession can be an actual interference with the exercise of the Tungalais' right of joining and marching along in procession in front. On the other hand, the learned Judges have dealt with it as if the question were whether the Vadagalais were entitled to join in and form part of the procession, assumed to be a Tungalai procession."

The question is whether these grounds really arise out of the judgment and if so, whether they raise such substantial question or questions of law of general interest as would justify our issuing a certificate of fitness for leave to appeal to His Majesty in Council. After giving my best considerations to the matter, I have come to the conclusion that they do not raise any such questions. There seems, no

doubt, to be some ambiguity of expression in two places in the judgment where the procession is spoken of as a Tungalai procession. I think that what the learned Judges meant was that that length of the procession which was occupied by the Tungalai Tamil Veda official reciters (who led the chant) and those worshippers who joined them might be referred to as the Tungalai procession. The decision in *Vijayaraghava Chariar v. Emperor* (5) was given in a case which arose out of criminal proceedings and the valuable judgments given in that case have to be read in the light of the judgment of their Lordships of the Privy Council in *Sadagopa Chariar v. Krishnamoorthy* (3). I am not satisfied that the learned Judges of this Court, whose decision is sought to be appealed against to the Privy Council, committed any error of law in their consideration of the due effect to be given to the decision in *Vijayaraghava Chariar v. Emperor* (5).

Far from the questions being of general religious interest to the community, I am satisfied that the litigation is the result of the action of a small though influential faction of Vadagalai sectarians residing in Conjeeveram. The bigotry of this faction and the not less rigorous bigotry of a corresponding Tungalai faction in the same town have been responsible for the continuous Conjeeveram Temple litigation, which has never ceased from where it began from 60 years ago. The rights of general worshippers, if I may say so with respect, have been fully safeguarded by numerous other decisions and have not been, in my opinion, affected by any of the observations found in the judgment in question. It is only the claim of this faction among the Vadagalais to introduce innovations into the customary practices during the period of the regular official worship in the temple and into and within the organised processional body during the carrying on of the customary processions outside the temple and their attempts to create disturbance to the public peace that have been properly, if I may say so, restrained by the judgment.

The contentions of the applicants that they only rely on the rights of ordinary temple worshippers, that they are anxious to

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safeguard the rights of the general public using the public highways seem to me to be patent pretences. It seems to me, therefore, that no question of law of general interest is involved but only the question whether the Courts should encourage the never-sleeping ingenuity of a certain temple faction, which is continually inventing fresh sources of Criminal and Civil litigation and new ingenious ways of interference with the exercise of temple office rights and discharge of temple office duties vested in the *mīrāsī* temple office-holders, who belong to the rival Tungalai sect. I would, therefore, dismiss this application for the grant of a certificate. The applicants will pay the respondents' costs.

NAPIER, J.—I entirely concur. I have nothing to add.

Application dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY No. 24 of 1913.

March 19, 1915.

Present:—Mr. Pratt, J. C.

In re THE FIRM OF MITHOMAL DWARKA-DAS—INSOLVENT.

Provincial Insolvency Act (III of 1907), ss. 36, 37—Transfer of property by insolvent shortly before his failure.—Good faith, test of.—Transfer by insolvent with a view to give preference to one creditor over others.—Test—Pressure of creditor, effect of.

Under section 36 of the Provincial Insolvency Act the test of the 'bona fides' of a transfer made by an insolvent in favour of an incumbrancer shortly before his failure is, whether the lender intended that the advance should enable his debtor to carry on his business and whether he had a reasonable ground for believing that it would enable him to do so. [p. 50, col. 2.]

Ex parte Johnson, In re Chapman, (1884) 26 Ch. D. 338; 53 L. J. Ch. 762; 50 L. T. 214; 32 W. R. 693; 48 J. P. 648, referred to.

In considering whether a transfer of property made by an insolvent was so made with a view to give one creditor preference over other creditors, the test is "what was the predominant motive in the debtor's mind at the time of the transfer?" [p. 52, col. 1.]

Ex parte Topham, In re Walker, (1873) 9 Ch. 614; 42 L. J. Bk. 57; 28 L. T. 716; 21 W. R. 655, referred to.

Semble: The pressure of a creditor excludes preference, which is a voluntary act on the part of the debtor. [p. 52, col. 1.]

Butcher v. Stead, (1875) 44 L. J. Bk. 129; 7 H. L. 839; 33 L. T. 541; 24 W. R. 463, referred to.

The Hon'ble Mr. Harchandrai Vishindas, for the Petitioning Creditors.

Mr. Dipchand T. Ojha, for the Insolvent.

Messrs. Hirdaram Mewaram, for the Mortgagees.

JUDGMENT.—This is an application by three petitioning creditors to set aside as void as against the Official Receiver a mortgage executed by the insolvent, Mithomal Dwarkadas. The insolvency petition was filed on the 21st October 1913 and the insolvent was adjudicated on the 23rd January 1914. The mortgage was executed on the 3rd August 1913 and is, therefore, within the periods limited in sections 36 and 37.

The mortgage was a mortgage of the whole stock in trade of the insolvent in his three shops in Karachi, Shikarpur and Chaman for a cash advance of Rs. 40,000. It is admitted that the consideration was cash and that it was paid in instalments from the 18th August 1913 to the 16th or 17th October 1913. There is a dispute as to the payment of a small part of the consideration, Rs. 4,200, to which I shall refer presently. But it is admitted that there was a substantial cash consideration contemporaneous with the mortgage. The mortgagees were two creditors of the insolvent. The issues that remain for decision, therefore, are:—

(1) Under section 36—was the mortgage *bona fide*?

(2) Under section 37—was the insolvent on the 3rd August 1913 unable to pay his debts as they became due?

(3) Also under section 37—was the mortgage executed with a view to giving the two mortgagees or either of them preference over other creditors?

As to the first issue, the real test of *bona fides* is that stated in *Ex parte Johnson, In re Chapman* (1): "Did the lender intend that the advance should enable his debtor to carry on his business and had he a reasonable ground for believing that it would enable him to do so?" If that was the intention of the mortgagees the transaction is unimpeachable. But if they knew that the debtor would not be enabled to carry on business, if the mortgage was merely a device for defeating other creditors, the transaction is not *bona fide*.

(1) (1884) 26 Ch. D. 338; 53 L. J. Ch. 762; 50 L. T. 214; 32 W. R. 693; 48 J. P. 648.

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Now, the insolvent's affairs were by no means hopeless at the time the mortgage was executed. He had a large stock in his shops. The sale of these not only realized enough to pay the mortgage-debt but left a surplus of Rs. 15,000 available to the Official Receiver. His manager says that at the time of the mortgage the debts were a lakh of rupees and the assets about 1½ lakhs of rupees. There was, therefore, good reason to suppose that with pecuniary assistance he would be able to tide over a period when the money market was tight. The insolvent's own accounts show that as a matter of fact the advances received on the mortgage enabled him to continue to do business. He paid *hundis* for Rs. 64,000 and drew *hundis* for Rs. 78,000 and one of the *hundis* he paid was in favour of one of the petitioning creditors. The insolvent himself says that he drew the advance in order to be able to honour his *hundis* and carry on his business. He also adds that he utilized the money in his business. The insolvent is much incensed against the mortgagees, because he thinks they have dealt harshly with him and driven him into the Bankruptcy Court (see notice Exhibit 9). There is, therefore, no reason to suppose that he has given this evidence in collusion with the mortgagees. I, therefore, fully believe the evidence of the mortgagees, Mr. Chellaram and Mr. Thorburn of Messrs. Forbes, Forbes, Campbell & Co., that the advance was made in order to assist an old customer whose position they then believed to be absolutely sound. Messrs. Forbes, Forbes, Campbell & Co. had contracts outstanding with the insolvent which resulted in losses to the amount of Rs. 23,427 (Exhibit 14). But there is nothing to show that these losses were anticipated at the time of the mortgage, for no attempt was made to secure their payment. The other mortgagee, Mr. Basarmal, was a creditor in respect of *hundis* for Rs. 10,000 and he did, as I shall presently show, gain an advantage in regard to them. But I think he acted in the belief that the best way of securing the *hundis* was to enable the debtor to continue to carry on his business and meet all his *hundi* liabilities and so pay not only himself but other creditors also. So far as he is concerned, I think the transaction may more properly

be referred to this motive than that of defeating other creditors.

There is one other point on which evidence has been led as affecting the *bona fides* of the transaction and that is that Rs. 4,200 of the consideration was not paid. But the evidence of payment is overwhelming. The insolvent signed a receipt for it, Exhibit 4. It is entered in his accounts as also in the accounts of Messrs. Forbes, Forbes, Campbell & Co. (Exhibit 12). Mr. Cowasji, the cashier, made the payment and produces the office cash slip (Exhibit 13). The money was paid and it appears that after the mortgagees took possession, it was privately deposited by the insolvent with Mr. Chellaram who will now, no doubt, hand it over to the Official Receiver.

On the *second* issue the evidence is not very clear. I have already indicated the financial position of the insolvent on the 3rd August. His assets were in excess of his liabilities, but he was probably unable to pay his debts as his assets were not liquid. It must have been for this reason that he executed the mortgage. I would, therefore, find on this issue in the affirmative.

On the *third* issue my finding is in the negative. There is no suggestion that any preference was shown to Messrs. Forbes, Forbes, Campbell & Co. But the other mortgagee Mr. Chellaram, had made his credit available to the insolvent. The insolvent drew *hundis* on himself in favour of Mr. Chellaram. These were sold by Mr. Chellaram in the bazar and the sums so realized paid to the insolvent. Now at the date of the mortgage *hundis* for Rs. 10,000 endorsed by Mr. Chellaram were outstanding. If the insolvent were unable to meet the *hundis* at due dates the holders would have recourse to Mr. Chellaram. At or about the time that each instalment of the advance was paid to the insolvent, a sum of money was deposited by the insolvent with Mr. Chellaram sufficient to meet the liability on the next *hundi* that would fall due. The last *hundi* fell due on the 11th October and a week after it was paid, the mortgagees foreclosed. It is contended on these facts that the whole transaction was a cloak to the preferential payment of the *hundis* on which Mr. Chellaram was liable. Mr. Chellaram explains that the deposits were made by the insolvent

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merely in order to get the benefit of interest. But the insolvent wanted money and was not in a position to lend money at interest; and the dates of the deposits so nearly correspond with the dates when the *hundi*s were due that I have no doubt that Mr. Chellaram took advantage of his position to see that the *hundi*s on which he was liable, were paid. It is only natural that Mr. Chellaram should do so. But on this issue I am not concerned with Mr. Chellaram's motives at all. It is the motive of the insolvent that has to be considered. What is the predominant motive in the debtor's mind, that is the test: *Ex parte Topham, In re Walker* (2). Now it is absurd to suppose that the insolvent who was not in a desperate position would have mortgaged the whole of his business simply to secure Mr. Chellaram. It is also idle to suggest that Mr. Chellaram dealt with the insolvent harshly. The alleged harsh treatment might lead to the inference that the insolvent was acting under the pressure of Mr. Chellaram—but the pressure of a creditor excludes preference, which is a voluntary act on the part of the debtor; see *Butcher v. Stead* (3).

The transaction was, therefore, *bona fide* and for consideration and did not constitute a fraudulent preference. I dismiss the application with costs.

Application dismissed.

(2) (1873) 8 Ch. 611; 42 L. J. Bk. 57; 28 L. T. 716; 21 W. R. 655.

(3) (1875) 44 L. J. Bk. 129; 7 H. L. 839; 33 L. T. 541; 24 W. R. 463.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 258 OF 1914.

September 6, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

KATHARI NARASIMHA RAJU—

PLAINTIFF—APPELLANT

versus

BHUPATI RAJU RAGUNADHA RAJU

AND OTHERS—DEPENDANTS—RESPONDENTS.

Sale of immoveable property less than Rs. 100 in value—Unregistered sale-deed—Possession delivered—

Title, if passes—Sale-deed, if evidence of contract to sell—Transfer of Property Act (IV of 1882), s. 54.

In the case of immoveable property of the value of less than Rs. 100, the existence of an unregistered deed of sale does not prevent the transferee from relying on an oral sale followed by possession and the unregistered document can be used as evidence of the contract to sell. [p. 53, cols. 1 & 2; p. 54, col. 1.]

Veda Muppan v. Kathari Padayachi, 5 Ind. Cas. 57; 7 M. L. T. 372; *Ammani v. Jagannatha Reddi*, 30 Ind. Cas. 7; 1915 M. W. N. 442; 18 M. L. T. 103; *Nagappa v. Deva*, 14 M. 55; *Muthukaruppan Samban v. Muthu Samban*, 25 Ind. Cas. 772; (1914 M. W. N. 768; 27 M. L. J. 497; 16 M. L. T. 344; 1 L. W. 754, referred to.

Appeal, under section 15 of the Letters Patent, preferred against the judgment of the Hon'ble Mr. Justice Oldfield, in Second Appeal No. 1652 of 1913, preferred against the decree and judgment of the Court of the Subordinate Judge of Masulipatam, in Appeal Suit No. 91 of 1912, against the decree of the Court of the District Munsif of Tanuku, in Original Suit No. 131 of 1909.

Mr. P. Chenchiah for Mr. T. Prakasam, for the Appellant.

Mr. B. Somayya for Mr. P. Narayana-murthi, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. He owned the plaint land in 1900 and 1901. He brought the suit in 1909, having been out of possession for eight or nine years before the suit. His story was that the 3rd defendant became his lessee in 1900. That story has been found to be false. The lower Courts have further found that in 1901 the plaintiff sold the plaint lands to the 3rd defendant, executed an unregistered sale-deed for Rs. 50 to the 3rd defendant and put the 3rd defendant in possession of the land. On these findings they dismissed the plaintiff's suit. That unregistered sale-deed is not produced, the 3rd defendant suppressing it according to the defendants Nos. 1 and 2, who are the vendees from the 3rd defendant.

The contention in second appeal is that the plaintiff, though he failed to prove the lease to the 3rd defendant, is entitled to succeed on his title which existed in 1901 and had not been lost either by adverse possession when the suit was brought in 1909, or by his execution of the unregistered sale-deed of 1901 which is invalid and useless for the purpose of effecting a transfer of ownership, by reason of the

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provisions of section 54 of the Transfer of Property Act.

If there was no valid sale to the 3rd defendant in 1901, the plaintiff is entitled to succeed on his title as the suit is not barred by limitation. The plaintiff (appellant) relies on the decision in *Muthukaruppan Samban v. Muthu Samban* (1) for his contention that no title passed under the unregistered sale-deed for Rs. 50 (relied upon by the defendants Nos. 1 and 2), though it was accompanied by delivery of possession. It has been held in at least two cases in this Court, reported as *Veda Muppan v. Kathari Padayachi* (2) and *Ammani v. Jagannatha Reddi* (3), that notwithstanding the existence of an unregistered sale-deed, which cannot validly effect a transfer of ownership even in respect of a sale of property of the value of less than Rs. 100, the delivery of the property sold in pursuance of the contract of sale is sufficient under section 54, paragraph 3, of the Transfer of Property Act for the transfer of the title. Under paragraphs 5 and 6 of section 54 of the Transfer of Property Act, a contract for the sale of immoveable property does not create any interest in, or charge on, such property and hence such a contract, though in writing, need not be registered even if it is for a price of Rs. 100 or more. Paragraph 3 of the section, which refers to the transfer of title by delivery, does not say that the contract of sale, which is to be converted into a sale (or transfer of title to the property), should be an oral contract and cannot be evidenced by the written deed, or that an invalid writing, purporting to transfer title prevents the delivery itself of its effect of transferring the title. According to the definition of sale in the 1st paragraph of section 54, two things (it seems to me) are required to constitute a sale: (1) a contract to transfer the ownership of the sold land in exchange for a price paid, etc., and (2) the transfer of such ownership, accordingly, by the vendor. In the case of property of the value of less than Rs. 100, the

contract of sale followed by the delivery of property in pursuance of that contract completes the sale according to paragraph 3 and a registered conveyance is not indispensable. In *Nagappa v. Deru* (4), it has been held that an unregistered sale-deed even for a sum of Rs. 100 can be used in evidence for proving the contract to sell, though not to prove the transfer of ownership. *A fortiori* a sale-deed for less than Rs. 100 can be used as evidence of the contract to make that sale. If there are any observations in *Muthukaruppan Samban v. Muthu Samban* (1) which tend to support the view that an unregistered document of sale cannot be used as evidence to prove even the contract of sale, I am not, with the greatest respect, prepared to agree with those observations. There is nothing in paragraph 3 of section 54 which constrains us to hold that if there is a contract of sale which is evidenced by a deed which is invalid to transfer title, the transfer of title by delivery cannot take place. The case in *Muthukaruppan Samban v. Muthu Samban* (1) seems to have been decided on a very strict construction of the pleadings in that case against the defendants [see the sentence in the judgment at page 346]: "Under these circumstances we do not think that it is open to these appellants to set up an oral sale as to which there was no issue or any evidence."

I would, therefore, dismiss the Letters Patent Appeal with costs.

NAPIER, J.—I assume that in this case there was no oral evidence to prove the oral sale other than the unregistered document. The questions are, whether the fact that there is a document prevents the 3rd defendant relying on an oral sale followed by possession and whether, if not, he can use the unregistered document to prove that the transfer was an exchange for a price paid or promised within the meaning of section 54 of the Transfer of Property Act. On the first point I can see no reason why the existence of the document should prevent the proof *aliunde*. Section 54 says that transfer may be made either by a registered instrument or by delivery. Until the document is registered, it has no effect to "transfer" and it must be open to the parties at

(1) 25 Ind. Cas. 772; (1914) M. W. N. 768; 27 M. L. J. 497; 18 M. L. T. 344; 1 L. W. 754.

(2) 5 Ind. Cas. 57; 7 M. L. T. 372.

(3) 30 Ind. Cas. 7; (1915) M. W. N. 442; 18 M. L. T. 108.

(4) 14 M. 55.

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any stage before registration to adopt the simple process of delivery. On the second question reliance is placed on the language used by the Judges who decided the case *Muthukaruppan Samban v. Muthu Samban* (1), which certainly lends support to that view. I am, however, unable to agree with it. The document is not compulsorily registrable under section 17 of the Registration Act, and, therefore, we have not to consider whether the proposed use to prove the agreement would not be permissible, because it would affect immoveable property within the meaning of section 49 of the Registration Act. I am unable to accept the construction put on section 54 in the above case that it requires all sale-deeds, if in writing, to be registered. In my opinion it only requires that if the sale-deed is to be relied on to establish transfer it must be registered. There being no law requiring the document to be registered, I see no reason why it should not be proved and used as required by the Evidence Act, section 91. That it could be so used is assumed in *Krishnaamma v. Suranna* (5), a case decided by a Full Bench of this Court [vide also *Bimaraz v. Popaya* (6) and *Kota Muthanna Chetti v. Alibeg Sahib* (7)], and the same view has been taken by this Court quite lately in a case reported as *Ammani v. Jagannatha Reddi* (3). I am, therefore, of opinion that the unregistered document is admissible in evidence to prove the contract, and there being evidence of delivery, the sale is proved. I agree, therefore, with the learned Judge and would dismiss the appeal with costs.

Appeal dismissed.

(5) 16 M. 148; 3 M. L. J. 54.

(6) 3 M. 46.

(7) 6 M. 174; 7 Ind. Jur. 11.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 2482
OF 1914.December 2nd, 1914.

Present:—Mr. Justice Shadi Lal.

KAMTA PERSHAD—PLAINTIFF—
APPELLANT

versus

INDUSTRIAL BANK OF INDIA, LTD.

(IN LIQUIDATION)—DEFENDANT—

RESPONDENT.

Companies Act (VI of 1882), s. 150—Contributory. Liability of, to pay debt due by him to Company—Procedure.

Under section 150 of the Companies Act, 1882, a contributory can be required, not only to meet calls which may be made on him, but also to pay any debt which he owes to the Company. [p. 55, col. 1.]

But the Court is not bound to proceed under section 150 for the recovery of debt due from a contributory and may, if so advised, direct the Liquidator to file a regular suit for the purpose. [p. 55, col. 1.]

Miscellaneous first appeal from the order of the Additional Judge, Ludhiana, dated the 7th October 1914.

Mr. Gulla Ram, for the Appellant.

Mr. Manohar Lal, for the Respondent.

JUDGMENT.—The learned Counsel for the appellant has admitted before me that his client was rightly held to be a contributory in respect of two shares, and has, therefore, not attacked the finding on that point. The appellant has also been required to pay to the Liquidator the debt due from him to the Company. The amount of this debt, as fixed by the lower Court, is supported by the pro-notes executed by the appellant and by the properly kept account books of the Company. He was given every reasonable opportunity of rebutting the case made out by the Liquidator, but it appears that he intentionally abstained from appearing in the Court. In these circumstances I cannot accede to the request for further enquiry and must hold that the amount has been fully proved.

It has been urged by Mr. Gulla Ram that the appellant cannot be called upon, in the summary proceeding, to pay the debt due from him and that the Liquidator should be ordered to establish his claim by bringing a regular suit for the purpose. The learned Counsel is unable to cite any authority in support of his contention and I myself feel no doubt whatever that it is altogether untenable. If the appellant had not been a contributory and had been a mere outsider

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qui the Company, I would have been prepared to hold that the summary remedy was incompetent in his case. But it has been admitted that he is a contributory and that being so, the law seems to me quite clear that a contributory can be required, not only to meet calls which may be made on him, but also to pay any debt which he owes to the Company.

This proposition is fully supported by section 150 of the Indian Companies Act, VI of 1882, which lays down in clear terms that the Court in a winding-up proceeding is empowered to direct a contributory to pay to the Liquidator any money, whether due as a debt or otherwise, which he owes to the Company. The object of the law is to avoid multiplicity of actions and to provide a cheap and expeditious remedy for the collection of the Company's assets which are in the hands of its contributories or officers. The section, therefore, provides a summary remedy for realising the debt due from the members of the Company, who are deemed to be parties to the winding-up proceeding. The language of the section is plain and does not admit of any doubt, and I see absolutely no reason for placing upon it a construction which would defeat the object which the Legislature had in view.

A similar provision will be found in section 165 of the Companies (Consolidation) Act of 1908, 8 Edward VII, C. 69. Further, the judgment of Lord Romilly, M. R., in *In re the Marlborough Club Company, Limited* (1) shows that if it had not been a case of fully paid share-holders, who could not have been put on the list of contributories, the Court would have allowed the Liquidator to recover by summary process debts due by share-holders to the Company.

I have accordingly no hesitation in overruling the contention raised on behalf of the appellant. I may add that the Court is not bound to proceed under section 150 for the recovery of debt due from a contributory and may, if so advised, direct the Liquidator to file a regular suit for the purpose.

The result is that the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

(1) 37 L. J. Ch 296; 5 Eq. 365; 18 L. T. 46; 16 W. R. 668.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2672 OF 1913.

August 31, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

NALLAGONDA PEDDA CHENNA

REDDI AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

ASUPALLEE BUDDA REDDY—

DEFENDANT—RESPONDENT.

*Gift—Possession under a gift from a limited owner—
Gift invalid against reversioners—Trespass by stranger
—Suit by donees for possession based on title, notwithstanding
ability of.*

Two days before her death, one S made a gift of certain immovable properties, which she inherited from her father, in favour of her step-sons. Prior to this gift the properties had been in the possession of her husband on her behalf and subsequent to the gift the husband continued to hold possession on behalf of the donees, his minor sons. Four days after the death of S, the defendant trespassed upon the properties and took forcible possession of the same. Four months afterwards, the plaintiffs, as donees under the gift aforesaid, instituted the present suit in ejectment against the defendant.

Held, that the plaintiffs were entitled to recover possession from the defendant, a trespasser, even though the gift in their favour was invalid as against the reversioners [p. 57, col. 2; p. 58, col. 1.]

Sundar v. Pa-bari, 12 A. 51 (P. C.); 16 I. A. 186; 5 Sar. P. C. J. 448, followed.

Quere.—Whether the plaintiffs would be entitled to possession, if they themselves had obtained forcible possession from the true owner? [p. 57, col. 2.]

Second appeal against the decree of the District Court of Kurnool, in Appeal Suit No. 66 of 1913, preferred against that of the District Munsif of Nandyal, in Original Suit No. 729 of 1912.

This second appeal coming on for hearing on the 5th and 6th of November 1914, the Court (Sadasiva Aiyar and Hannay, JJ.) made the following

ORDER.—Before deciding this second appeal, we consider it advisable to obtain a finding from the lower Appellate Court on the 3rd issue in the case on the evidence on record.

The District Judge of Kurnool will submit his finding within six weeks from the date of receipt of records and the parties will be at liberty to file objections to the said finding within ten days after notice of the receipt of the same shall have been posted up in this Court.

In compliance with the above order, the

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District Judge of Kurnool submitted the following

FINDING.—I have been directed to record a finding on the evidence already on the record on the third issue framed by the original Court, which is that of the District Munsif of Nandyal. The third issue runs thus:—

Whether the defendant is the nearest reversioner to the suit estate after the death of the late Subbakka; and if so, whether the gift of Subbakka to the plaintiffs binds him?

The learned District Munsif in the judgment in Original Suit No. 72 of 1912 on his file has found the first part of this issue in the negative and has expressed himself in no measured terms; and with this part of the finding, I can but agree. The defendant has called no witnesses who can speak as relations to the claim which he sets up to be the son of the brother of Rami Reddy, the last male holder of the suit properties; and the evidence which he does adduce on the subject is of very little use to him. He himself states that Rami Reddy was one of four brothers, but it is not explained why in such a case the properties on partition were divided only into two shares instead of into four. Nor is it explained how, if the defendant's father got a fourth share of the family estate on division, he or the defendant has come to lose it so that he has none of the estate now.

So far as to probabilities. With regard to the oral evidence other than that of defendant himself, D. W. No. 2 says in his examination-in-chief that Rami Reddy had three brothers, but in cross-examination states that he had no brother. She also thinks that defendant's father may have been Narappa Reddy, though his father was actually Pedda Fakeer Reddy. This witness is wrongly described in the lower Court's judgment as D. W. No. 3. D. W. No. 3 is actually the Bogam witness, and is correctly described as such by the lower Court. He does not know much about Rami Reddy's family, as he says that their property consisted of one terraced house (middle).

Nor does he know the name of the father of defendant. D. W. No. 4 knows the names of neither the father nor mother of defendant's father and Rami Reddy; but speaks to their being brothers because he lives in their

village. He is not related to any of them, and the lower Court has made a mistake, probably clerical one, in saying that he is related to the parties. D. W. No. 5, whose age is given as 50, and not as 40 stated by the lower Court, says that Rami Reddy and defendant's father were brothers, but he too cannot say who their father was. All this oral evidence is of the very smallest value and quite unconvincing. It is pointed out for the defence that the evidence for the plaintiffs also is not that of relatives, and only consists of a denial of the defendant's claim to be the nearest reversioner. But the burden of proof is on the defendant, and he has not discharged it. I uphold the lower Court's finding on the first part of the issue.

As to the second part of the issue, the plaintiffs do not deny that the gift of Subbakka to the plaintiffs will not bind defendant if he is the nearest reversioner. The lower Court has held that, since the defendant is found not to be a reversioner to the suit estate, the gift to plaintiffs binds him, but this is not a proper finding on the issue. What has to be found is if the gift binds him supposing he is found to be the next reversioner, and I find as to that that it does not bind him. The point, however, is of very little importance when the first part of the issue is found against the defendant.

This second appeal coming on for final hearing on the 25th of August 1915 after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, Mr. S. Duraiswami Iyer, for the Appellants, argued that the appellants had obtained peaceable possession under the deed of gift. They were, therefore, entitled to hold such possession against all except the true owner. The reversioners had not come forward now and the defendant, who was a trespasser, was not entitled to withhold possession. See *Sundar v. Parbati* (1) and *Ganapathi Mudali v. Venkatalakshminarasappa* (2). Even if the appellants were trespassers themselves, they were entitled to protection as against subsequent trespassers.

(1) 12 A. 51 (P. C.); 16 I. A. 1-6; 5 Sar. P. C. J. 448.
(2) 25 Ind. Cas. 109; (1914) M. W. N. 728.

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Mustapha Sahib v. Santha Pillai (3), *Narayana Row v. Dharmachar* (4), *Adinarayana Iyer v. Krishnan* (5).

Mr. S. Ranganatha Iyer, for the Respondent:—The suit is one based on title and not one under section 9 of the Specific Relief Act. The plaintiffs must show a subsisting title in them before they can succeed in recovering possession from the defendant. As against the cases cited for the appellants as to the right of a trespasser suing another trespasser for possession, see *Nisa Chand Gaita v. Kanchiram Bagani* (6). The cases in *Sundar v. Parbati* (1) and *Asher v. Whitlock* (7) do not support such an extreme position.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. Both the plaintiffs are minors. They are suing by their father, Chenna Reddi as their next friend.

The land in dispute belonged to their step-mother, Subbakka, by inheritance. She had only a life interest therein. She died issueless on the 21st August 1912. Two days before her death, she made a gift of the plaintiff lands to her minor step-sons, plaintiffs, evidently because she was on loving terms with her husband who was looking after the lands for her. The gift is, no doubt, invalid after her death as against the reversionary heirs of her father as whose property she inherited it. As I said, her husband was in possession on her behalf on the date of the gift-deed to her step-sons and he continued to be in possession during the two days which elapsed between the gift-deed and her death and for four days afterwards. Reading the plaintiff paragraphs Nos. 5 to 8 literally, it seems to me clear that the plaintiffs' next friend considered himself to have been in possession after the date of the gift on behalf of his wife's donees (that is, his own minor sons, the plaintiffs) till he was dispossessed by the defendant about the 25th August 1912. The suit was brought

within four months afterwards, namely, on the 23rd December 1912. The suit was not, however, brought under section 9 of the Specific Relief Act, but relying on the title under the gift-deed (which became invalid against the reversioners after the plaintiffs' step-mother's death) and mentioning also the continued possession of the plaintiffs' next friend for about one week after the date of the gift-deed till the dispossession by the defendant. The defendant has been found by the lower Courts to be a pure trespasser (the title he set up as alleged reversioner having been found against), he not having denied in his written statement the allegations as to possession in the plaintiffs' next friend for six days after the gift-deed and the dispossession on the 25th August as set out in the plaint.

Taking it that the minor plaintiffs cannot make out a good title as against the reversioners of Subbakka's father's estate, I think that the principle of the decision in *Ganapathi Mudali v. Venkatalakshminarasayya* (2), decided by Miller, J., and myself, applies to the facts and as the plaintiffs' next friend had obtained and was in peaceable possession for several years before the deed of gift and continued in such possession for six days after the deed of gift (his possession on the date when the defendant dispossessed him being treated in the plaint as the minor plaintiffs' possession and his dispossession being treated as the dispossession of the plaintiffs), he on behalf of his minor sons is entitled to recover back possession from the defendant who forcibly ejected him. *Sundar v. Parbati* (1), their Lordships of the Privy Council say at pages 56 and 57 that "their possession was lawfully attained in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing." "It does not admit of doubt that they" (the persons so in possession) "are entitled to maintain their possession against all comers except the person who can plead a preferable title." It is not necessary for the purposes of this case to decide whether, if a person (who was dispossessed by the defendant) himself came into possession not peaceably but by using force against the real owner, such a person could maintain his possession against the second trespasser. For instance (to

(3) 23 M. 179.

(4) 28 M. 514; 13 M. L. J. 140.

(5) 18 Ind. Cas. 97; 1912 M. W. N. 707.

(6) 26 C. 579; 3 C. W. N. 568.

(7) (1865) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jer. (N. S.) 925; 13 L. T. 254; 14 W. R. 26; 148 R. R. 598.

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take an extreme case), A, the real owner, is forcibly dispossessed by B. B is in possession for three months and then B is forcibly dispossessed by C who continues in possession for 11½ years. Can B successfully maintain a suit for restoration of possession against C on the strength of B's three months' possession? The cases in *Mustapha Sahib v. Santha Pillai* (3), *Narayana Row v. Dharmachar* (4) and *Adinayana Iyer v. Krishnan* (5), no doubt do go that length [see, however, *Nisa Chand Gaita v. Kanchiram Bagani* (6)] but as I said before, it is not necessary to decide that question as the plaintiffs got into possession in this case peaceably.

In the result, the lower Appellate Court's decision against the plaintiff will be reversed and that of the District Munsif restored with costs in plaintiffs' favour in this and the lower Appellate Court.

NAPIER, J.—I agree. If the matter were *res integra*, I should have serious doubt whether the view taken by the High Court of Calcutta in *Nisa Chand Gaita v. Kanchiram Bagani* (6) is not correct. The decision of the Privy Council in *Sundar v. Parbati* (1) is authority for the proposition that in certain circumstances persons actually in possession without title are entitled to maintain their possession against all comers, except a person who can show a preferable title, and are entitled to consequential remedies. The decisions in *Mustapha Sahib v. Santha Pillai* (3) and *Narayana Row v. Dharmachar* (4) would go as far as holding that a person entering into possession of immovable property with knowledge that he had no title and even by force, can, when evicted by any one but the true owner, maintain an action to recover possession. With the greatest deference to the learned Judges, I find no authority for this position either in the decision of the Privy Council or in the English case of *Asher v. Whitlock* (7). As, however, I agree with my learned brother that the plaintiff in this suit held possession under a *bona fide* claim of title, I agree in allowing the appeal and restoring the decree of the District Munsif.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 218 OF 1914.

February 27, 1915.

Present:—Sir Henry Drake-Brockman, Kt., J. C.

HIRALAL AND ANOTHER—PLAINTIFFS—
APPELLANTS
versus

Musammal GOPIKA—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 66—Sale in execution of decree—Suit by heirs of certified purchaser—Defendant, if can set up title.

Section 66 of the Civil Procedure Code is confined to suits brought against certified purchasers. [p. 59, col. 1.]

Where the plaintiffs sued to eject the defendant from certain plots of land on the ground that the lands were bought by the plaintiffs' brother at an auction sale held in execution of a decree against the original owner:

Held, that it was open to the defendant to set up her own title and to show that the certified purchaser was a mere *benamidar* for her [p. 59, col. 2.]

Ghazindia v. Bishan Dial, 27 A. 443; A. W. N. (1905) 39; 2 A. L. J. 111; *Musammal Bukhs Koneur v. Lalla Buhoree Lal*, 18 W. R. 57 (P. C.); 10 B. L. R. 159; 4 M. L. A. 496; 3 Sar P. C. J. 69; 20 E. R. 871, followed.

Appeal against the decree of the District Judge, Nagpur, dated the 22nd November 1913, confirming that of the Junior Subordinate Judge, Nagpur, dated the 29th July 1913.

Mr. M. Chuckerbutty, for the Appellants.

JUDGMENT. The plaintiffs in the suit out of which this second appeal arises sued to eject the defendant from two *malik makbuz* plots and one absolute occupancy field in *Mauza Khedi*. It is common ground that these lands were bought in 1902 by Khannulal, deceased brother of the plaintiffs, at an auction sale held in execution of a decree obtained against the original holder. The plaintiffs' case is that Khannulal was in possession till his death in 1909, when he was succeeded by his widow, who in turn died in 1911 after being ousted by the defendant in 1910: they claim accordingly as Khannulal's heirs.

The Courts below have concurred in finding that Khannulal was a mere *benamidar* for the defendant, who has all along been in possession on her own behalf as beneficial owner. They have also overruled the plaintiffs' contention that section 66, Civil Procedure Code, operates to

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preclude the defendant from setting up a beneficial title as against the heirs of the certified auction-purchaser, and the only point pressed in second appeal is that they are wrong in so doing.

The part of section 66 on which reliance is placed for the plaintiffs-appellants is the first sub-section and runs as follows:—

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

In the Code of 1882 the corresponding provision, namely, the first paragraph of section 317, stood thus:—

"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

In *Hirachand v. Kishendas* (1) it was held by Ismay, J. C., on the strength of the Privy Council ruling in *Musammal Buhuns Kowur v. Lalla Buhoree Lall* (2) that section 317 aforesaid was, like the corresponding provision (section 260) in Act VIII of 1859, confined to a suit brought against a certified purchaser. The substitution in section 66 of the present Code of the word 'plaintiff' for the words 'any other person' only serves to make it still clearer that the Legislature intended to give effect to the view of the Privy Council, and not to change the law as laid down by that Tribunal. The same view as to the scope of section 317 in the Code of 1882 was taken by a Divisional Bench of the Allahabad High Court in *Ghazi-ud-din v. Bishan Dial* (3), where the facts were very similar to those in the present case. Other authorities in the same sense are *Govinda Kuar v. Lala Kishun Prosad* (4) and *Muthuvaiyan v. Sinna Samavaiyan* (5).

It is true that in *Balaji v. Dajiba* (6) Crosthwaite, J. C., citing *Jokhee Lall v.*

- (1) 9 C. P. L. R. 55.
 (2) 18 W. R. 157 (P. C.); 10 B. L. R. 159; 14 M. L. A. 406; 3 Sar. P. C. J. 69; 20 E. R. 871.
 (3) 27 A. 443; A. W. N. (1905) 39; 2 A. L. J. 111.
 (4) 28 C. 370.
 (5) 28 M. 526; 15 M. L. J. 419.
 (6) 2 C. P. L. R. 137 at p. 139.

Huns Kooer (7), held the effect of section 317 in the Code of 1882 to be to make the title of the auction-purchaser complete against any one who claims on the ground that the purchase was *benami* on behalf of another, and laid down this rule as applicable even where the suit is brought by the auction-purchaser and not against him. The learned Judicial Commissioner, however, did not notice the Privy Council ruling above mentioned or the later one to the same effect, namely, *Lokhee Narayan Roy Chowdhry v. Kalypoddoo Bandopadhyaya* (8). The later authorities I have cited and the difference between section 66 (1) of the present Civil Procedure Code and section 317 of its immediate predecessor make it clear to my mind that the law is still as laid down by the Privy Council. I hold, therefore, that the lower Courts were right in allowing the defendant to set up her title and to show that Khannulal was a mere trustee for her. This appeal accordingly fails and is dismissed without notice to the respondent.

Appeal dismissed.

(7) 10 W. R. 167.

(8) 23 W. R. 358; 2 I. A. 154.

MADRAS HIGH COURT.

REFERRED CASE No. 1 OF 1914.

August 31, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
 Mr. Justice Napier.

Messrs. AGUSTUS BROTHERS—PLAINTIFFS
versus

M. A. FERNANDEZ—DEFENDANT.

Civil Procedure Code (Act V of 1908), ss. 4, 6, O. II, r. 2—Provisions of Code, whether applicable to Village Munsifs—Suit for recovery of portion of price

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of article sold instituted in Village Munsif's Court—Subsequent suit for balance of amount due on account of various purchases, whether barred.

Order II, rule 2 of the Civil Procedure Code prohibits only the splitting of claims arising out of the same cause of action. [p. 61, col. 1.]

Where a customer makes distinct purchases on distinct dates, the merchant has got a distinct cause of action in respect of each purchase or set of purchases unless there is an agreement or settlement of accounts between the parties consolidating all these separate causes of action into one. [p. 61, col. 1.]

Where, therefore, in a suit for the balance of the amount due from the defendant on account of small purchases made by him on different occasions from the plaintiff's shop, it appeared that the plaintiff had previously sued for one portion of the claim in the Village Munsif's Court:

Held, that Order II, rule 2, did not apply and the subsequent suit was not barred. [p. 62, col. 1.]

Beni Ram v. Ram Chandra, 26 Ind. Cas. 302; 12 A. L. J. 959; 36 A. 560; *Mandal & Co. v. Fazul Ellahi*, 26 Ind. Cas. 209; 41 C. 825, followed.

The provisions of the Civil Procedure Code, 1908 are inapplicable to Village Munsif's Courts. [p. 62, col. 1.]

Mir Khan v. Kularsa, 13 M. 145, followed.

Case stated under rule 1, Order XLVI, of Schedule I of Act V of 1908, by the Subordinate Judge of Cochin, in Small Cause Suit No. 97 of 1913.

JUDGMENT.

SADASIYA AIYAR, J.—The facts which have led to this reference by the Subordinate Judge of Cochin in a Small Cause Suit in his Court, might be shortly stated thus: The defendant made purchases from the plaintiff's shop for small sums from time to time till 26th May 1912, made part payments and had to pay Rs. 88-7-0 as balance on such purchases. The suit was brought in September 1913 for the recovery of this Rs. 88-7-0 and interest. The plaintiff had, at the end of 1912, brought a suit in the Village Munsif's Court of Cochin for the recovery of Rs. 2-4-0, being the price of one bottle of whisky purchased by the defendant in April 1912, this item of Rs. 2-4-0 being one of the several items of account in respect of the purchases made by the defendant up to the 26th May 1912.

The lower Court has made this reference assuming that, if the first suit had been brought in an ordinary Civil Court instead of in the Court of the Village Munsif, Order II, rule 2, corresponding to old section 43 of the Civil Procedure Code, would be a bar to the present suit. Order II, rule 2, says (omitting portions unnecessary for this case): "Every

suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action;.....Where a plaintiff omits to sue in respect of,.....any portion of his claim, he shall not afterwards sue in respect of the portion so omitted."

I am not at all sure that where a customer makes distinct purchases on distinct dates, the merchant has not got a distinct cause of action in respect of each purchase or set of purchases. In *Beni Ram v. Ram Chandra* (1), it was held [doubting the decision in *Preonath Mukerji v. Bishnath Prasad* (2)], that when a debtor gave a *hundi* for Rs. 500 out of a debt of Rs. 4,000 and odd, and the creditor first brought a suit on the *hundi*, he was not precluded from maintaining a second suit for the balance due on account by reason of Order II, rule 2. In the case *Preonath Mukerji v. Bishnath Prasad* (2) [the soundness of the decision in which, was doubted in *Beni Ram v. Ram Chandra* (1)] the Court held that where a doctor got a promissory note for Rs. 700 for seven days' fees and continued to attend on the patient for six days more and then first brought a suit on the promissory note and recovered Rs. 700, he was barred by section 43 [Order II, rule (2)] from bringing a suit for the Rs. 600 due for the attendance during the remaining six days. In *Mandal & Co. v. Fazul Ellahi* (3), Jenkins, C. J., and Woodroffe, J., held that though the contract between the parties was contained in one and the same writing, if that writing expressly said that it related to two separate contracts (one relating to the delivery of cases of candles to be shipped in July 1908 and the other to the delivery of cases of candles to be shipped in August 1908), two separate suits can be maintained. I am aware that a merchant does not usually bring numerous separate suits against the same customer, each suit for the amount due on each purchase transaction. But that is because he is entitled under Order II, rule 3, Civil Procedure Code to unite in the same suit several causes of action against the same defendant unless prohibited by rules 4 and 5 of Order II.

1) 26 Ind. Cas. 302; 36 A. 560; 12 A. L. J. 959.

(2) 29 A. 256; A. W. N. (1907) 41; 4 A. L. J. 85.

(3) 26 Ind. Cas. 209; 41 C. 825.

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Order II, rule 2, prohibits only the splitting of claims arising out of the same cause of action and if the cause of action in respect of purchase for Rs. 2-4-0 was different from the other causes of action in respect of other purchases and if there was no agreement (or settlement of accounts) between the parties which consolidated all these separate causes of action into one cause of action, I think that Order II, rule 2, has no application and this reference is, therefore, incompetent.

Assuming, however, that the claim made in the Village Munsif's Court was on the same cause of action as that under which the present suit is brought, the question is whether Order II, rule 2, is applicable when the first suit had been brought in the Village Munsif's Court. In *Mirkhan v. Kadarsa* (4) it was held that the Civil Procedure Code has no application to the Courts of Village Munsifs at all, as section 6 of the old Civil Procedure Code provided that nothing in the Civil Procedure Code affected the jurisdiction or procedure of Village Munsifs and that hence the concurrent jurisdiction of the ordinary Civil Courts was not taken away by the provision in section 15 of the Civil Procedure Code that "every suit shall be instituted in the Court of the lowest grade competent to try it."

Though, in the present case, the provision of the Civil Procedure Code to be considered is not section 15, but Order II, rule 2, the same reasoning applies. But the learned Subordinate Judge who has made this reference entertains a doubt as to whether the decision in *Mirkhan v. Kadarsa* (4) even as regards the applicability of section 15 of the Civil Procedure Code, has not become inapplicable where the decision has to be under the new Code owing to the change in the language of section 6. Section 6 of the old Code of 1882 enacted (among other things) as follows: "Nothing in this Code affects the jurisdiction or procedure (c) of Village Munsifs or village *punchayats* under the provisions of the Madras Code or (d) shall operate to give any Court jurisdiction over suits of which the amount or value of the subject-matter exceeds the pecuniary limits of its ordinary jurisdiction." Section 6 of the Code of 1908 says:—"Save in so far as is otherwise expressly provided, nothing herein contained

shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction." The learned Subordinate Judge who has made this reference, thinks that the omission in the present Code of the words "affects jurisdiction or procedure of Village Munsifs, etc.," on which words the learned Judges who decided *Mirkhan v. Kadarsa* (4), relied, might make some difference, though he notices that section 4 of the new Code of 1908 is more widely worded than section 4 of the old Code. While section 4 of the old Code saved certain specific Acts affecting the Central Provinces, Burma, Punjab and Oudh and the laws passed under the Indian Councils' Act of 1861, relating to suits between landlords and tenants and suits relating to partition of immoveable property, section 4 of the new Code of 1908 very generally says that "nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or..... any special form of procedure prescribed, by or under any other law." It was because the savings under section 4 had been extended in the new Code, section 6 of the new Code confined itself to the provision (d) of the old Code section 6, namely, that ordinary pecuniary jurisdiction should not be exceeded. The learned Subordinate Judge says that section 4 (1) of the new Code as regards this saving clause is somewhat differently worded from the saving clause of section 6 of the old Code, and hence he is in doubt as to whether the ruling in *Mirkhan v. Kadarsa* (4) is applicable when interpreting section 4 (1) of the new Code in the same manner as when interpreting section 6 of the old Code. I do not find any material change in the wording and if there is any difference, the saving under section 4 (1) of the new Code is larger in scope than that under section 6 of the old Code and hence the *ratio decidendi* in *Mirkhan v. Kadarsa* (4), is *a fortiori* applicable to section 4 (1) of the new Code.

Ameer Ali and Woodroffe are also of opinion; (See Commentary under section 6) that it was in view of the extended scope of

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section 4 of the present Code, the reproduction of sections 6 and 7 of the last Code (except as to the final paragraph, which is the present section 6 has been considered unnecessary.

It is to be observed that in making this reference the Subordinate Judge has not clearly drawn up the point or points on which doubt is entertained by him (see Order XLVI, rule 1). However, taking it that the reference is whether Order II, rule 2, applies when a suit is brought for the balance of a claim arising out of the same cause of action after a suit had been brought for one portion of the claim in the Village Munsif's Court, I would answer the reference in the negative.

NAPIER, J. I agree that the suit is not barred by Order II, rule 2, and think that the question is clear beyond doubt. Section 4 of the Code of 1908 is very wide in terms; therefore, the provisions of the Code are inapplicable to Village Munsifs' Courts. There are no provisions in the Code for these Courts corresponding to sections 7 and 8, which make certain sections applicable to Provincial Small Cause Courts and Presidency Small Cause Courts. Chapter IV to Chapter VI of the Madras Village Courts Act, I of 1889, provides complete procedure for such Courts, covering the same ground as the Civil Procedure Code does for its Courts. Section 18 enacts the very rule which the Subordinate Judge seeks for in the Civil Procedure Code. There are numberless sections of the Civil Procedure Code which are manifestly inapplicable to village Courts. The reference, therefore, must be answered in the negative.

Reference answered in the negative.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 716 OF 1914.

July 7, 1915.

Present:—Mr. Stanyon, A. J. C.

THE MUNICIPAL COMMITTEE OF
SAUGOR DEFENDANT—APPELLANT

versus

NILKANTH AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Nuisance—Nuisance at law, what constitutes—Act

offending susceptibilities of individuals, whether actionable—Establishment of slaughter-house—Suit for injunction, who can bring—Act done under statutory authority, when unlawful—Central Provinces Municipal Act (XVI of 1903), s. 71.

In order to constitute a nuisance at law it is essential that there should exist either actually or impliedly, (1) *injuria*, i. e., a wrongful act constituting or causing damage, and (2) *damnum*, i. e., damage, loss, or inconvenience. *Damnum absque injuria* gives no right of action. [p. 67, col. .]

Where the act or omission causing or constituting an alleged nuisance is unlawful *per se*, e. g., where it is of itself a violation of statutory provisions or of private common law rights, the law will presume damage to exist; but where the act is innocent and lawful, then the question whether it amounts to an actionable nuisance is one of fact to be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case. [p. 67, col. .]

An act which offends the susceptibilities of individuals or the sentiments of a class is not, *ipso facto*, an actionable nuisance and cannot be made a ground for overriding ordinary rights in property. [p. 68, col. 1.]

The establishment and maintenance of a slaughter-house for butcher's meat is *per se* an offensive trade, even though it is not included as such in section 99 of the Central Provinces Municipal Act 1903. [p. 64, col. 1.]

But whether in any particular case it is an actionable nuisance depends mainly on the locality in which it is placed; and, therefore, the question is one of fact to be determined upon the circumstances of each particular case. [p. 64, col. .]

Where the establishment and maintenance of a slaughter-house amounts to a nuisance to one or more persons being in the neighbourhood of it, any one of such persons may sue for an injunction. [p. 64, col. 2.]

The motive which underlies a complaint of nuisance is relevant in a case of injunction. [p. 72, col. .]

Where an act is done under an authority conferred by Statute the conditions laid down by the Statute must have been strictly followed; otherwise the act is unauthorized and wrongful. [p. 66, col. 2.]

Section 71 of the Central Provinces Municipal Act requires that the approval of the Deputy Commissioner to the selection of a site for a slaughter-house shall be obtained before any building of the slaughter-house is begun on the proposed site; and a Municipal Committee which builds a slaughter-house on a site selected by itself without the previous approval of the site by the Deputy Commissioner, does an unauthorized and unlawful act and cannot use the Statute as a defence to an action brought against it on the ground that the act has created a nuisance. [p. 66, col. 2.]

Appeal against the decree of the District Judge, Saugor, dated the 16th September 1914, reversing that of the Munsif, Saugor, dated the 30th January 1914.

Mr. F. W. Dillon, for the Appellant.

Dr. H. S. Gour, for the Respondents.

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JUDGMENT.—The suit out of which this appeal has arisen was filed on the 12th April 1913, in the Court of the Munsif of Saugor by three persons, namely, Nilkanth Rao, *Brahmin*, Trimbak Rao, *Brahmin*, and Hiralal, *Kori*, all residents of "Madia Naka," a Municipal ward in the town of Saugor. The plaintiffs claimed a perpetual injunction to restrain the defendant, the Municipal Committee of the town of Saugor, from establishing and maintaining a slaughter-house for goats on a site within the vicinity of the dwelling houses of the plaintiffs. The Munsif, in a careful and well-reasoned judgment, held that the plaintiffs had not made out a case for the grant of an injunction, and dismissed the suit with costs. This decree was, however, upset by the District Court on appeal by two of the plaintiffs, namely, Nilkanth Rao and Hiralal, to whom a decree for a perpetual injunction, as prayed for in the plaint, was granted. The defendant-Committee has, therefore, made this second appeal upon various grounds set out in the memorandum of appeal, which will be considered in due course. The case was argued with great ability by learned Counsel on both sides, and I have had some difficulty in forming a conclusion.

The questions involved are of some public importance, and there is no published decision of this Court to which I can refer as a guide to a proper decision. The main issues of law which arise may be stated thus:—

(1) Is the establishment and maintenance of a slaughter-house within the residential quarter of a town *per se*, a nuisance at common law?

(2) If so, can a private suit for an injunction be maintained by any person more particularly affected by such nuisance?

(3) If so, what statutory protection is there against such a suit for a Municipal Committee in the Central Provinces?

It will be readily perceived that if the answer to either of the first two questions is in the negative, then the present suit cannot proceed; and that it will be equally untenable if the Statute Law gives an absolute protection, under all circumstances, to the act of the defendant Committee in

establishing and maintaining the slaughter-house in dispute.

Upon a careful consideration of the matter, I am of opinion that this suit cannot be disposed of on the above issues only. The conclusion to which I have come upon each of them may be briefly stated thus:—

(1) The slaughter of animals for sale is undoubtedly an offensive business, but whether or not it amounts to a public or private nuisance, is a question depending for answer upon the facts of each particular case.

(2) Where the establishment and maintenance of a slaughter-house amounts to a nuisance to one or more persons living in the neighbourhood of it, any one of such persons may sue for an injunction.

(3) The statutory power given to Municipal Committees in the Central Provinces to fix places for the slaughter of animals for sale does not authorize such Committees to cause a nuisance.

As to the *first* point, it is a matter of common sense, beyond all reasonable dispute, that the slaughter of animals for food cannot be seen, or the noises connected with it heard, or the odours arising from it inhaled by the general body of the public, judged by such standards as I must apply in this case, without a strong sense of repugnance. The business is one which is offensive *per se*. In England this has always been the view, and it has, therefore, been held that a slaughter of animals for sale, when carried on in a populous place, or too close to a residential dwelling, may amount to a nuisance: *Jones & Powell, In re* (1), *Rex v. Watts* (2). In *Rattigan v. Municipal Committee of Lahore* (3), a case which is much relied on by the defendant-appellant in this appeal, it was proved by the expert testimony on both sides, and generally accepted by the learned Judges who decided the case, that the business carried on in a slaughter-house is, *per se*, of an offensive character. It is for this reason that

(1) (1628) Palm. 536 at p. 539; 81 E. R. 1208.

(2) (1826) 2 Car. & P. 486; 31 R. R. 636.

(3) 106 P. R. 1888.

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the establishment and maintenance of slaughter-houses, like other offensive trades, has long been subject to special statutory regulations both in England and in British India. For example, the private Act of Parliament, 45 Geo. III c. 99, s. 56, which was afterwards replaced by 59 Geo. III c. 39, s. 88, forbade the keeping, use, or employment of any house or place for the purpose of slaughtering animals, not killed for butcher's meat, within a distance of one thousand yards from a work-house. Slaughter-houses for butcher's meat have generally been the subject of Municipal Regulations in England, because the business of slaughtering is by its nature accepted as offensive to the senses of those brought too closely into contact with it. In India the same conditions prevail. Every Municipal and Cantonment enactment requires the local authorities governed by it to control and regulate the establishment and use of slaughter-houses. Section 71, Central Provinces Municipal Act, 1903, is the law here applicable, and sub-section (3), which forbids the slaughter of animals for sale at any but the places fixed and controlled by the Committee, implies an acknowledgment by the Legislature that the business to be carried on in a slaughter-house is dangerous or offensive to the public. The conclusion, then, is irresistible that the establishment and maintenance of a slaughter-house for butcher's meat is, *per se*, an offensive trade, even though it is not included as such in section 99 of the local Municipal Act.

But an offensive business is not, *ipso facto*, a nuisance against which the law will grant relief. The slaughter of animals for butcher's meat is a business which, from its nature, is liable to cause a nuisance to the neighbourhood where it is carried on; but whether in any particular case, it is an actionable nuisance, depends mainly on the locality in which it is placed: and, therefore, the question is one of fact to be determined upon the circumstances of each particular case. It follows from this that a slaughter-house may be a nuisance in one place and not necessarily so in another; and also that it may be a nuisance to the general public in one situation and only a nuisance to particular persons in another. Thus it may be (i) no nuisance, (ii) a public nuisance or (iii) a private nuisance, and

subject to (i) no suit, (ii) a suit by or on behalf of the public aggrieved by it, and (iii) a suit by a private person injured by it. Where, as here, it is alleged to be a private nuisance to the dwellers of habitations nearest to it, such a suit as the present is clearly maintainable. A private nuisance may arise out of an act itself wrongful, or an act, not in itself necessarily wrongful, but the consequences of which are prejudicial to the plaintiff's person, house, land, etc.: *Reynolds v. Clerk* (4). It is a form of nuisance which affects those persons who are immediately within the scope of its operation, but does not injure or inflict inconvenience upon others who are further removed from it. It may be even advantageous or pleasurable to those who are at a distance, as in the case of church bells: *Soltan v. De Held* (5).

It will be observed that I have now reached the second of the three issues raised by me, namely, the right of the plaintiffs, as private persons, to maintain this suit. The importance of the division of nuisances into public and private lies chiefly in the difference of the remedies applicable to, and in the right of action given by, each. In England it was at one time held that any one might abate a public nuisance: *James v. Hayward* (6), *Rex v. Wilcox* (7). But, on the Civil side, it is now held to be the law that a private individual has no right of action against a public nuisance, unless he can show that he has sustained some special damage over and above that inflicted upon the community at large: *Colchester v. Brooke* (8), *Dimes v. Petley* (9), *Bateman v. Bluck* (10). Action against a public nuisance in England must ordinarily be taken by or in the name of the Attorney-General: *Wallasey Local*

(4) (1725) 8 Mod. 272; 1 Stra. 634; 88 E. R. 193; Fortes. 212; 2 Ld. Ray. 1399.

(5) (1851) 2 Sim. (N. S.) 133 at p. 142; 21 L. J. Ch. 153; 16 Jur. 326; 61 E. R. 291; 89 R. R. 245.

(6) (1630) Cro. Car. 184; 79 E. R. 761.

(7) (1690) 2 Salk. 458; 91 E. R. 395.

(8) (1845) 7 Q. B. 339; 68 R. R. 458; 15 L. J. Q. B. 59; 9 Jur. 1090; 115 E. R. 518.

(9) (1850) 15 Q. B. 276; 41 R. R. 573; 19 L. J. Q. B. 449; 14 Jur. 1132; 117 E. R. 462.

(10) (1852) 18 Q. B. 870; 88 R. R. 813; 21 L. J. Q. B. 406; 17 Jur. 386; 118 E. R. 329.

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Board v. Gracey (11), *Tottenham Urban District Council v. Williamson* (12), *Stoke Parish Council v. Price* (13), *Boyce v. Paddington Borough Council* (14), *Watson v. Hythe Borough Council* (15). The Indian Codes of Civil Procedure, prior to that now current, contained no analogous law. But in the present Code section 91 expressly provides as follows:—

"(1) In the case of a public nuisance the Advocate-General, or two or more persons, having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions."

Section 93 of the same Code extends to Local Governments, and to Collectors or other officers appointed by them, similar powers in places outside the Presidency towns. A public nuisance may affect one person so much more than all others in the same neighbourhood as to amount to private nuisance so far as he is concerned. Where a noise caused by a tinman plying his trade affected three houses only, it was held that this was a private nuisance and not indictable: *Rea v. Lloyd* (16). But, even in England, a private individual, having a valid right of action in respect of the special injury sustained through a public nuisance, may join as a plaintiff in the proceedings of the Attorney-General for relief against his special injury: *Attorney-General v. Logan* (17), *Attorney-General v. Lonsdals (Earl)* (18),

Attorney-General v. Cokermonth Local Board (19), and several other cases which I need not cite. But a private individual may bring an action in his own name in respect of a public nuisance, when, and only when, he can show that he has suffered some particular, direct, and substantial damage over and above that sustained by the public at large, or when the interference with the public right involves a violation of some private right, or of some special protection or benefit given to him by Statute: *Bhawan Singh v. Narottam Singh* (20), *Paine v. Partrick* (21), *William's case* (22), *Robert Murys's case* (23), *Attorney-General v. Forbes* (24), *Bell v. Quebec Corporation* (25), *Whelan v. Hewson* (26), *Boyce v. Paddington Borough Council* (14), *Devonport Corporation v. Plymouth, Devonport Tramways Co.* (27). In every private action material damage, actual or prospective, must be made out before an action can be maintained. There is no right of action against a *damnum absque injuria*. In the present case the plaintiffs have alleged material injury, actual and prospective, and I have no doubt that, upon the allegations set forward by them and brought out in full detail by some of their witnesses, the action is maintainable, so far as the law of procedure is concerned.

I come now to the third of the issues of law raised by me, namely, as to the extent of statutory protection given to the defendant Committee in the matter of establishing and maintaining slaughter-houses. In many cases acts, which would not merely be offensive or dangerous but would amount to nuisances, whether common or merely private, are found to be authorized by the words of a Statute. For instance, to break up or place any permanent obstruction on

(11) (1887) 36 Ch. D. 593; 56 L. J. Ch. 739; 57 L. T. 51; 35 W. R. 694; 51 J. P. 740.

(12) (1896) 2 Q. B. 353; 65 L. J. Q. B. 591; 75 L. T. 238; 44 W. R. 676; 60 J. P. 725.

(13) (1899) 2 Ch. 277; 68 L. J. Ch. 447; 80 L. T. 643; 47 W. R. 663; 63 J. P. 502.

(14) (1903) 1 Ch. 109; 72 L. J. Ch. 28; 87 L. T. 564; 51 W. R. 109; 67 J. P. 23; 1 L. G. R. 98.

(15) (1906) 70 J. P. 153; 4 L. G. R. 340; 22 T. L. R. 245.

(16) (1802) 4 Esp. 200.

(17) (1891) 2 Q. B. 100; 65 L. T. 162; 55 J. P. 615.

(18) (1868) 7 Eq. 377; 38 L. J. Ch. 335; 20 L. T. 64; 17 W. R. 219.

(19) (1874) 18 Eq. 172 at p. 176; 44 L. J. Ch. 118; 30 L. T. 590; 22 W. R. 619.

(20) 2 Ind. Cas. 365; 31 A. 441; 6 A. L. J. 499.

(21) (1690) Carth. 191; 90 E. R. 715.

(22) (1592) 5 Co. Rep. 72 b; 77 E. R. 163.

(23) (1612) 9 Co. Rep. 111 b, 113 a; 77 E. R. 895.

(24) (1836) 2 My. & Cr. 123; 45 R. R. 15; 40 E. R. 587.

(25) (1879) 5 App. Cas. 84; 49 L. J. P. C. 1; 41 L. T. 451.

(26) (1871) 6 Ir. R. C. L. 283.

(27) (1884) 52 L. T. 161; 49 J. P. 405.

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a public highway is, *prima facie*, a nuisance. But statutory powers have been given in many cases to do this to railway and tramway companies, and for the purposes of laying gas or water mains, electric light cables, and telegraph and telephone poles and wires; and where the Statute, by express words or by necessary implication, does sanction the act which causes the nuisance, all remedy, whether by indictment or action, is taken away, provided that the statutory sanction is used in a cautious and reasonable way: *Ret. v. Pease* (28); *London, Brighton and South Coast Railway Company v. Trumpton* (29). The Courts, however, are careful to see that authority to commit the nuisance complained of is expressly given or necessarily implied from the words of the Statute in question. If such authority is not so given, an action may be successfully brought against the corporation causing the nuisance: *Powell v. Fall* (30); *Rapier v. London Tramways Company* (31). Even where the Statute does authorize a nuisance the persons so authorized are responsible if they exercise their powers negligently, and without taking reasonable precautions to prevent damage resulting therefrom: *Vaughan v. Taff Vale Railway* (32); *Jolliffe v. Wallasey Local Board* (33).

In the Central Provinces every Municipal Committee is empowered, with the approval of the Deputy Commissioner, to fix and abolish places, either within or without the limits of the Municipality, for the slaughter of animals for sale, and, with the like approval, to grant and withdraw licenses for the use of such places, or, if they belong to, or are under the control of the Committee, to charge rent or fees for the same: section 71, Act XVI of 1903. But it is clear that these provisions convey no authority to establish, maintain, or license any slaughter-house which is, or may become, a public or

private nuisance. On the contrary, the Legislative intention in giving the above and other powers of inspection and control is manifestly this, that, as far as possible, the arising of any such nuisance may be prevented. Therefore, if a Municipal Committee establishes, maintains, or licenses the use of a slaughter-house which, whether by reason of its situation, or of the manner in which, or the description of animal for the killing of which it is used, is a public or private nuisance in law, the Statute will afford no defence to such Committee against an action for relief against the nuisance.

It is also clear that, where an act is done under an authority conferred by Statute, the conditions laid down by the Statute must have been strictly followed; otherwise the act is unauthorized and wrongful. The remedy of a private individual, for an injury caused to him by an act which is in itself wrongful, stands on a much higher level than where the act is not wrongful. Section 71 of the Municipal Act above mentioned requires the approval of the Deputy Commissioner to the selection of a site for a slaughter-house. It is clear that in this country such an approval is a very material condition governing the statutory authority given to Municipal Committees. It is not a mere form. The Legislature is perfectly alive to the danger and difficulty which may arise from the conflict of feelings and sentiments among persons of so many different persuasions as are collected together in Indian towns, and it, therefore, expressly requires the approval of the highest local authority, and one generally independent of, and impartial to, the causes of difference, to approve of every selected site. I am clear that the intention of the Legislature is that this approval shall be obtained before any building of a slaughter-house is begun on the proposed site; and that an approval of the site, after the house has been built, which may be influenced by considerations of *factum valet*, or of the public expense and inconvenience involved in refusing sanction, is not a due compliance with the law. I hold that a Municipal Committee which builds a slaughter-house on a site selected by itself without the previous approval of the site by the Deputy Commissioner, does an unauthorized and unlawful act, and cannot use the Statute as a

(28) (1832) 4 Farn. & Adol. 30; 1 N. & M. 69; 2 L. J. M. C. 26; 110 E. R. 366; 38 R. R. 207.

(29) (1885) 11 App. Cas. 45; 55 L. J. Ch. 354; 54 L. T. 20; 34 W. R. 657; 50 J. P. 388.

(30) (1880) 5 Q. B. D. 597; 49 L. J. Q. B. 428; 43 L. T. 562.

(31) (1898) 2 Ch. 588; 63 L. J. Ch. 36; 2 R. 448; 69 L. T. 361.

(32) (1860) 5 H. & N. 679; 29 L. J. Ex. 247; 6 Jur. (N. S.) 599; 2 L. T. 394; 8 W. R. 549; 120 R. R. 779.

(33) (1878) 9 C. P. 62; 43 L. J. C. P. 41; 29 L. T. 682.

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defence to an action brought against it on the ground that the act has created a nuisance.

Having thus demonstrated the legal aspect of the case, so far as the right of suit and the statutory defence to it are concerned, it is necessary to consider what amounts to a private nuisance giving right to an action at law. In order to constitute a nuisance at law it is essential that there should exist, either actually or impliedly, (1), *injuria i. e.*, a wrongful act constituting or causing damage, and (2) *damnum*, i. e., damage, loss, or inconvenience. *Damnum absque injuria* gives no right of action. An *injuria* is the violation of some right which another possesses. There must, therefore, be a right existing in the complainant, and a corresponding duty on the part of the alleged wrong-doer not to interfere with that right: *per* Bramwell, B., in *Dunn v. Birmingham Canal Company* (34). Absence of the right, or of the duty, or of the violation of the duty, prevents the act complained of from being actionable. Where the act or omission causing or constituting an alleged nuisance is unlawful *per se*, e. g., where it is of itself a violation of statutory provisions or of private common law rights, the law will presume damage to exist: *Baten's case* (35); *Pindar v. Wadsworth* (36); *Embrey v. Owen* (37); *Pennington v. Brinsop Hall Coal Company* (38); *Attorney-General v. Conduit Colliery Company* (39); *McCartney v. Londonderry and Lough Swilley Railway Co.* (40). But where the act is innocent and lawful, then the question whether it amounts to an actionable nuisance is one of fact to be determined, not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case: *Sturges v. Bridgman* (41);

Rushmer v. Polsue & Alfieri Ltd. (42), affirmed *Polsue & Alfieri Ltd. v. Rushmer* (43), and numerous other cases. In dealing with a case of an alleged private nuisance it must be remembered that every person is entitled, as against his neighbour, to the comfortable and healthful enjoyment of the premises owned or occupied by him, whether for business or pleasure. In England it has been well laid down that in deciding whether, in any particular case, this right has been invaded and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among the English people: *per* Knight Bruce, V. C., in *Halter v. Selfe* (44). It is also necessary to take into account the circumstances and character of the locality in which the complainant is living, and the similar annoyances which previously existed there: *St. Helen's Smelting Company v. Tipping* (45); *Polsue & Alfieri Ltd. v. Rushmer* (43). It should also be borne in mind that a person cannot, by applying his property to special or extraordinary uses or purposes, whether for business or pleasure, restrict the right of his neighbour in the ordinary and legitimate enjoyment of his property, [*Robinson v. Kilvert* (46)] or impose upon his neighbour burdens which, in the ordinary course of things, he is not called upon to bear. Extraordinary user may be an alteration or use of premises for purposes which are noxious, or dangerous, or so offensive as to be a real nuisance. And the party who brings about a change in the existing state of things by introducing an offensive business into a neighbourhood where no such business pre-

(34) (1872) 8 Q. B. 42 at p. 49; 42 L. J. Q. B. 34; 27 L. T. 683; 21 W. R. 266.

(35) (1610) 9 Co. Rep. 53 b; 77 E. R. 80.

(36) (1802) 2 East. 154; 6 R. R. 412; 102 E. R. 328.

(37) (1851) 6 Ex. 353; 86 R. R. 331; 20 L. J. Ex. 212; 15 Jur. 633; 17 L. T. 79.

(38) (1877) 5 Ch. D. 769; 46 L. J. Ch. 773; 37 L. T. 149; 25 W. R. 874.

(39) (1895) 1 Q. B. 301; 64 L. J. Q. B. 207; 15 R. 267; 71 L. T. 777; 43 W. R. 366; 59 J. P. 70.

(40) (1904) A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 305.

(41) (1879) 1 Ch. D. 852 at p. 865; 48 L. J. Ch. 785; 41 L. T. 219; 28 W. R. 200.

(42) (1906) 1 Ch. 234; 75 L. J. Ch. 79; 93 L. T. 823; 54 W. R. 161; 22 T. L. R. 139.

(43) (1907) A. C. 121; 76 L. J. Ch. 365; 96 L. T. 510; 23 T. L. R. 362.

(44) (1851) 4 De G. & Sm. 315 at p. 322; 87 R. R. 393 at p. 398; 20 L. J. Ch. 433; 15 Jur. 416; 64 E. R. 849; 17 L. T. 103.

(45) (1865) 11 H. L. Cas. 642; 35 L. J. Q. B. 66; 11 Jur. (N. S.) 785; 12 L. T. 776; 13 W. R. 1083; 145 R. R. 348.

(46) (1889) 4 Ch. D. 88; 58 L. J. Ch. 392; 61 L. T. 60; 37 W. R. 545.

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viously existed, is, in my opinion, bound to show that his act is legal and justifiable.

It seems clear that all these considerations must be made in this case, not with reference to the plain, sober and simple notions obtaining among the people of towns in England, but according to what is found to be reasonable and proper in view of the conditions which prevail in this country. But, as pointed out by Stanelly, C. J., in *Shahbaz Khan v. Umrao Puri* (47) in dealing with a question in which the ordinary rights of property are involved, the Courts must act upon some general principle or rule of law. It has been well laid down in a series of cases that an act which offends the susceptibilities of individuals or the sentiments of a class, is not, *ipso facto*, an actionable nuisance, and cannot be made a ground for overriding ordinary rights in property: *Hadjee Muzhur Ali v. Gundlawaree Sahoo* (48), *Muttumira v. Queen-Empress* (49), *Queen-Empress v. Byramji Edalji* (50), *Queen-Empress v. Zaki-ud-din* (51), *Romesh Chunder Sanyal v. Hiru Mondal* (52) and *Shahbaz Khan v. Umrao Puri* (47), approved in *Mohammad Yakub v. Emperor* (53). But in applying these rulings, it must be remembered that what is not indictable as a public nuisance may yet be actionable as a private nuisance. This distinction will be further considered hereafter.

So far I have discussed the law from the point of view of an existing nuisance. But in the present case the plaintiffs also complain of possible future injury, and to that extent their suit is a *quia timet* action. Therefore it seems necessary to discuss the law governing the right to an injunction against an act which is objected to on the ground of prospective injury. In England it has been held that the injured party need not wait until he has suffered injury before seeking relief: *Penruddock's case* (54), and

an injunction may be granted to restrain the commission of a prospective nuisance: *Dawson v. Paver* (55), *Elwell v. Crowther* (56), *Attorney-General v. Kingston-on-Thames Corporation* (57). To obtain such an injunction it is necessary to show a strong case of probability that the apprehended mischief will in fact arise: *Attorney-General v. Manchester Corporation* (58). If imminent danger of a substantial kind be shown, or should it appear that the apprehended danger, if it comes, will be irreparable, an injunction will be granted: *Fletcher v. Bealey* (59), *Haines v. Taylor* (60), *Ripon (Earl) v. Hobart* (61). An injunction to restrain the erection of a hospital for infectious diseases will only be granted when there is a real danger to health and property; in the present state of science the establishment of a small-pox hospital will not be assumed to be a serious source of danger so as to constitute a nuisance for which an injunction will be granted in a *quia timet* action: *Metropolitan Asylum District v. Hill* (62), *Bendelov v. Wortley Union* (63), *Fleet v. Metropolitan Asylums District (Managers)* (64), *Attorney-General v. Nottingham Corporation* (65), *Attorney-General v. Manchester Corporation* (58), *Attorney-General v. Rathmines & Pembroke Hospital Board* (66). It is not sufficient merely to allege that the proposed acts of the defendant will have an illegal result as against the plaintiff, without putting before the Court sufficient material to enable it to judge

(55) (1847) 5 Hare 415; 71 R. R. 155; 4 Railw. Cas. 81; 16 L. J. Ch. 274; 11 Jur. 766; 67 E. R. 974.

(56) (1862) 31 Beav. 163; 135 R. R. 383; 31 L. J. Ch. 763; 8 Jur. (n. s.) 1004; 10 W. R. 615; 54 E. R. 1100.

(57) (1865) 34 L. J. Ch. 481; 146 R. R. 703; 11 Jur. (n. s.) 596; 12 L. T. 665; 13 W. R. 888.

(58) (1893) 2 Ch. 87; 62 L. J. Ch. 459; 3 R. 427; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343.

(59) (1885) 28 Ch. D. 688; 54 L. J. Ch. 424; 52 L. T. 541; 33 W. R. 745.

(60) (1846) 10 Beav. 75; 50 E. R. 511; 76 R. R. 96; On appeal 2 Ph. 209; 11 Jur. 73; 41 E. R. 922; 78 R. R. 71.

(61) (1834) 3 My. & K. 169; 41 R. R. 40; Coop. t. Brough. 333; 3 L. J. Ch. (n. s.) 145; 40 E. R. 65.

(62) (1881) 6 App. Cas. 193; 50 L. J. Q. B. 353; 44 L. T. 653; 29 W. R. 617; 45 J. P. 864.

(63) (1887) 57 L. T. 840; 57 L. J. Ch. 762; 36 W. R. 168.

(64) (1884) 1 T. L. R. 80; affirmed 2 T. L. R. 361.

(65) (1904) 1 Ch. 673; 73 L. J. Ch. 512; 90 L. T. 308; 52 W. R. 281; 68 J. P. 25; 2 L. G. R. 698; 20 T. L. R. 257.

(66) (1904) 1 I. R. 161; 7 Irish Law Rep. 679.

(47) 30 A. 181 at p. 184; A. W. N. (1908) 64; 5 A. L. J. 147; 7 Cr. L. J. 381.

(48) 25 W. R. 72 Cr.

(49) 7 M. 590; 1 Weir 246.

(50) 12 B. 437.

(51) 10 A. 44; A. W. N. (1887) 232.

(52) 17 C. 852.

(53) 6 Ind. Cas. 454; 32 A. 571; 7 A. L. J. 649; 11 Cr. L. J. 355.

(54) (1598) 5 Co. Rep. 100 b; 77 E. R. 210.

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of that question for itself: *Haines v. Taylor* (60). Where some degree of present nuisance exists, the Court will take into account its probable continuance and increase, and its present existence raises a presumption of its continuance: *Goldsmid v. Tunbridge Wells Improvement Commissioners* (67), *Phillips v. Thomas* (68). It seems to me that the law as above laid down for England is the proper law to apply, *mutatis mutandis*, to *quia timet* actions in India. In doing so, the conditions of climate, of scientific and sanitary development, of the efficiency attained by corporations and others in the management and control of dangerous and offensive trades, of the disposition and habits of the people generally, and the like, obtaining in this country as compared with England must, of course, be taken into account. But the general principles and doctrines propounded in the English cases afford a proper guide for the just decision of similar cases in India.

Next it seems expedient to draw a further distinction between public and private nuisances, because, from some of the pleas raised and arguments advanced on behalf of the defence, the distinction appears to have been overlooked. For example the first ground in the memorandum of appeal before me reads thus:—

"That it should have been held that the plaintiffs could not maintain this suit inasmuch as the alleged nuisance is not shown to be one which affects them in any greater degree than it affects other residents of the locality."

Such a contention would be perfectly correct, supposing the fact to be as stated, if the erection of the slaughter-house caused a public nuisance so as to make section 91, Code of Civil Procedure, 1908, applicable. But the rule embodied in the above ground of appeal has no application where there is no allegation on either side that a common nuisance has been caused.

As in England, so in India, a remedy is provided against a public nuisance by the criminal law as well as by way of a civil action.

Section 268, Indian Penal Code, thus defines a nuisance of that class:—

"A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

A common nuisance is not excused on the ground that it causes some convenience or advantage."

It is not necessary that the annoyance caused by an act or illegal omission indicted as a common nuisance should injuriously affect every single person within its range of operation. It is sufficient that it should affect people in general who dwell in the vicinity: *per Anderson, J.*, in *Phiraya Mal v. Emperor* (69). Sections 269 to 289 inclusive of the Indian Penal Code deal with various acts which have been held to constitute public nuisances in England, and section 290 covers all other acts and omissions found to or come under that category. The erection of a slaughter-house, in some circumstances, may be a public nuisance. But that is not a point which has been raised in this case, and it is not necessary to discuss it. A private nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. It is in the *quantum* of annoyance that public nuisance differs from private. But the extent of the injury to the particular individual must be measured by a more or less general standard and not merely by any susceptibilities peculiar to the individual concerned. The legal maxim applicable is *lex non favet votis delicorum*:—the law favours not the wishes of the dainty, and it clearly inspired the dictum in *Walter v. Selfe* (44).

Having thus considered the law applicable to a suit for an injunction against a private nuisance, I turn now to the particular facts of this case. As already stated, the first Court found that no nuisance had been created. The lower Appellate Court has held that a nuisance both actual and prospective has come into existence. This is a finding of fact and it if had been based upon a proper consideration of the case

(67) (1866) 1 Ch. 349; 35 L. J. Ch. 382; 12 Jur. (N. S.) 308; 14 L. T. 154; 14 W. R. 562.

(68) (1890) 62 L. T. 793.

(69) 9 P. R. 1904; 69 P. L. R. 1904; 1 Cr. L. J. 513.

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from a correct standpoint and accompanied by a sound appreciation of what amounts in law to a nuisance, this appeal could not have been maintained. But it is just in these matters that both the Courts below seem to me to have erred, and I am of opinion that the case must go back for proper trial and decision. In itself it is a suit of small value, but the question involved is one of public importance and likely to arise again and again.

The allegations of the plaintiffs may be stated thus:—

The slaughter-house is located so close to their residences as to be a nuisance causing actual and prospective injuries as given below:—

(1) By offending the susceptibilities of the plaintiffs, who are vegetarian Hindus;

(2) By the offensive noises and odours inseparable from the business of slaughtering;

(3) By reducing the value of their property owing to the vicinity of an offensive business;

(4) By a gradual setting up of impurity and pollution in the neighbourhood when carnivorous birds and small animals shall have been attracted, and unwholesome odours and refuse shall have had time to accumulate by a continued use of the slaughter-house, causing annoyance, discomfort, and possible impairment of health to the plaintiffs.

The pleas of the defendant may be stated thus:—

(1) The slaughter-house creates no present nuisance being built and managed with due regard to sanitation, and the site for it being selected in order that it might be close to a market established for the sale of the meat brought from it.

(2) The objections taken by the plaintiffs are sentimental and unreal.

I leave out of consideration some technical and absurd pleas put forward by the defendant as to no cause of action having arisen, the plaint being insufficiently stamped, and the plaintiffs being liable to pay damages for delaying the construction of the slaughter-house.

The learned District Judge has correctly reproduced some of the propositions as to what the law requires to be found in a case of nuisance. But he has made no application of them in deciding this suit. He has brushed aside the maxim, *lex non favet votis delicatorem*, and has regarded the question

before him purely from the point of view of a vegetarian Brahmin. In doing so he has accepted as a foundation for his decision much that is merely the opinion of such Brahmins, without any experience of the conditions attaching to slaughter-houses. The following extracts from the judgment of the lower Appellate Court will make this clear:—

"The evidence adduced in the case describes the ordinary concomitants which the existence of a slaughter-house denotes or makes apparent."

I frankly confess my inability to obtain an intelligent grasp of which this sentence means. The learned Judge proceeds:

"Witnesses have described nuisance caused according to their own state of feeling, sentiment and power of observation."

It would have been more to the point if witnesses could have deposed to what was within their knowledge as experts, or their experience as persons who have lived near slaughter-houses.

The learned Judge correctly treated as valuable the evidence of the Civil Surgeon, but he only looked at it from one side. He found that at the time of his judgment "the sanitary arrangements made by the defendant Committee are perfect" and that "the place always looks clean and tidy." Then he added, "but it is not possible to look into this consideration as there is no guarantee when laxity may prevail." This was a pure conjecture because the learned Judge carefully excluded, as irrelevant, evidence going to show the experience obtained in such cases in other Municipal slaughter-houses. In fact such evidence is most important and in law most relevant as affording a guide to the decision of two facts in issue, namely, (1) what is the general public feeling as to slaughter-houses being established close to dwelling-houses in towns in India, and (2) what is the usual effect and efficiency of Municipal management of slaughter-houses. The learned Judge, like the two witnesses upon whose opinions his judgment largely turns, guesses without evidence at the prospective injury pleaded by the plaintiffs. He writes:—

"The inconveniences to which the plaintiffs with their neighbouring owners are subjected by the existence of the slaughter-

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house in question are thus described by two respectable residents of the locality who have their residential quarters similarly situate to the slaughter-house as that of the plaintiffs."

These witnesses are stated to be P. W. No. 10, Vasudeo Ramchand Halve, and P. W. No. 11, Sadasheo Madho Parande.

Of the respectability of these witnesses there is no doubt, Vasudeo Rao being the Clerk of Court in the office of the District Judge of Raipur, and Mr. Parande being an Additional District Judge at Nagpur. They possess houses said to be respectively within 100 feet and 300 feet from the slaughter-house in dispute and half a furlong or one furlong from the houses of the plaintiffs. There is evidently some error in the distances so given. The witnesses do not reside in these houses at present. They both confess to absolute ignorance of what takes place in a slaughter-house, and admit having no personal experience as to the conditions prevailing in the immediate vicinity of a slaughter-house, never having lived near any such establishment. Therefore, their statements, as to the results likely to ensue from the establishment of the slaughter-house in dispute near the houses of the plaintiffs, are purely conjectural. The inconveniences which they predicate may be thus stated:—

(1) Noxious odours from the slaughter-house will reach the houses of the plaintiffs.

(2) The constant sight of the slaughter-house will bring unpleasant thoughts to the minds of the plaintiffs.

(3) Crows and vultures will be attracted and will defile the neighbourhood with their droppings, and will make it impossible for the plaintiffs to place grain and other articles of food outside. They will also scatter bones and meat about the place and foul the water of wells.

(4) Numbers of dogs will begin to frequent the locality: their fighting will cause disturbance, and among them animals suffering from rabies may appear and be a source of serious danger.

(5) The continuous slaughter will be ever before the eyes or present to the minds of the people in the vicinity.

(6) Flies with their concomitant trouble and danger will assemble in large numbers.

(7) The carnivorous birds may be a source of danger to newborn babes.

(8) Morning worship will be rendered impossible owing to distraction caused by the noises and odours from the slaughter-house, and by the mental distress arising from a constant recollection or imagining of what may be going on within its walls.

(9) People of the class of witnesses will not care to buy houses in the neighbourhood.

The learned Judge accepts these opinions as evidence which cannot be doubted, and lays stress on the fact that the first two plaintiffs are Brahmins. He then introduces his own extra-judicial knowledge or his personal sentiments into the matter and goes a good deal beyond the evidence. He refers to the first two plaintiffs as "high classed Maharashtra non-flesh-eating Brahmins of the old type," and to the first of them, Nilkanth Rao, as one who "has reached the hoary age of 70 without deviating in the least degree from the first principles taught to him by his ancestors." The learned Judge then surmises that nothing could annoy this plaintiff more than the presence of the slaughter-house, and that such an abomination "is likely to shorten his life." Further on we read:

"His mental vision could not possibly get rid of the phenomenal aspect of the operation carried on inside the four walls of that little building standing right in front of his view, howsoever barricaded by high walls of brick and mortar. It must be practically a matter of impossibility to him to denude his faculty of the memory of the details attendant, which must in the very nature of things so engross his attention as to lead to extreme nausea or a sense of disgust whether at the time of worshipping or of eating or of drinking or of sleeping."

If we descend, from this very estimable regard for the feelings of a venerable Brahmin gentleman, and from the realms of high ideal and vivid imagination, to the *terra firma* of facts and sober judgment, we shall find that the slaughter-house stands behind the house of this plaintiff and that he need never look at it unless he wants to do so: that it emits no foul or peculiar

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odour at present: that the bleating of assembled goats is a common and constant noise in all parts of Indian towns: and that the plaintiff has probably never been in a slaughter-house in his life, and cannot, therefore, build up any true mental vision of what goes on in there. I am very far from saying that he will not suffer any annoyance from the fact of a slaughter-house being established within 50 or 60 yards of his residence; but exaggerated and imaginary descriptions of that annoyance are not legal findings in a case of nuisance. We see here a marked disregard of the maxim already quoted. If the case of the plaintiffs can be placed no higher than as one of wounding the susceptibilities of a septuagenarian and vegetarian, it is a case that must fail. But there may be much more in it when it comes to be regarded from the proper point of view. The findings must be based on evidence and not on mere opinion and conjecture. When the evidence is there the Court may, of course, make all the presumptions open to it under section 114 and other provisions of the Evidence Act. It may serve some purpose if I lay down some of the points of inquiry and the nature of the evidence required.

The first point is to enquire into the position and conditions of the locality into which this slaughter-house has been introduced. Is it on the outskirts of the town or well inside it? Is it populous? What is the approximate number and general class of people living within a radius of say 500 yards of the slaughter-house? Were any offensive trades of any kind carried on in the neighbourhood before the slaughter-house was established? If so, did any one object to them?

Next we want the evidence of experts and not the opinions of inexperienced persons as to the effect of placing a slaughter-house, however well managed, within 50 or 60 yards of residences, regarded from a purely sanitary point of view. In the Punjab case, on which much reliance was placed by the learned Counsel for the appellant, the distances were 220 yards and 440 yards, and nine doctors differed, five being on one side and four on the other. In India the law has placed no limit of

distance, but we have seen that in England, in bygone centuries, one thousand yards was laid down for the interval between a slaughter-house and a work-house necessary to avoid an indictment against those who set up the former. There must have been something universally accepted as offensive in the vicinity of such an establishment. In this branch of the subject the climate of Saugor is an element to be considered, offensive trades being generally aggravated by heat, especially moist heat.

Next it is very necessary to ascertain how Municipalities in these provinces generally dispose of their slaughter-houses; and whether such houses, as a general rule, have been found to attract dogs, cats, flies, vultures, kites, and crows which constantly haunt the precincts and defile the neighbourhood: and, if so, up to what radius their droppings and scavenging are so concentrated as to amount to a nuisance. There should be plenty of evidence of this available in Saugor itself, in connection with the slaughter-house which the one now in dispute was erected to replace. Evidence on this point should be of witnesses who are living, or have lived, close to a Municipal slaughter-house, or been otherwise in a position to see the effect of its presence on its immediate surroundings.

It will also be necessary to see whether the Committee complied with the law by obtaining the approval of the Deputy Commissioner to the site selected before they proceeded to build the disputed slaughter-house thereon.

The fact that the slaughter-house is near the meat market or otherwise serves the convenience of the Committee is, of course, no defence. Nor should the Court attach any importance to the consideration that the Committee will be put to serious expense if the slaughter-house is now condemned. Objection was made very promptly, and the Committee have proceeded with the building and started work therein with their eyes open to that objection. The fact that the President and Secretary of the Committee are Mussalman gentlemen should not be admitted to consideration unless it appears that this fact furnishes a motive for the complaint made by the plaintiffs: for the motive which underlies a complaint of nuisance has been held to be relevant in a case of injunction:

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Attorney-General v. Cambridge Consumers' Gas Company (70). *Attorney-General v. Sheffield Gas Consumers' Company* (71), *Harrison v. Southwark and Vauxhall Water Company* (72), *Christie v. Davey* (73). But the fact that the resolution to reject the objection of residents in the neighbourhood, and build the slaughter-house on the site in question, was only carried by the votes of four members against three of the defendant Committee is a fact which the Court may consider in coming to a conclusion as to the suitability of the site.

Finally the plaintiffs' case should be regarded from the point of view of, say, an even-minded, tolerant, flesh-eating Hindu of the same education and refinement as the plaintiffs. What would such a man undergo from the proximity of the slaughter-house to his dwelling apart from any hypersensitive objections based on religious grounds? It is only on some such basis that the interference of the Civil Court can be justified. Law is not a panacea for all the ills that flesh is heir to, and it is only on general principles, where an actionable wrong is clearly made out, that assistance from the Courts can be invoked. In dealing with the rights of the plaintiffs to a reasonable use and enjoyment of their dwelling-houses the rights of the defendant Committee to an equally reasonable use and enjoyment of Municipal land or land under Municipal management and control must not be overlooked. The learned Judge must hold the balance even and carefully and strictly exclude his own personal prejudice, if any, against slaughter-houses. The case must go back for a fresh decision upon the lines indicated.

The appeal is allowed. The decree of the lower Appellate Court is reversed, and the case is remanded to that Court for a fresh decision with advertence to the remarks made in this judgment. There will

be no refund of Court-fees. Costs here and hitherto will follow the event. I allow Rs. 30 as Pleader's fees in this Court.

Appeal allowed; Case remanded.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1082 OF 1911.

March 29, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shah Din.

TANSEY—PLAINTIFF—APPELLANT

versus

RIVETT—DEFENDANT RESPONDENT.

Contract Act (IX of 1872), s.—73—Breach of contract to make plaintiff a partner—Damages, measure of.

Where the defendant promised to admit the plaintiff to a partnership but broke the promise and, thereby, caused him loss—

Held, (1) that the plaintiff was entitled to damages to the extent of the loss caused by the breach; [p. 74, col. 2.]

(2) that the measure of damages in such cases is the difference between the value of the plaintiff's estate immediately after the defendant's breach of promise and the value it would have had if the defendant had performed his promise. [p. 74, col. 2.]

First appeal from the decree of the District Judge, Ambala, dated the 20th June 1911.

Mr. C. Bevan Petman, for the Appellant.

The Hon'ble Mr. Muhammad Shafi, K. B., and Mr. Muhammad Ilyas Khan, for the Respondent.

JUDGMENT.—This a part-heard and part-decided case. On 3rd August 1914, a Division Bench consisting of Johnstone and Scott-Smith, JJ., in an order which should be read along with this judgment decided that, while it was not proved that defendant actually made plaintiff a partner, he had certainly promised to do so; that there was adequate consideration for that promise; that defendant broke that promise and that plaintiff is entitled to damages "if he can show loss."

In argument Mr. Shafi has laid some stress upon the words in italics as if they meant that plaintiff must show loss in a concrete and positive way; but in our opinion, the words must be liberally construed in

(70) (1868) 4 Ch. 71; 38 L. J. Ch. 94; 19 L. T. 508; 17 W. R. 145.

(71) (1853) 3 De. G. M. & G. 304; 98 R. R. 151; 22 L. J. Ch. 811; 17 Jur. 677; 11 W. R. 245; 43 E. R. 119.

(72) (1891) 2 Ch. 479 at p. 414; 60 L. J. Ch. 630; 63 L. T. 864.

(73) (1893) 1 Ch. 316; 62 L. J. Ch. 439; 3 R. 210.]

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accordance with the authorities—in short, the words really mean “to the extent to which he is under the law entitled.”

We have heard very lengthy and complicated arguments, but the matter is really simple and most of the facts have been already found or are patent on the record.

Put briefly and generally, plaintiff, after a term of employment by the firm, returned to England, and was induced in 1901 to come back and resume work. There can be no doubt that hopes of a partnership were held out to him. Time passed and now and again, *e.g.*, in 1905, the subject was raised and discussed, and was, at least once, put aside because defendant contemplated turning the concern into a Company; and finally in October 1908 things proceeded so far that a memorandum was drawn up showing plaintiff's share in the firm as valued at Rs. 28,750 as from 1901, this amount being almost entirely worked off at date by crediting to plaintiff Rs. 4,500 per annum as share of profits and debiting him year by year with interest on the successive balances not yet thus liquidated; and then upon a suggestion by plaintiff, the figure was put at Rs. 30,000, plus an additional Rs. 7,500, for which he was to give a pro-note, to be worked off by plaintiff out of salary and profits and to be treated as a loan as from 1908. This was actually posted up in the firm's books, and plaintiff continued to work until 26th March 1910, when he was turned out. No deed of partnership had been executed, and for this and other reasons, the previous Division Bench held that plaintiff never actually became a partner.

In our opinion, plaintiff has suffered substantial loss. Had defendant performed his engagements, plaintiff would now be a partner to the extent of 1/8th in a solvent firm of which the capital was valued by defendant at 3 lakhs; and in our opinion* it is immaterial

how much plaintiff put in in cash into the business, or whether he put in anything. The measure of damages in such cases is the difference between the value of plaintiff's estate immediately after defendant's breach of promise and the value it would have had if defendant had performed his promise.

On 26th March 1910, plaintiff found himself out of employment and, so far as we know, with nothing but the savings, if any, he had effected from his salary. Had defendant carried out his promises, plaintiff would have been a partner in the firm with a Rs. 37,500 interest. At the same time we cannot give plaintiff a cash decree for this sum in full, for a share in a firm cannot, in view of the uncertainties of commerce and certain indications on the record, to which we do not wish to draw particular attention, that the firm has not in all respects been doing well, be taken as equivalent to cash of the same amount as the estimated value of the share; and we, therefore, take 2/3rds of that value as a fair figure. The plaintiff is, we hold, entitled to 2/3rds of Rs. 37,500, *i.e.*, to Rs. 25,000 with costs in full. We give costs in full, because it was natural for plaintiff to claim all he has claimed; and we dismiss the cross-objections.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1009 OF 1914.

September 24, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Tyabji.

KEEPILACHERI PARKUM CHEEPOTHI
AMMAD AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

VANNATHANKANDIYIL AMBALA-
THANKANDI AYISSA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Letters Patent (Madras), s. 37—Appellate Side Rules of the Madras High Court, r. 105, if ultra vires—Appellant's failure to make necessary deposit for printing—Appeal, whether liable to be dismissed—Civil Procedure Code (Act V of 1908), O. XXI, rr. 11, 16.

* [Cf. Leake on Contract, 5th Edition, page 740 and page 742: Section 73, Indian Contract Act: *Per curiam* in *Hadley v. Baxendale*, 9 Ex. 341; 2 Com. L. R. 517; 23 L. J. Ex. 179; 18 Jur. 358; 2 W. R. 302; 23 L. T. (o.s.) 60; 196 R. R. 742.

Ogdens, Ltd. v. Nelson; *Ogdens, Ltd. v. Telford*, (1905) A. C. 109; 74 L. J. K. B. 433; 53 W. R. 497; 92 L. T. 478; 21 T. L. R. 359.

Akuljoo v. Hurbhuj, 68 P. R. 1867, quoted by Mr. Shafi, was a case of brokerage partnership with no capital involved.

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Rule 105 of the Appellate Side Rules of the High Court directing dismissal of an appeal for default of prosecution if any of the papers mentioned therein have not been printed owing to the appellant's failure to make the necessary deposit therefor, is covered by section 37 of the Letters Patent and is not *ultra vires*. [p. 75, col. 2.]

The rule does not contravene the provisions of the Code of Civil Procedure by limiting the right of appeal conferred by section 100 nor is it at variance with the provisions of Order XLI as to the manner of disposal of an appeal. [p. 75, col. 2.]

Where an appeal is liable to be dismissed on a preliminary ground, the appellant cannot demand a hearing on its merits. [p. 76, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 666 of 1911, preferred against that of the Court of the District Munsif of Nadapuram, in Original Suit No. 593 of 1910.

FACTS of the case appear clearly from the judgment.

Messrs. B. Narasimha Rao and T. K. Govinda Aiyar, for the Appellants:—The power to frame rules regulating the hearing of appeals must be derived from the Code of Civil Procedure and not from sections 13 or 14 of the Charter Act, section 37 of the Letters Patent or the Court Fees Act. The rules contained in the Code of Civil Procedure, *viz.*, Order XLI, rules 11, 17 and 18 are exhaustive.

Rule 105 of the Appellate Side Rules of the Madras High Court in reality curtail the right of appeal given by section 100 of the Code of Civil Procedure and is, therefore, invalid and *ultra vires*. *Ramhari Sahu v. Madan Mohan Mitter* (1) and *Fatimunnissa v. Deoki Pershad* (2).

The appeal having been posted after issue of notice, the appellant is entitled to be heard on the merits of the appeal.

Mr. T. R. Ramachandra Aiyar, for the Respondents.

This second appeal coming on for orders under rules 100 A and 105 of the Rules of the High Court, Appellate Side, the Court delivered the following

JUDGMENT.

AYLING, J.—This second appeal comes before us for orders with reference to rule 105 of the Appellate Side Rules. The appellants admittedly failed to make the

necessary deposit for printing papers as required by the rules within the time allowed: and in our order on Civil Miscellaneous Petition No. 2329 of 1915 we have declined to extend the time. Under the rule, the appeal is, therefore, liable to be dismissed.

It has, however, been argued that the latter part of the rule itself (rule 105) is *ultra vires*. The rule runs thus:—

"The appeal shall be liable to be dismissed for default of prosecution, if any of the papers mentioned in this rule have not been printed owing to the appellant's failure to make the necessary deposit therefor."

The rule, as it stands, has been in force since 1905 and has frequently been enforced by dismissal of appeals. Even in 1905 it was in no sense a novel provision. A similar penal clause is found in the rules as far back as 1879, though it is omitted or modified in the rules as re-issued between 1900 and 1905. No authority whatever has been quoted in support of the contention that it is *ultra vires*, and so far as I am aware its validity has never hitherto been questioned.

It is, in my opinion, undoubtedly covered by section 37 of the Letters Patent, which gives this Court power "to make rules and orders for the purpose of regulating all proceedings in Civil cases which may be brought before the said High Court."

Our attention was drawn to the proviso, which enacts that in making such rules and orders the High Court shall be guided as far as possible by the provisions of the Civil Procedure Code. I cannot accept this argument that the rule contravenes the provisions of the Code by limiting the right of appeal conferred by section 100 of the Code of Civil Procedure: and I do not think there is much force in the contention that it is at variance with the provisions of Order XLI (reproducing section 541 *et seq.* of the old Code) as to the manner of disposal of an appeal. There seems to be no reason why an order of dismissal for infringement of this rule should not be covered by either rule 11 (1) or rule 16 of Order XLI of the Civil Procedure Code. Which of these would be applicable would depend on the procedure followed by the Appellate Court prior to the time of default. In the present case notice has issued under rules 13 and

(1) 23 C. 339.

(2) 24 C. 350 (F. B.); 1 C. W. N. 21.

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14, respondents have been served: and appearance has been filed for two of them (respondents Nos. 3 and 4). The appeal has not been posted under rule 12 for disposal on its merits, appellant having made default in payment of printing charges while respondent was being served with notice. Rule 16 would, therefore, appear to be applicable. But under either rule the dismissal would appear to be legal. Each gives appellant a right to be heard "in support of the appeal", but where the appeal is liable to be dismissed on a preliminary ground, he cannot demand a hearing on the merits of the appeal.

The penal proviso in the rule under consideration appears to be substantially identical with that embodied in the rules of the Calcutta High Court, Part II, Chapter VIII, rule 17, and Chapter IX, rule 5. The former clause (rule 17) was the subject of consideration in two cases [*Ramhari Sahu v. Mudan Mohan Mitter* (1) and *Fatimunnissa v. Deoki Pershad* (2)]. The immediate question was the nature of the remedy available to an appellant whose appeal had been dismissed for default but it is to be observed that throughout the argument in each case no doubt appears to have been felt as to the validity of the rule.

In my opinion rule 105 is not *ultra vires*.

I would direct the dismissal of the appeal with costs.

TYABJI, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1159 OF 1913.

March 31, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Chevis.

RAFI-UD-DIN—PLAINTIFF—PETITIONER
versus

SECRETARY OF STATE FOR INDIA—
DEFENDANT—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 3, 18—Collector, whether a Court—Order rejecting application for reference—Chief Court, whether can interfere.

A Collector who takes action under section 18 of the Land Acquisition Act is not in any sense a Civil Court, and the Chief Court has no jurisdiction to interfere with his order rejecting an application praying that the matter of the award be referred for the determination of the Court. [p. 76, col. 2; p. 77, col. 1.] *Administrator-General of Bengal v. Land Acquisition Collector*, 12 C. W. N. 241; *Krishna Das Roy v. Land*

Acquisition Collector of Pabna 13 Ind. Cas. 470; 16 C. W. N. 327; 16 C. L. J. 165, dissented from.

Robert Leslie v. Collector of Mergui, 1 L. B. R. 132, followed.

Petition for revision from the order of the Special Land Acquisition Officer and Collector, Delhi, dated the 26th July 1913.

Mr. *Sundar Das*, for the Petitioner.

The *Government Advocate* and Mr. *Mool Chand*, for the Respondent.

JUDGMENT.—The first and most important question involved in this petition and in Civil Revisions No. 754 of 1912 and No. 280 of 1914 is whether this Court has jurisdiction to interfere with an order of a Collector, purporting to be made under section 18 of the Land Acquisition Act, 1894, which rejects an application by a person interested, who has not accepted the award, that the matter be referred for the determination of the Court.

The authorities on this point are in conflict. On the one hand we have two decisions of the High Court of Calcutta [*Administrator-General of Bengal v. Land Acquisition Collector* (1) and *Krishna Das Roy v. Land Acquisition Collector of Pabna* (2)] which support the contention that such orders can be revised by the High Court under its general powers of revision. On the other hand, we have a ruling of the Chief Court of Burma [*Robert Leslie v. Collector of Mergui* (3)] to the opposite effect.

We have given these authorities and the arguments addressed to us our best consideration, and as a result are satisfied that the view taken by the Burma Chief Court is correct. In our opinion, neither the provisions of the Civil Procedure Code nor the provisions of the Punjab Courts Act give this Court the power to revise orders passed by any officer or Tribunal other than a Civil Court subordinate to the Chief Court, and we find it impossible to hold that a Collector who takes action under section 18 of Act I of 1894 is in any sense a Civil Court. He is certainly not a "Court" as that expression is defined in section 3 of the Act, and we are unable to find any support in the provisions of the Act for the proposition that the Collector in rejecting an application made to him under section 18 of

(1) 12 C. W. N. 241.

(2) 13 Ind. Cas. 470; 16 C. L. J. 165; 16 C. W. N. 327.

(3) 1 L. B. R. 132.

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the Act "is a Court and acts judicially and his order is subject to revision" by the High Court.

Admittedly, in all proceedings up to and including the time of making his award, the Collector is in no sense a Judicial Officer, but merely the agent of Government, acting ministerially. Is then there anything in section 18 of the Act which implies that in accepting or rejecting an application thereunder, the Collector is transformed into a Civil Court?

We can find nothing to justify this inference. He is certainly not a "Court" as defined in the Act itself, and the learned Counsels who appeared on behalf of the various petitioners were unable to enlighten us as to the kind of Civil Court into which the Collector had developed when dealing with applications under section 18. Civil Courts as they exist in the Punjab are specified and defined in the Punjab Courts Act and, so far as we can see, the Collector cannot be regarded as any one of those Courts. Mr. Fazal-i-Husain seeing this difficulty, put forward the extraordinary proposition that the Collector was, as it were, the clerk of the Court to which the reference should be made! It is hardly necessary for us to deal seriously with a suggestion of this kind.

We were much pressed with the argument that unless this Court had power to revise orders passed by Collectors under section 18 of the Act, grave injustice might result in cases where the Collector refuses on arbitrary or insufficient grounds to make the reference prayed for. But even if we are to assume that such orders cannot be revised by the Collector's superior Executive or Revenue Officer, we cannot, on the ground of inconvenience or even of the possibility of injustice, arrogate to ourselves a jurisdiction which we do not possess by law, and as at present advised, we are satisfied that we have no power to interfere with orders passed by a Collector, even if, in passing those orders, he acted not merely as a Revenue Officer, but as a Revenue Court.

We hold, therefore, that we have no jurisdiction to entertain these petitions for revision and we accordingly reject them. As the petitioners had the authority of the Calcutta rulings to support their con-

tentions and as the question is *res integra* so far as this Court is concerned, we leave the parties to bear their own costs in all these cases.

Revision rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2385 OF 1913.

August 26, 1915.

Present:—Justice Sir William Ayling, Kt., and
Mr. Justice Tyabji.

GOVINDASAMY RAJA—DEFENDANT NO. 1

—APPELLANT

versus

KUPPAMMAL—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 30—Suit for cancellation of sale-deed—Consideration, non-payment of—Intention to effect transfer—Vendor and purchaser—Vendor's right to demand payment—Deed intended to operate on death of vendor—Will—Construction.

Where there is a deed purporting to convey property for consideration and it is found that no consideration passed, one of the questions to be determined in a suit for cancellation of the deed is whether there was any intention to effect a transfer. If there was, the failure to pay the consideration does not necessarily make the sale-deed void or voidable but may only give the right to payment of the consideration together with a lien on the property until the consideration is paid. [p. 79, col. 2.]

Fulley Mahomed v. Dattabhoj, 25 B. 10 at pp. 18, 19; 2 Bom. L. R. 907, followed.

Where in a suit for cancellation of a sale-deed, purporting to convey certain properties, it appeared that no title was intended to pass under the document until the death of the plaintiff-vendor, on which the properties would vest in the defendant-vendee.

Held, that the document was really intended to operate as a Will and was revocable by the plaintiff at any time. [p. 80, col. 1.]

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 193 of 1912, preferred against that of the District Munsif of Chingleput, in Original Suit No. 403 of 1910.

Mr. C. S. Venkatachariar, for the Appellant.

Mr. N. Viswanadha Aiyar, for the Respondent.

This second appeal coming on for hearing on the 4th and 5th November 1914, and having stood over for consideration till the 13th November 1914, the Court (Oldfield and Tyabji, JJ.) delivered the following

JUDGMENT.

OLDFIELD, J. —I agree to the remand for findings proposed in the judgment which my learned brother is about to deliver and reserve discussion of the case until their receipt.

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TYABJI, J. The plaintiff prayed for (1) a declaration that a sale-deed (Exhibit I, dated 1st June 1909 and purporting to convey the house and lands referred to in the schedule to the plaint) is "nominal and that neither the 1st defendant nor any other defendants acquired any right thereby," (2) for cancellation and delivery of the said deed to the plaintiff, (3) for possession of the said lands of which the defendants or some of them had (according to the plaintiff) unlawfully taken possession in July 1910, (4) for mesue profits and (5) costs.

The sale-deed was purported to be executed for 8 items of consideration, making up altogether Rs. 2,000. The District Munsif held that no part of the consideration was received by the plaintiff prior to the suit (paragraphs 6—16 of his judgment). He found, however, that a year after the institution of the suit, the 1st defendant discharged a debt of Rs. 100 payable by the plaintiff: the agreement to discharge this debt was the 7th item of consideration in the deed.

The District Munsif then proceeded to consider the effect of the finding that there was "an absence or non-payment" of consideration. For this purpose he first referred to the report in the Madras Law Journal of *Amirthammaly Ponnusami Pillai* (1), *Amirthammaly Periasami Pillai* (2), the judgment in the Letters Patent Appeal in which does not seem to have been brought to his notice. Next (in paragraph 19 of his judgment) he considered the effect of the averments in the plaint, which he held to be tantamount to an averment on the part of the plaintiff of an understanding between the parties that the transaction was not to be given effect to at once, but was brought about to meet the contingency of plaintiff's sudden death and to take effect only after her death.

This being the state of the pleadings according to the District Munsif, he referred to the evidence and stated his conclusion in paragraphs 21 and 22 of his judgment.

In the result he gave a decree "declaring that the sale-deed, Exhibit I, is a nominal one during the life-time of the plaintiff and that it cannot confer any title on defendants so long as plaintiff is alive, and

directing recovery by plaintiff of possession, from defendants, of the plaint B schedule property."

Both parties appealed to the District Court, the plaintiff in order to obtain the unrestricted declarations for reliefs prayed for and the defendants to have the suit dismissed altogether.

In appeal the plaintiff succeeded completely.

The plaintiff's grounds of appeal to the lower Appellate Court are not before us. The defendants' grounds of appeal raised the contention

(1) that it should have been held that title was intended to pass to the defendants by the sale-deed (ground 1);

(2) that full or at least partial consideration had been paid (grounds 2, 3 and 4);

(3) that as part of the consideration had been paid by the defendants, the only remedy of the plaintiff was to sue for the balance (ground 15);

(4) that the District Munsif made out a new case for the plaintiff (referring no doubt to the finding on the 1st issue) (grounds 9 and 11); the rest of the defendants' grounds of appeal to the lower Appellate Court are either merely argumentative or not relevant to the questions before us.

The learned District Judge accepted the District Munsif's conclusion that the recitals in the sale-deed of consideration having proceeded from the 1st defendant to the plaintiff were "fictitious," adopting the reasoning in paragraphs 6—16 of the District Munsif's judgment. Having referred to these paragraphs by number and expressed his concurrence, the District Judge proceeds to consider in paragraph 3 of his judgment the effect of the evidence, and finally deals with the law in paragraphs 4 and 5 of his judgment, distinguishing the facts as found by himself from the facts which, in his opinion, would be necessary to make the discussion in paragraphs 18 and 19 of the District Munsif's judgment applicable.

The District Judge's view as to the effect of the evidence is thus expressed in paragraph 3 of his judgment: "the intention was that title should not pass unless the plaintiff died at or about that time from the illness from which she was then suffering." He again adverts to the view that he took of the evidence in paragraph 5

(1) 17 M. L. J. 386.

(2) 4 Ind. Cas. 507; 5 M. L. T. 255; 32 M. 325.

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which brings out the effect of his finding, and the difference between the views of the evidence taken by himself and the District Munsif respectively.

The District Judge's view as to the legal consequence of the facts found is expressed partly in paragraph 3, partly in paragraphs 4 and 5 of his judgment. It is to the effect that the condition precedent to the sale having any effect had become impossible of fulfilment and that, therefore, the plaintiff was entitled to have the sale-deed cancelled.

The defendant appeals to this Court and the grounds argued before us are that the lower Appellate Court proceeded on a point which was not covered by the pleadings, that it erred in holding that the sale-deed does not operate because the condition precedent was not fulfilled, that the defendants were taken by surprise and had no opportunity of adducing any evidence on the point, that there was no evidence that the sale-deed should operate only if the plaintiff died of the illness she is alleged to have been suffering from at the time of Exhibit I, that no such agreement could be proved as it would be opposed to the provisions of section 92 of the Indian Evidence Act and that there was ample consideration for the sale-deed.

The first question, therefore, that has to be decided is whether the lower Courts were right in interpreting the pleadings as they did. In this connection it is no doubt true that the defendants did not suggest to the lower Appellate Court, as they now do, that they could have adduced evidence on the allegations considered to have been proved by the District Munsif and that they omitted to do so owing to their being misled by the terms of the plaint and taken by surprise at the hearing. On the other hand, the lower Appellate Court does not deal with the defendants' grounds of appeal in which they complained that the District Munsif had made out a new case for the plaintiff; and what is more, the case that the lower Appellate Court finds in favour of the plaintiff is not identical with that which the District Munsif considered might fairly be taken to represent the allegations in the plaint. For the case that the District Munsif considered to be alleged and made out was

that the sale was to take effect when and as from the time that the plaintiff died: the District Judge held the plaintiff's case to be that the sale-deed was to have effect only if the plaintiff died of the illness from which she was then suffering.

The defendants are also justified in complaining that the real questions which the Court has to take into consideration in order to grant the reliefs prayed for have not been kept in mind. The importance of this in connection with section 39 of the Specific Relief Act is insisted upon and illustrated in *Valley Mahomed v. Dattubhoy* (3).

Where there is a deed purporting to convey property for consideration and it is found that no consideration passed, one of the questions to be determined for the purposes of section 39 of the Specific Relief Act is whether there was any intention to effect a transfer. For if there was, then failure to pay the consideration does not necessarily make the sale-deed void or voidable. It may only give the right to payment of the consideration together with a lien on the property until the consideration is paid.

In these circumstances it is necessary before disposing of this appeal to ask for findings on the following

Issues :—

(1) Whether the sale-deed referred to in the plaint was executed subject to a separate oral agreement constituting a condition precedent to its coming into operation.

(2) If the 1st question is answered in the affirmative, then what were the terms of the said agreement?

(3) Was the consideration referred to in Exhibit I intended to be paid by the 1st defendant, and

(4) Was it intended to effect any real transfer by Exhibit I and if so, what was the nature of the transfer intended to be made?

Inasmuch as no condition precedent is clearly put forward in the plaint, the defendants are entitled to have a written statement setting forth the case of the plaintiff on this point. Such a written statement shall be furnished within a reasonable time to be fixed by the District Judge.

The findings will be submitted within

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two months; seven days will be allowed for filing objections.

Fresh evidence may be adduced.

In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted the following

FINDING.— * * * * *

Issue (1). I find * * * * * that there was a separate oral agreement constituting a condition precedent to the sale-deed coming into operation.

Issue (2). * * * * * the agreement was not that the sale-deed should come into operation only if she died of the disease she was then suffering from, but that it was that it should come into operation only in the event of her death, whenever that may happen.

Issue (3). * * * * * the consideration referred to in Exhibit I was not intended to be paid by the 1st defendant.

Issue 4. * * * * * it was intended that the 1st defendant should be put forward as the ostensible owner of the property conveyed under Exhibit I, but that possession and enjoyment should continue with the plaintiff during her life-time.

This second appeal coming on for final hearing on the 11th August 1915, after the return of the findings of the lower Appellate Court upon the issues referred to it for trial, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The findings of the District Judge are not as clear as they might be. But we understand them to amount to this: that no title was intended to pass under the document Exhibit I until the death of plaintiff, on which the properties would vest in defendants. There is evidence to support this view, and we see no reason for not accepting it. It follows that the document was really intended to operate as a Will and would be revocable by plaintiff at any time.

On this view, we see no reason to modify the decree of the lower Appellate Court except as to costs. Bearing in mind that plaintiff has only herself to blame for the litigation into which her disingenuous conduct has landed her, we direct that both parties bear their own costs throughout.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1367 OF 1913.

March 31, 1913.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

AHMAD DIN ANIS-UL-RAHMAN—
PLAINTIFFS—APPELLANTS

versus

ATLAS TRADING COMPANY OF DELHI
DEPENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 104 (1) (f), (2)—Order filing private award in part—Second appeal, whether competent—Error of law, whether ground for revision.

On an application for filing an award made without the intervention of the Court, it was decided that part of the award, being on a matter which could not be the subject matter of arbitration, was void; but that the valid portion of the award being separable from the invalid one, the award could be filed so far as it was free from the objection of invalidity. On appeal the application for filing the award was rejected on the ground that a private award must be either affirmed in its entirety or rejected *in toto*.

Held, (1) that no second appeal lay in the case; [p. 80, col. 1.]

(2) that the order was not open to revision as an error of law is not a material irregularity and did not constitute a ground for revision. [p. 81, col. 1.]

Second appeal from the decree of the Divisional Judge, Delhi, dated the 16th June 1913.

Mr. Nanak Chand, for the Appellants.

Mr. Moti Sagar, for the Respondent.

JUDGMENT.—The plaintiffs-appellants applied to the Court of first instance under paragraph 20 of the second Schedule to the Civil Procedure Code for filing an award made without the intervention of the Court. The Court decided that part of the award, being on a matter which could not be the subject-matter of arbitration, was void; but as the valid portion of the award was separable from the invalid one, the Court ordered the award to be filed so far as it was free from the objection of invalidity. Upon appeal by the defendant, the learned Divisional Judge held that a private award must be either affirmed in its entirety or rejected *in toto* and that the order of the lower Court accepting part of the award was bad in law. He accordingly accepted the appeal and rejected the application for filing the award.

The plaintiffs have preferred a second appeal from the decision of the Divisional

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Judge and we have no hesitation in holding that no second appeal lies in the case. It is clear that the decision of the Court of first instance was an "order" and not a "decree" and that an appeal against it was preferred under section 104 (f), Civil Procedure Code. Now, section 104, sub-section (2), provides in the clearest possible terms that no appeal lies from an order passed in appeal under that section. We must, therefore, hold that the second appeal is incompetent.

Mr. Nanak Chand has, however, asked us to treat the memorandum of appeal as an application for revision; but we are of opinion that there is no good ground for interference on revision. It is manifest that the order of the Divisional Judge is entirely in accordance with the principle of the judgments passed under the Civil Procedure Code of 1882, and the question, whether the law has been modified by the new Code, is not free from difficulty.

It is true that paragraph 14 (a) of the second Schedule of the Code of 1908 authorizes the Court to accept the valid portion of an award if it is separable from the bad portion thereof; but it is a debatable point whether that provision is applicable to an award made outside the Court. The judgment in *Dhanpat Rai v. Musammat Kahn Deri* (1) has applied the rule laid down under the Code of 1882 to a case which was decided under the new Code and has impliedly held that the Code of 1908 did not change the existing law in regard to private awards. In these circumstances, it cannot be said that the decision of the lower Appellate Court is so palpably erroneous as to call for interference on revision.

Taking the matter in the most favourable light for the appellants, the only thing that can be urged is that the lower Appellate Court has made a mistake of law. But it has been repeatedly held that an error of law is not a material irregularity and does not constitute a ground for revision.

Further, the fact that another remedy by way of regular suit to enforce the award is available to the appellants, is also a ground for our declining to

exercise the discretionary jurisdiction in revision.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 237 OF 1914.

September 1, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Seshagiri Aiyar.

SUNDARAM IYER AND OTHERS—
DEFENDANTS—APPELLANTS

versus

KULATHU AIYER—PLAINTIFF—
RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 3 (5), 5, 53, 111, 112—Person entitled to arrears of rent, if landholder—First charge on holding, right of—Landholder out of possession, whether can attach holding—Remedy open to him.

A person to whom arrears of rent are due is a "landholder" notwithstanding the fact that his estate has terminated, but he has not a first charge on the holding. He can distrain the moveable property or the trees on the holding of the defaulter but is not entitled to attach the holding itself. [p. 85, col. 1.]

Ramsami v. Bhaskarasami, 2 M. 67 at p. 73 (P. C.); 5 C. L. R. 241; 6 L. A. 170; 3 Ind. Jur. 420; 4 Sar. P. C. J. 50; 3 Suth. P. C. J. 646; 3 Shome L. R. 36, followed.

Arthur Henry Forbes v. Maharaj Bahadur Singh, 23 Ind. Cas. 632; 18 C. W. N. 747; (1914) M. W. N. 397; 15 M. L. T. 380; 12 A. L. J. 653; 27 M. L. J. 4; 1 L. W. 1059; 41 C. 926 (P. C.), followed.

Second appeal against the decree of the District Court of Tinnevely, in Appeal Suit No. 111 of 1913, preferred against that of the Revenue Divisional Officer of Shermadevi, in Summary Suit No. 5 of 1912.

Messrs. M. D. Devadoss and V. S. Govindachariar, for the Appellants.

Mr. S. Ramaswami Aiyar, for the Respondent.

JUDGMENT.

SPENCER, J.—The question which we have to decide is, whether a landholder in Madras who has ceased to be a landholder can recover rent for the years when he was a landholder by bringing the ryot's holding to sale under the provisions of Chapter VI of Madras Act I of 1908. For Bengal it has been decided by the Privy Council with reference to the Bengal Tenancy Act that he cannot [Vide *Arthur Henry Forbes v. Maharaj Bahadur Singh* (1)]. The

(1) 23 Ind. Cas. 632; 18 C. W. N. 747; (1914) M. W. N. 397; 15 M. L. T. 380; 12 A. L. J. 653; 27 M. L. J. 4; 1 L. W. 1059; 41 C. 926 (P. C.).

(1) 23 Ind. Cas. 422; 30 P. R. 1914; 11 P. W. R. 1914; 31 P. L. R. 1914.

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Madras Estates Land Act is modelled on the Bengal Tenancy Act. Therefore, the above decision must have great weight with us so far as it is based on provisions which have been repeated in the Madras Act. There are, however, several distinctions between the two Acts. In Bengal a landlord must bring a suit and obtain a decree before he can bring to sale the tenant's holding. In Madras he can proceed summarily to attach the holding by notice to the defaulter served through the Collector, provided that he has exchanged a *patta* and *muchilika* with the *ryot* or tendered him such a *patta* as he was bound to accept. Section 5 of Madras Act I of 1908 and section 65 of Bengal Act VIII of 1885 both declare that the rent shall be a first charge upon the holding. Section 109 of the Madras Act provides for the case of a conflict between the right of a landholder distraining produce and the right of a Civil Court decree-holder by declaring that the landholder's right shall prevail, but this does not apply to the case of a landholder selling the *ryot's* holding. As in Madras he does not occupy the position of a decree-holder, there can be no competition from other decree-holders for rateable distribution of the proceeds of the sale.

Section 148, clause (h), of the Bengal Tenancy Act, which declares that "notwithstanding anything contained in section 232 of the Civil Procedure Code an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him," does not find a place in the Madras Act. Thus one strong argument for the position that the right to sell the holding for arrears is vested in the landholder *qua* landholder is wanting. The Privy Council decision dwells on the anomaly which would arise by two persons, the landlord and the *ex*-landlord, having simultaneously a first charge on the tenure, and it goes so far as to class the *ex*-landlord as an outsider.

This anomaly would present no real difficulties in Madras. Under section 111, a landholder cannot sell the holding for arrears until the revenue year in which they became due is over, and he has under

section 112 only one year in which he can take this step. Unless proceedings begun by one landholder were still going on when the succeeding landholder wished to sell the holding for the rent of the following year, there would be no conflict of interests. Even after the sale of the holding the purchaser would be liable for the rent of the year in which he was in occupation. In case of a dispute between two or more rival claimants to the title of landholder, section 3 (5) provides that the person who shall be deemed to be landholder for the purpose of this Act is the person whom the Collector may recognise or nominate as landholder. Again, when there is an intention to distinguish between landholders in possession and other landholders who have no subsisting interest, the Madras Act speaks distinctly of landholders in possession (*vide* section 200). This may be used as a not very convincing argument that where the word "landholder" occurs in the Act without qualification, it includes persons out of possession.

I will now consider whether there are any other indications within the four corners of the Act that landholders have, as in Bengal, no right to proceed against their *ryots'* holding, unless their interest as landholders subsists at the time.

It is provided in section 53 that the remedy of landholders against the *ryots'* moveables and holdings under Chapter IV of the Act is only available to those landholders who have exchanged a *patta* and *muchilika* with their *ryots*, or have tendered them such a *patta* as they were bound to accept, or there must be a valid *patta* or *muchilika* continuing in force. Can it be said that a valid *patta* or *muchilika* 'continues in force' between a *ryot* and landholder who has ceased to have any subsisting interest in the estate? If the answer is 'No, but he is a person who has exchanged or tendered a *patta* under the first part of section 53,' we must then look to section 52 and we find this section declaring that no *ryot* shall be bound to accept a *patta* for a period of more than one revenue year and that *pattas* and *muchilikas* accepted or exchanged for any revenue year remain in force only until the commencement of the revenue

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year for which fresh *pattas* are accepted or exchanged.

Under the old Act (VIII of 1865) it was recognised by the Privy Council in *Ramasami v. Bhaskarasami* (2) that there must be a subsisting relation of landlord and tenant for the exchange of *pattas* and *muchilikas*.

The result, therefore, is that distraint and sale are remedies open only to landholders who have at the time of exercising this power a valid *patta* in force between themselves and their *ryots*. I am aware that in his commentary on the Act, Mr. V. Ramadoss takes a different view, but the illustration which he gives to make the matter clear begs the whole question.

Again, in section 3 (5) a landholder is defined as 'a person owing an estate or part thereof' and it is doubtful if he can lay claim to be called such a landholder merely because at some previous date he has owned an estate. If, as in this case, he is a lessee and comes within the description of a person "entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner," there can be no reason for imputing to the Legislature an intention to create in favour of such persons rights of greater extent and duration than those which are declared to be the property of owners who are landholders in their own right.

I am, therefore, of opinion that the lower Courts were right in their conclusions that, as the defendant was not the lessee for *Fasli* 1322, he could not attach the plaintiff's lands for the arrears of *Fasli* 1321. In such cases the only remedy left to the ex-landholder is the right of suing upon his contract for rent.

This second appeal is dismissed with costs. The memorandum of objections is also dismissed with costs.

SESHAIAH AIYER, J.—Vagikulam is an *inam* village belonging to the *Vyasarayya Mutt*. The defendant had a lease of it from the *mutt* for 10 years up to the end of *Fasli* 1321. His son became the lessee in *Fasli* 1322. The plaintiff, who is a *ryot* of the village, is alleged to have made default in the payment of rent for *Fasli* 1321. In or about September 1912,

(2) M. 67 at p. 73 (P. O.); 5 O. L. R. 341; 6 I. A. 173; 3 Ind. Jur. 420; 4 Sar. P. O. J. 50; 3 Suth. P. O. J. 646; 3 Shome L. R. 36.

the defendant attached the plaintiff's holding for the arrears. This suit is to raise the said attachment. The only question for decision is whether defendant, who had ceased to be the lessee from July 1912, can attach the plaintiff's holding for the rent due to him while he was the lessee. There is no question that the defendant was a landholder up to the end of *Fasli* 1321. See *Bachu Ferrajugar v. Bhogireddy Subbarayudu* (3). It is also undisputed that the lessee who succeeded the defendant was a landholder at the time when the attachment was made.

After hearing the matter argued very fully on both sides and having regard to the grounds of the decision in *Arthur Henry Forbes v. Maharaj Bahadur Singh* (1), I have, though not without hesitation, come to the conclusion that the defendant had no right to enforce the attachment of the plaintiff's holding in September 1912. The reasoning of the Judicial Committee in *Arthur Henry Forbes v. Maharaj Bahadur Singh* (1) applies to this case, although, as I shall presently show, the provisions of the Act which the Privy Council had to construe, differ in some material respects from the Estates Land Act. The definition of "landholder" would apply, in my opinion, to the defendant. The somewhat hypercritical comments of the learned Vakil for the respondent on the language of section 3 (5) have not convinced me to the contrary. He laid stress upon the phrase "owning an estate" and argued that it predicates a subsisting interest at the time of the attachment. The next clause "entitled to collect the rent," would certainly apply to the man whose lease had expired but to whom arrears were still due. I do not think that the word "owning" was intended to negative the rights of persons who owned the estate at the time the arrears fell due. Another argument which belongs to the same category is the distinction sought to be made between *rent* and *arrears of rent*. I am of opinion that the defendant was a landholder when he attached the holding. One has only to look at section 205 of the Act to see that the Legislature in Madras contemplated the existence of landholders with co-ordinate or mutually exclusive rights. It is different in Bengal. The definition of "landlord" (it is not landholder) is that he is

(3) 12 Ind. Cas. 171; 36 M. 126; 10 M. L. T. 282; (1911) 2 M. W. N. 251.

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"a person *immediately* under whom a tenant holds". This would undoubtedly exclude the defendant in Bengal. So far as I am able to see, there can be but one landlord at a time in Bengal, although there may be a proprietor and a landlord. There is no provision in the Bengal Tenancy Act corresponding to section 200 of our Act which limits the power of the *landholder in possession*. Consequently the observation of the Judicial Committee in *Arthur Henry Forbes v. Maharaj Bahadur Singh* (1) that there can be but one landlord, cannot apply to conditions which obtain in Madras.

It seems to me that to hold that on the expiry of the lease the lessee has no right of distraint would render nugatory the provisions of the Act. Sections 77 and 111 make it clear that distraint proceedings should be commenced only if the rent due during the "next preceding 12 months remains unpaid." These sections do not impose the further restriction that at the time of the distraint, the distrainer must be the sole landholder. As proceedings of this kind are prohibited during the year that rent falls due, it seems to me that the Legislature contemplated action being taken by the person who had the estate when the arrears fell due. On the other hand, the Bengal Legislature confers the right to distraint only on the person in whom the estate vests at the time. Section 148 (h) prohibits an assignee of a decree from distraining unless the estate itself is transferred to him. There is no corresponding provision in the Madras Act. I do not think that the fact that in Bengal distraint proceedings have to be taken after decree in a Civil Court affects the question. My conclusion upon this portion of the case is that the defendant was entitled to distraint.

The third question is "could he distraint the plaintiff's holding?" It is here that the *ratio decidendi* of the Privy Council decision affects the defendant. In the Madras Act, there is a provision for the landholder distraining the general moveable property of the defaulter. See section 77. In section 121 of the Bengal Tenancy Act, which corresponds to section 77, this power is not given. In Madras, (a) the holding, (b) the crops on the holding, (c) the ordinary moveable property of the tenant and (d) the trees on the holding, subject to specified exceptions, can be distrained. In Bengal the distraint can

only be with reference to (a) and (b). Therefore, if in the present case, the defendant had distrained the moveable property or the trees, I would have held that the proceedings were not illegal; both the landholders having the right to distraint these properties. In the case of the holding itself, section 5 of the Madras Act and section 65 of the Bengal Tenancy Act give the landholder or the landlord, as the case may be, a first charge for the rent due. In Madras, the first charge extends to the crops on the holding as well, but although in Bengal the crops can be distrained, the rent is not made a first charge on them. This right of *first charge* must be taken to have been given only to the landholder who has a subsisting interest. [See *Ramasami v. Bhaskarasami* (2).] There would certainly arise a conflict of interests in the case of the holding being attached by two persons. The lessee that has passed out may not take action until the very end of the second year. The lessee in possession may commence proceedings in the beginning of his second year. As some time must elapse before the holding is brought to sale, the question will have to be dealt with whether both or either of them had the right to attach and whose rights should take precedence. It was argued that this dispute can be settled by the Collector under the second clause of section 3 (5) of the Estates Land Act. I think the clause would only enable the Collector to recognise one of two claimants as the landholder. It would not authorise him to decide the question of priority regarding the rights of two landholders. The Judicial Committee in the Calcutta case pointed out in more than one place that the right to distraint the holding is dependant upon the right of first charge. It is also pointed out that "to acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure, must have the landlord's interests vested in him." Again we have this strong expression of opinion: "In whose decree and on whose application is the tenure to be sold? The question admits of only one answer, that it is the existing landlord alone who can execute the decree; the ex-landlord is an outsider, and, whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the

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tenure itself."

The expression "existing landlord" and "ex-landlord" may not be appropriate to designate the position of the two landholders in Madras, but there is no doubt that the Judicial Committee have clearly and emphatically laid down that a holding can be sold only by the landlord who has a subsisting interest in the estate. The language of section 127 of the Estates Land Act is in favour of this position. Under clause (c), if the holding is sold, the person to whom the arrears were due in the previous *Fasli* gets no portion of it. The arrears payable under clause (b) will go to the attaching landholder and not to the person whose interest has ceased. I must, therefore, conclude that the holding can be attached only by the landholder who has the estate still in his possession.

As I have discussed the sections at some length, I may re-state my conclusions thus:—

1. A person to whom arrears are due is a landholder, notwithstanding the fact that his estate has terminated.

2. The law does not give him a first charge on the holding.

3. He can distrain the moveable property or the trees on the holding of the defaulter.

4. He is not entitled to attach the holding.

These propositions will reconcile the provisions of the Estates Land Act with the decision of the Judicial Committee in *Arthur Henry Forbes v. Maharaj Bahadur Singh* (1). The second appeal must be dismissed with costs. The memorandum of objections must also be dismissed with costs.

Appeal dismissed

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1289 OF 1913.

March 31, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Chevis.

TUFEL MUHAMMAD AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

SHAHAB DIN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Custom—Succession—Self-acquired property—Kakezai

Sheikhs of Hoshiarpur—Sister—Collaterals—Onus probandi—Muhammadian Law, whether can be pleaded in second appeal.

Among *Kakezai* *Sheikhs* of Hoshiarpur a collateral cannot oust a sister or her descendants from property which was acquired by her brother and has, after his death, come into her possession. [p. 86, col. 1.]

Where the plaintiffs based their claim to succeed upon a special custom but having failed to establish it sought to rely upon their personal law:

Held, that the plaintiffs could not in second appeal ask the Court to decide the case upon the basis of *Muhammadian Law*. [p. 86, col. 2.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 28th March 1913.

Mr. *Fazal-i-Husain*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—One Shams-ud-Din, an *ekka-driver* of Hoshiarpur town and by caste a *Kakezai Sheikh*, died in 1891 leaving a widow, *Musammât Hitti*, who, upon her husband's death, took possession of the property left by him and retained the same until her own death in October 1911. Plaintiffs, who are agnates in the fourth degree of Shams-ud-Din, brought the present suit in February 1892 and in it they claim to recover the said property from the defendants, *Musammât Umri* (who is the daughter of a sister of the deceased) and *Nizam Din*, who is the son of another sister of deceased.

Defendants pleaded that of the property in dispute the moveables belonged to *Musammât Hitti* herself and the house was the acquired property of Shams-ud-Din; that *Musammât Hitti* succeeded to the house as absolute owner after her husband's death; that *Musammât Hitti* had prior to her death made an oral gift of the property in suit to *Musammât Umri*; and that in any case plaintiffs had no right to succeed to the house in the presence of *Musammât Umri* and *Nizam Din*.

It is quite clear from the plaint and the statement made in Court by plaintiffs that the latter based their claim to succeed upon a special custom whereby they were entitled, after the death of *Musammât Hitti*, to succeed to the whole of the property to the entire exclusion of *Musammât Umri* and *Nizam Din*, the direct descendants of two of Shams-ud-Din's sisters, and in their plaint and pleadings no reference was made to the *Muhammadian Law* of succession.

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The first Court found that the moveable property had not been proved to have been the property of Shams-ud-Din; that the house was the acquired property of the latter; and that plaintiffs had failed to prove that by custom they were entitled to succeed to such property in preference to sisters and sisters' descendants, or that *Musammal Hitti* had no power to make a gift of it to the defendant, *Musammal Umri*. It accordingly dismissed the suit. The Divisional Judge on appeal agreed with the first Court's findings as regards the moveables and as to the validity of the gift of the house to *Musammal Umri*. He further held that plaintiffs had failed to prove that they were the heirs or reversioners or residuaries of *Musammal Hitti*.

Plaintiffs succeeded in obtaining from the Divisional Judge's successor-in-office a certificate to the effect that there was a question of custom involved in the case, viz., whether *Kakegai Sheikhs* of Hoshiarpur are governed by Customary Law in the matter of inheritance, and that the case was of sufficient importance to justify a further appeal. Upon the strength of this certificate, an appeal preferred by them to this Court was admitted to a hearing before a Division Bench, and has been argued before us at some length on their behalf by Mr. Fazal-i-Husain.

It is obvious that upon the record as it stands plaintiffs' claim, based as it was upon a special custom whereby collaterals entirely exclude sisters in succession to acquired property, must fail, as the three alleged instances given in proof of this custom are absolutely valueless. Each instance is easily explainable—and indeed has been explained—on grounds which are wholly consistent with the defendants' contention that a collateral cannot oust a sister or her descendants from property which was acquired by her brother and has, after his death, come into her possession. Defendants are in possession, and it is for plaintiffs to prove that they have the right to recover the property from the former.

This they have failed to establish, and Mr. Fazal-i-Husain, realising the weakness of his clients' case upon this point, wished to argue that in any event plaintiffs were entitled under the Muhammadan Law to

claim part of the property. The obvious answer to this is that plaintiffs never relied upon their personal law in the Courts below. They deliberately ignored its provisions and strenuously urged that they were heirs by special custom to the entire property, though if Muhammadan Law applied, they could at best have claimed only $\frac{1}{12}$ th, sisters being entitled to $\frac{2}{3}$ rd and *Musammal Hitti* to $\frac{1}{12}$ th, and *Musammal Hitti's* share having been gifted to *Musammal Umri*. The first Court, no doubt, framed an issue as to plaintiffs' possible rights under Muhammadan Law, but it gave no finding on that issue probably because plaintiff never urged their rights under that law, and dismissed the suit on the ground that plaintiffs had failed to prove the custom set up by them. In the circumstances, if plaintiffs had really relied on their personal law in the alternative, we would have expected to find in their memorandum of appeal to the Divisional Judge's Court a ground to the effect that in any event, plaintiffs were entitled to part of the property under that law. But there is in that memorandum of appeal no hint of any such alternative claim, and it is too late now in second appeal, when plaintiffs realise the hopelessness of their claim as preferred, for them to ask us to decide the case upon the basis of Muhammadan Law. They have vainly endeavoured to wrest the whole property from defendants and by so doing have sacrificed—and deliberately—the very small share that might have fallen to them if they had taken their stand on Muhammadan Law.

The suit has been rightly dismissed, as plaintiffs have failed to establish the custom upon which they relied, and we accordingly dismiss the appeal with costs.

Appeal dismissed.

BOMMARAJU VENKATA PERUMAL v. SUBRAMANYA NAYANI VARU.

NGA LU DAW v. MI MO YI.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 370 OF 1913.

March 19, 1915.

Present:—Mr. Justice Seshagiri Aiyar and

Mr. Justice Kumaraswami Sastri.

RAJE BOMMARAJU VENKATA PERUMAL RAJU BAHADUR VARU, MINOR BY GUARDIAN W. A. VARADACHARIAR—

RESPONDANT NO. 2—APPELLANT

versus

SUBRAMANYA NAYANI VARU AND

OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act I of 1908), O. XXI, r. 10, 64—Execution—Order for attachment—Application for execution not disposed of—Subsequent application for sale of property, whether barred.

Where an order for attachment was made on an execution application but the application was not disposed of in any way and another application was made for the sale of the property:

Held, (1) that there could be no bar of limitation in the case as the decree-holder was only asking that effect be given to the application which was already pending before the Court;

(2) that the decree-holder had not disabled himself by laches from seeking to enforce his remedies under the pending application.

Subba Chariar v. Muthuveeram Pillai, 14 Ind. Cas. 264; 36 M. 553; 24 M. L. J. 545, Venkatamma v. Manikkam Nayani Varu, 26 Ind. Cas. 244; 16 M. L. T. 399, followed.

Appeal against the order of the District Court of North Arcot, in Execution Petition for Revision No. 66 of 1910, in Original Suit No. 27 of 1884.

Mr. L. A. Govindaraghava Aiyar, for the Appellant.

Mr. T. V. Venkatarama Aiyar, for the Respondents.

JUDGMENT.—An order for attachment was made on the execution application in 1897. That application has not been disposed of in any way. The present one was to sell the attached property. There can be no bar of limitation in such cases, as the decree-holder only asks that effect be given to the application which is still pending before the Court. His present prayer should not be regarded as a new application. We are unable to hold that the decree-holder has either abandoned his application or that he has disabled himself by laches from seeking to enforce his remedies under the pending application. Following Subba Chariar v. Muthuveeram Pillai (1) and Venkatamma v. Manikkam Nayani Varu (2), we hold that the application is in time and dismiss this appeal with costs.

Appeal dismissed.

(1) 14 Ind. Cas. 234; 36 M. 553; 24 M. L. J. 545.

(2) 26 Ind. Cas. 244; 16 M. L. T. 399.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 153 OF 1914.

April 22, 1915.

Present:—Mr. McColl, A. J. C.

NGA LU DAW AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MI MO YI AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Buddhist Law—Inheritance—"Payin" and "lettetpwa" property, meaning of—Right of child claiming through both parents—"Auratha" son, definition of—Out-of-time grand-children, right of, to inherit—Verbal mortgage—Subsequent document—Deal evidence admissible to prove transaction.

"Payin" property means property already owned by a person when he or she marries, whether he or she actually obtained possession or not. Property inherited by a person during marriage is not "payin" but "lettetpwa." [p. 89, col. 2.]

A child who has a claim through both parents gets a double portion both of inherited and of other lettetpwa property of what a child, who claims through one only, gets. [p. 90, col. 1.]

Ma Sio Nyo v. Ma Kyaw, U. B. R. (1892-96), II, 159; Maung Tun Gyan v. Ma Bala, U. B. R. (1897-01), II, 185 and Ma Min E. v. Ma Kyaw Taki, L. B. R. (1892-1900) 361, followed.

Maung Gale v. Maung Hya, 4 L. B. R. 189, dissenting from.

Out-of-time grand-children, if they be the children of the "auratha" son, receive the same share as their youngest uncle or aunt. [p. 92, col. 1.]

The Auratha son is the son who in case his father dies or becomes incapacitated is competent to take his place in the family. [p. 92, col. 1.]

A married three wives in succession. His son by the 1st wife having predeceased him. His grandsons sued his daughters by the other wives for their share of the property left by A. The defendants contended (1) that all the lands were inherited by A during his 3rd wife's coverture; (2) that certain plots had been mortgaged by A and redeemed by the 1st defendant; (3) that the plaintiffs were not entitled to inherit as they had been guilty of unfilial conduct; (4) that, at any rate, they were liable for their share of A's funeral expenses and (5) that A had given certain plots of land to the 1st and 2nd defendants:

Held, (1) that the gift to the 1st and 2nd defendants, even if proved, was invalid as they were living with the father at the time; [p. 89, col. 1.]

(2) that the presumption was that the plaintiffs were entitled to inherit and the burden of proving unfilial conduct was on the defendants and that the mere fact that the plaintiffs took no part in maintaining A, though he was blind and lame for many years before his death, was not sufficient; [p. 89, col. 2.]

(3) that if the plaintiff's father had been alive he could have been entitled to inherit one-half of the property acquired during his mother's marriage, &

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quarter of the property inherited by A during either of the other two marriages and one-third of A's "pyin" brought to the 1st marriage, and the plaintiffs were entitled to get their father's share between them; [p. 91, col. 2; p. 92, col. 2.]

(4) that the 1st defendant having re-deemed certain lands the plaintiffs must pay their share of the mortgage-money before getting their share of the inheritance; [p. 92, col. 2.]

(5) that, as two different plots of land were mortgaged and redeemed as one parcel, the plaintiffs being entitled to one third of one and one-fourth of the other and the areas and values of the two were also different, it was fair under the circumstances of the case to apportion the charge according to the value of the lands than according to the area. [p. 93, col. 1.]

Where a mortgage is effected verbally and possession is given, the transaction is complete and the fact that a document is subsequently executed does not bar oral evidence of the original transaction. [p. 89, col. 2.]

Mr. S. Mukerjee, for the Appellants.

Mr. C. G. S. Pillay, for the Respondents.

JUDGMENT.—The plaintiffs-appellants are the grand-children of Maung Hnin, who married three wives in succession, namely, Ma Ngwe, Ma Kye U and Ma Kywet O. The plaintiffs-appellants are sons of Maung Ne Kya, son of Maung Hnin by his first wife, Ma Ngwe, who predeceased his father.

The 1st defendant-respondent, Ma Mo Yi, is daughter of Maung Hnin by his second wife, Ma Kye U. Her sister, Ma Mo Hmi, was not made a party to the suit as she had been given in adoption to others.

The 3rd defendant-respondent is Maung Hnin's daughter by his third wife, Ma Kywet O.

The plaintiffs-appellants alleged that Maung Hnin had left six pieces of land the plans of which are marked *, *, *, * and **.

The total area of these lands is 13.17 acres. The plaintiffs-appellants claimed the whole of *, *, * and *, two-thirds of *, and one-sixth of *, total 9.23 acres. Why the lands should be divided in that way they did not explain, and the matter is made still more obscure by the 5th paragraph of the plaint, in which it is stated that as all the lands were acquired during their mother's coverture they were entitled to one-half and the defendants-respondents to one-fourth each. No attempt was made to obtain an explanation.

The defence was (1) that all the lands had been inherited by Maung Hnin during

Ma Kywet O's coverture from his father, Maung Kathe, (2) that the land * had been mortgaged by Maung Hnin to one Maung Paw Kye and that the 2nd defendant-respondent was working it as his tenant, (3) that Maung Hnin had mortgaged the lands * and * and the 1st defendant-respondent had redeemed them for Rs. 61-8-0, (4) that the plaintiffs-appellants were not entitled to inherit as they had been guilty of unfilial conduct and (5) that if they were held entitled to inherit, they should be held liable for their share of the expenses of Maung Hnin's funeral which amounted to Rs. 73-12-0.

When the case came to trial, a further defence was set up to the effect that Maung Hnin had given the lands * and * to the 1st defendant-respondent and the lands *, * and * to the 2nd defendant-respondent.

The Township Judge found that the lands *, *, * and * had been inherited by Maung Hnin from his mother during his first wife, Ma Ngwe's coverture and that he had inherited the lands * and * during his third marriage from his father.

He further found that the land * had been mortgaged to Maung Paw Kye, and that the lands * and * had been redeemed by the 1st defendant-respondent for Rs. 61-8-0. He also apparently held that the alleged gifts had been proved, and that they were valid, but he dismissed the suit on the ground that the plaintiffs-appellants were not entitled to inherit, as they had not assisted in maintaining their grandfather, Maung Hnin, who for several years before his death was lame and blind.

On appeal, the learned District Judge found that the alleged gifts had not been proved and that the mortgage to Maung Paw Kye could not be proved, as it had been effected by an unregistered mortgage-deed. He overlooked the questions of the redemption of the lands * and * by the 1st defendant-respondent and of the funeral expenses; he found that the plaintiffs-appellants had not been guilty of such conduct as would debar them from inheriting; he declined to go into the question whether Maung Hnin had inherited the lands during his first, second or third marriages, because he imagined that the inherited property

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must be 'payin,' and following *Maung Gale v. Maung Bya* (1), he held that if plaintiffs-appellants' father had not predeceased Maung Hnin they would have been entitled to one-third of the lands, but that as they were out-of-time grand-children they were entitled to one-twelfth, and he accordingly gave them a decree for a one-twelfth share.

Both the parties have appealed to this Court, the plaintiffs on the ground that they should have been given a bigger share, and the defendants on the grounds that the lower Appellate Court should have held that the lands had been inherited during the third marriage, that the plaintiffs-appellants were debarred by their conduct from inheriting and that the gifts were proved.

As regards the gifts I would say that, even if proved, the gift of the lands * and ** to the 2nd defendant-respondent would be invalid as she was living with her father at the time. A text from the *Kaingsa* runs: "A gift made, though not in extremis, is invalid if delivery of possession has not taken place before the death of the donor and it shall revert to the estate; but if there has been delivery of possession the co-heirs cannot claim it."

"The above rules refer to children living apart from the parents. As regards children living with the parents a gift does not take effect even when there has been delivery of possession, because children living with the parents are still under parental control." The same rule is given by the *Kandaw*, *Vannadhamma*, *Rasi* and *Panam Dhammatha* and has, I think, generally been accepted.

There is some evidence that the 1st defendant-respondent lived with the 2nd defendant-respondent and, therefore, with Maung Hnin, in which case the gift of the lands * and * would be invalid too, but in any case I do not think the evidence is such as to establish that Maung Hnin really and finally divested himself of his property. He apparently merely allowed the 1st defendant-respondent to redeem these two pieces of land so that she might help to maintain him with its produce. I am of opinion, therefore, that there was no gift.

As regards the mortgage to Maung Paw Kye, the lower Appellate Court is wrong. In the first place, Maung Paw Kye says that the mortgage was first effected verbally and that later its terms were reduced to writing. If possession were given in the first instance the transaction was complete, and the fact that a document was subsequently executed would not bar oral evidence of the original transaction. In the second place, the 2nd defendant-respondent was admittedly in possession of the land * as Maung Paw Kye's tenant, and consequently as Maung Paw Kye was not a party to the suit this piece of land should not have been included in the decree.

The Township Judge found that the lands * and * had been redeemed by the 1st defendant-respondent for Rs. 61-8-0. He also found that the accounts of Maung Hnin's funeral had been settled. These findings have not been challenged in this Court by either side and, therefore, they may be accepted.

With regard to the contention that the plaintiffs-appellants are debarred by unfilial conduct from inheriting from Maung Hnin, I agree with the lower Appellate Court. The presumption is that they are entitled to inherit and the burden of proving unfilial conduct is on the defendants-respondents. The facts that Maung Hnin for many years before his death was lame and blind and that the plaintiffs-appellants took no part in maintaining him, are not sufficient. The defendants-respondents apparently maintained their father out of his own properties, none of which was in the plaintiffs-appellants' possession, and there is no evidence that the latter were ever called upon to render services and refused, or that they were on other than the best terms with their grandfather.

The learned District Judge clearly does not properly understand what 'payin' properly means. It means property already owned by a person when he or she marries, whether he or she has actually obtained possession or not. Property inherited by a person during marriage is not 'payin' but 'lettetpwa,' although on divorce the principle of *nissayo* and *nissito* is applied to it [*Mi Myin v. Nga Twe* (2)]. The lands in

(1) 4 L. B. R. 189.

(2) U. B. R. (1906) Buddhist Law, Divorce 19,

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suit were not admitted to be Maung Hnin's *payin* property on the contrary, the plaintiffs-appellants alleged that it was all *lettelpwa* of the first marriage and the defendants-respondents alleged that it was *lettelpwa* of the third marriage.

Of course if *Maung Gale v. Maung Bya* (1) was rightly decided, it would not matter whether the lands were inherited during the first or the third marriage, because it was held that the rule that the children of a marriage during which property was acquired get, when that property is partitioned, double what the children of other marriages get, did not apply to property inherited during a marriage.

I am, however, unable to agree with that ruling. The principle that a child who has a claim through both parents gets double what a child who claims through one parent, only, gets, was laid down in *Ma Sein Nyo v. Ma Kyee* (3), *Ma Min E. v. Ma Kyaw Tahi* (4) and *Maung Tun Gyaw v. Ma Bala* (5). The principle is clearly discernible in many texts, it is a most reasonable one and it was not disputed in *Maung Gale v. Maung Bya* (1). But it was there held that it only applied to property acquired by the joint exertions of husband and wife and not to inherited property, because such property was acquired without exertion.

I do not think this is a sufficient reason for differentiating between property inherited during a marriage and other *lettelpwa* property.

Property given to a married couple could not be said to have been acquired by the joint skill or labour of both, and yet obviously the principle in question would have to be applied to such property.

There would have been nothing unreasonable in a rule that property inherited during a marriage was the separate property of the spouse who inherited it, but that was not the rule adopted.

Furthermore, the ruling in question seems to me to be directly opposed to the texts that specifically provide for the case in point.

Mr. Justice (now Sir Henry) Hartnoll says, "The texts lay down no general rule.

The *Kungya* does not differentiate between hereditary and other acquired property. The *Dhamma* gives the son of the first marriage preference over the other two. The *Manukya* gives preference to the son of the marriage during the continuance of which the hereditary property was acquired, because he has the right to inherit the property through both parents. In section 245 the *Cittara* says "... The mother's separate property shall be divided equally among all the three sons..." The meaning of this text would seem to be that the mother's hereditary property is to be divided equally amongst the sons of the three marriages." Apparently, he considered that the texts were so contradictory that no general rule could be deduced from them and that, therefore, the fairest thing to do was to divide inherited property equally amongst all the children and he thought that the passage from the *Cittara* cited favoured such a distribution. I venture the opinion that the learned Judge was wrong on both points.

The *Kungya*, it is true, gives a rule which is to be found nowhere else. It is one of the oldest *Dhammathats* reputed to have been compiled in the year 728 B. E. and the rule which it gives was very likely the rule then in force, but it seems to have been altered later. The texts from the other *Dhammathats* collected in section 245 of U Gaung's Digest, which are all probably 300 years nearer the present time and probably only a little more than 150 years old, can be easily reconciled.

The rule appears to be, as I have said above, that the child who claims through both parents gets a double portion both of inherited and of other *lettelpwa* property. The *Dhamma* lays down that where three wives are married in succession, "the hereditary property of the father shall be divided into three shares; the son of the first wife shall receive two shares and the two sons by the second and third wives shall receive the remaining share between them." The remark that the *Dhamma* gives the son of the first wife preference over the other two seems to me hardly to express the case. This text obviously refers to the case where the property has been inherited during the first marriage, and that is why the son of that marriage gets more than the sons of the other marriages. Moreover, the compiler of the

(3) U. B. R. 1892-96, II, 159.

(4) L. R. (1892-900) 361.

(5) U. B. R. (1897-01), II, 185.

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Dhamma has clearly made a mistake which is pointed out by the compiler of the *Manukye*. In the case of two marriages only, the son of the marriage during which property was acquired would, of course, get two-thirds and the son of the other marriage would get one-third under the general rule. In applying this rule to a case of three marriages the compiler of the *Dhamma* still gives the son of the marriage during which the property was acquired two-thirds and consequently each of the other sons only gets one-sixth. The compiler of the *Manukye* says that this is wrong: "As regards the father's hereditary property the statement that if it is acquired during the first marriage and taken to the subsequent marriages during which no property was acquired it shall be reckoned as property belonging to the first marriage, and that the son of the first marriage shall take two shares and the son of the subsequent marriage one share, refers to the case where there are only two wives and there is a son by each. In the present case, as the three sons are of the same father though by different mothers, the whole of the father's hereditary property shall be divided into four shares: the son of the first wife shall receive two shares and the sons by the second and third wives one share each. Debts, if any, shall be liquidated similarly. The same rule shall, *mutatis mutandis*, apply if the father comes into the possession of the hereditary property while living with the second or with the third wife, or if debts are contracted then. . . A son is given two shares out of the property acquired during his mother's life-time, because he has the right to inherit the property through both parents."

The text is as clear as it can possibly be and no distinction whatever is made between property inherited by the father during marriage and property acquired otherwise during the same period.

The text from the *Rajabala* at first sight appears to distinguish between hereditary property and other *lettetpwa*. The English translation runs: "All property other than hereditary property, acquired during the life-time of each mother, shall be divided into four shares and her son shall take two shares and the son of each of the other two mothers one share each." But this is a mistranslation. The text should run: "All property other than the wife's hereditary

property, etc." The excepted property has been dealt within the preceding line, which lays down that the son of each mother shall succeed to her hereditary property.

None of the other texts in this section refer specifically to property inherited by the common parent, but they all agree with the *Manukye* as to the distribution of *lettetpwa* between the three children of three different marriages, and if there had been any question of a different rule for property inherited during marriage by the common parent and other *lettetpwa*, one would have expected that the rule would be given.

The passage from the *Cittara* cited by Mr. Justice (now Sir Henry) Hartnoll cannot bear the meaning which he placed on it.

The texts cited in section 246 of the Digest provide for the converse case where a woman marries in succession three husbands and has a son by each. The text in question lays down that her *separate* property shall be divided equally amongst all the three sons, it does not say that property inherited by her during one of the marriages is to be so divided. The first passage from the *Cittara* given in section 245 of the Digest— it is not translated in the English translation—shows clearly enough that property inherited by the father during one of the marriages is not to be divided equally amongst the sons of the three marriages.

I am of opinion, therefore, that if plaintiffs-appellants' father, Maung Ne Kya, had been living he would have been entitled to inherit one-half of the property acquired during his mother, Ma Ngwe's marriage, a quarter of the property inherited by Maung Hnin during either of the other two marriages and one-third of Maung Hnin's *payin* brought to the first marriage.

It is, therefore, necessary to decide when each of the lands in suit were acquired, with the exception of the land *, which is not shown by the plaintiffs-appellants to have been in Maung Hnin's possession when he died and which must, under the circumstances of the case, be taken to be, as alleged, under mortgage to Maung Paw Kye and incapable at present of partition.

There is evidence that * was given to Maung Hnin by his father, Maung Katho. I see no reason to disbelieve this evidence,

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and as there is none on the other side, I accept it. But the plaintiffs-appellants' contention that the gift was made during Ma Ngwe's coverture, cannot be accepted, in view of the evidence that this land was given to Maung Hnin on the occasion of his novitiate. The presumption is that he was not yet married, and that he took this piece of land to his first marriage as his *payin*. Maung Ne Kya if living would, therefore, be entitled to one-third of this piece of land.

According to the witnesses, Ma Pon Nyo and Maung Kyaw Nya, the lands * and * were inherited by Maung Hnin from his mother during his first marriage and the lands * and * were inherited from his father, Maung Kathe, i.e., during the third marriage, as Maung Kathe died after Maung Hnin had married Ma Kywet O.

The only evidence on the other side is that of the witnesses Maung Hmu and Maung Te Naung, who say that all the lands were inherited from Maung Kathe. They are much less definite than Ma Pon Nyo and Maung Kyaw Nya, and they were disbelieved by the Township Judge, and, therefore, I think the evidence given by Ma Pon Nyo and Maung Kyaw Nya should be taken as correct.

If he had been living, therefore, Maung Ne Kya would have been entitled to one-third of the land *, one-half of the lands * and * and one-fourth of the lands * and *. It remains to be considered whether the plaintiffs-appellants are entitled to these shares or as out-of-time grand-children to one-fourth of these shares.

The learned District Judge in awarding the plaintiffs-appellants a one-twelfth share of the lands overlooked the rule that out-of-time grand-children, if they be the children of the *auratha* son, receive the same share as their youngest uncle or aunt.

The question of the definition of the *auratha* son, however, remains. The eldest son is generally but not necessarily the *auratha* son. The son, who in case his father dies or becomes incapacitated is competent to take his place in the family, is the *auratha* son. If the eldest son be blind or otherwise incapacitated his younger brother, if competent, and not he is the *auratha* son, *vide* the text from the *Dhammathakya* and other texts collected in section 62 of the Digest, Volume I.

Consequently, I take it that until the eldest son reaches the age of discretion there can be no *auratha* son in the family. Again, though the eldest son cannot claim one-fourth of the estate from his father on the death of his mother, he can claim that share from his mother on the death of his father because he then takes his father's place in the family, he nevertheless, if competent to replace his father in case of the latter's death, becomes the '*auratha*' son as soon as he becomes so competent and does not have to wait until his father's death to attain that position. I think this is clear from the texts collected in section 162 of Volume I of the Digest, of which I would particularly mention that from the *Dhamma*, which is more emphatic in the original Burmese than in the English translation. The Burmese runs: "If the eldest, the *auratha*, son dies whilst his parents are still living . . .", thus clearly indicating that the eldest son may attain the position of an *auratha* son whilst his father is still alive.

It is not suggested that Maung Ne Kya was in any way incapacitated from taking his father's place; he married and had children and, therefore, must have attained the age of discretion and in fact only predeceased his father by 10 years. He was, therefore, the *auratha* son.

It is not necessary to go into the question whether it is only the eldest son of the *auratha* son that can get the same share as the latter's youngest brother, because Maung Ne Kya's eldest son is still alive and he and his brother—the two plaintiffs-appellants—can obviously only get their father's share between them.

Lastly, as I have held that the lands * and * were redeemed by the 1st defendant-respondent for Rs. 61-8-0, it is obvious that the plaintiffs-appellants must pay their share of this debt before they can get their share of the inheritance.

One final difficulty remains. The lands * and * were mortgaged and redeemed as one parcel, but the plaintiffs-appellants are entitled to one-third of * and to one-fourth of the land * and the question is how the redemption money is to be apportioned between these two lands. The area of * is slightly more than five times that of * but its value according to the 1st plaintiff-appellant is only five-fourths of the value

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of * and this valuation has not been disputed. I think it is fairer to apportion the charge according to the value of the lands than according to the area. The plaintiffs-appellants must, therefore, pay four-ninths of Rs. 61-8-0 = Rs. 27-5-4.

The decree of the lower Appellate Court is accordingly modified as follows:—Upon the plaintiffs-appellants paying into Court within six months of this date the sum of Rs. 27-5-4, the lands *, *, *, * and * will be partitioned and a one-third share of *, a one-fourth share of the lands * and * and a half share of the lands * and * will be given to the plaintiffs-appellants, i. e., 4-65 acres altogether. There will be no order as to costs as the plaintiffs-appellants claimed about double what they were entitled to.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1506 OF 1914.

September 13, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

THE RAJA OF PITHAPURAM, THROUGH
M. SUBBARAYADU GARU, DEWAN AND
AUTHORISED AGENT—PLAINTIFF—APPELLANT
versus

JONNALAGODDA VENKATASUBBA
ROW—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), Ch. IV, s. 52—Agreement to pay enhanced rate entered into before Act came into force—Pattas and muchilikas exchanged under Rent Recovery Act, whether binding on tenant after Estates Land Act came into force.

An agreement to pay an increased rate of rent entered into before the Madras Estates Land Act came into force by a person who was a yearly tenant does not bind him after the Act came into force, as his status is changed by the Act. [p. 93, col. 2.]

Section 52 applies only to *pattas* and *muchilikas* exchanged since the Act came into force and no retrospective effect can be given to that section so as to bring within its operation *pattas* and *muchilikas* executed under the Rent Recovery Act, VIII of 1865, and tenable for a year only. [p. 93, col. 2.]

Second appeal against the decree of the District Court of Godavari at Rajahmundry, in Appeal Suit No. 185 of 1913, preferred against that of the Court of the Head-quarters Deputy Collector, Cocanada, in Land Suit No. 122 of 1911.

Mr. S. Srinivasa Aiyangar, for the Appellant.

Messrs. P. Narayana-murthi and V. Ramadoss, for the Respondent.

JUDGMENT.—The defendant was let into possession before the Madras Estates Land Act under Exhibit III which fixed the rent at Rs. 221 per *fasli*. Settlement operations began in the *zemin-dari*, and the Settlement Officer recommended that a rent of Rs. 394 should be levied on the holding.

Consequently in July 1907 the defendant agreed to pay Rs. 394 and odd a year, as he understood that to be the recommendation of the Settlement Officer. Meantime the Madras Estates Land Act came into force, and the defendant became a permanent tenant. After the first year was over, disputes arose regarding the rate of rent. Nothing was paid for *Fasli* 1318. Then the officials of the *zemin-dari* suggested that the rent should be brought down to Rs. 285. The defendant agreed to this, but stipulated that this rate should not apply to *Fasli* 1318. The defendant paid at the rate of Rs. 285 for *Faslis* 1318, 1319 and 1320. The present suit is to recover the balance due on the footing of the rent agreed in July 1907.

The Deputy Collector gave the plaintiff a decree for rent at the rate claimed by him. The District Judge held that he is not entitled to anything more than 285 rupees a year. We think the lower Appellate Court is right. It was argued before us that as the only binding agreement was that entered into in July 1907, under section 52 of the Act, it is enforceable for the suit *faslis*. We are unable to uphold this contention. Chapter IV deals with permanent occupancy *ryots*. The agreement came to at a time when the defendant was only a yearly tenant cannot apply to his changed status. Further, we are of opinion that section 52 only applies to *pattas* and *muchilikas* exchanged since the Act came into force. Under the old Act, *pattas* and *muchilikas* remained in force only for a year and we see no ground for giving retrospective operation to section 52.

The only provisions which enable Courts to fix the rent are contained in sections 27 and 28. There were payments at the rate of Rs. 285 for a number of *faslis*. This was

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in pursuance of a compromise arranged between the parties. Although there were disputes regarding some unessential particulars, we think that the parties were agreed on the main question as to fixing the rent at Rs. 285. This was the amount lawfully paid in *faslis* 1318 to 1320 and was lawfully payable in the subsequent *fasli* under section 28 of the Act.

The District Judge is, therefore, right in holding that the plaintiff is not entitled to anything more than Rs. 285 for the suit *faslis*.

We dismiss the second appeal with costs.

Mr. Ramadoss's client agrees to pay the interest on the arrears due, if it has not been already paid.

The memorandum of objections is also dismissed with costs.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 81 OF 1914.

April 27, 1915.

Present:—Mr. McColl, A. J. C.
MI CHAN MYA AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

MI NGWE YON—PLAINTIFF—RESPONDENT.

Buddhist Law—Inheritance—Share of children of first marriage—Keitima child adopted before second marriage, right of—Undutiful conduct—Burden of proof.

Under the Buddhist Law adoption, like marriage, is not a mere contract, nor is it a grant or other disposition of property, nor is an adoption required to be in writing and, therefore, the fact that a deed of adoption was drawn up, does not preclude other evidence of the adoption. [p. 96, col. 1.]

The object of the *keitima* adoption is generally to provide the adoptive parents with an heir. In the case of such an adoption there must be a distinct occasion on which it takes place, it must be public and there is very often, though not always, a ceremony. [p. 95, col. 2.]

According to the Buddhist Law of inheritance, the children of a first marriage are, on the death of their father, who has married again after the death of their mother, entitled to three-fourths of the property taken to the second marriage, and one-eighth of the *lettelpica* of that marriage. The same rule applies to a *keitima* child adopted by a man and his first wife. [p. 98, cols. 1 & 2.]

In the case of *keitima* child living apart from his adoptive parents, the real question for determination is whether the surrounding circumstances proved to exist establish an intentional severance of the family tie or not. The requirement of joint residence can be safely released in the case of an adoptive child who is also a blood relation. [p. 96, col. 1.]

Where the *keitima* child was the niece of the adoptive father and a year after her marriage lived in a granary in his compound, except for one year when she lived in her father-in-law's house, and for certain months in every year during which she lived in a field hut for the purpose of cultivating her adoptive father's field:

Held, that so far as a joint living was concerned, the requirements of the *Dhammathats* were sufficiently complied with and consequently the burden of proving that she was by undutiful conduct debarred from inheriting was on the adverse party. [p. 96, col. 2.]

Mr. C. G. S. Pillay, for the Appellants.

Mr. R. K. Banerjee, for the Respondent.

JUDGMENT.—The 1st defendant-appellant is the widow of Maung Po, deceased, and the 2nd defendant-appellant is their infant son. The plaintiff-respondent sued them for a three-fourths share of Maung Po's estates alleging that she had been adopted by Maung Po and his first wife, Ma Hla Dun, as their *keitima* child, and that the whole of the estate had been acquired by Maung Po before he married the 1st defendant-appellant and had been taken by him to that marriage.

The defence was that the plaintiff-respondent was not Maung Po's *keitima* daughter, that even if she were, she had not maintained filial relations with him and that in any case she was not entitled to get three-fourths of the estate.

The Courts below found the adoption proved and awarded plaintiff-respondent three-fourths of the property taken to the 2nd marriage and one-eighth of the *lettelpica* of that marriage. The defendants-appellants have now appealed under section 100, Civil Procedure Code, on various grounds.

The first ground is that the findings of the lower Appellate Court as to adoption are contrary to the provisions of Buddhist Law, inasmuch as (1) there was little or no evidence of publicity and notoriety, and (2) there was no evidence as to whether the adoption was *keitima* or *apaddittha*. Reliance is placed on *Ma Pica v. Ma The The* (1) as to adoption being a mixed question of fact and law. I have no doubt as

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to the correctness of this contention, but of course this Court cannot go into the credibility of witnesses in an appeal under section 100, Civil Procedure Code, unless the lower Appellate Court has committed some error of law or procedure in believing or disbelieving the witnesses; and that is not urged in the present case.

Now apart from evidence of repute there is the direct evidence of Maung Shwe Lun (plaintiff-respondent's natural father), Maung Tun U, Maung Pi (Maung Po's brother) and Maung Kyi Maung that the plaintiff-respondent was adopted and that a ceremony to which monks were invited was held. Maung Shwe Lun on cross-examination gave evidence which contradicted the plaintiff-respondent and went to show that there had been a rupture of the filial bond, but on re-examination he contradicted his previous statements. The Courts below discarded the whole of his evidence on the ground that he was a paralytic. I do not think their action can be called in question in an appeal under section 100, Civil Procedure Code. The other witnesses, if believed, —and their credibility cannot be questioned now—conclusively prove the adoption and prove that it was a public one. Moreover, there is evidence of later repute, *e. g.*, that given by the witnesses Maung Kyaw Za Maung Shan Gyi and the important documentary evidence that the plaintiff-respondent was entered in *thathameda* assessment rolls as Maung Po's daughter. I would add that the circumstantial evidence corroborates the direct evidence of the adoption, but it is unnecessary to refer to it because the direct evidence which cannot now be challenged proves the adoption.

As to there being no evidence as to whether the adoption was a *keitima* or an *apaddittha* one, I would say in the first place that the point, if taken at all, should have been taken in the Court of first instance. To allow the evidence to be recorded without asking a question on the point and then to urge on appeal for the first time that there was no evidence as to the kind of adoption was not fair to the plaintiff-respondent. I thoroughly agree with the learned Divisional Judge that it must be taken that when the witnesses spoke of an adoption they meant a *keitima* adoption. Moreover the evidence points to a *keitima* adoption and

not to an *apaddittha* one. An *apaddittha* son is described in section 16 of U Gaung's Digest as, "a foundling brought up in the family" (*Manu*), "a foundling adopted casually and brought up in the family" (*Haru*), "a child casually adopted and brought up in the family of the adoptive parents, being abandoned by his natural parents" (*Kaingza*). "A child casually adopted whether its parents or relatives are known or unknown" (*Dhamma* and *Manukye*), "son casually adopted through compassion" (*Kandaw*), "son casually adopted" (*Vivicchaya*), "a foundling brought up in the family" (*Pakasani*), "foundling or destitute child casually adopted" (*Manu*). "Foundling casually adopted" (*Panam* and *Kungyalinga* and *Amwebon*). It is clear that there is a very great distinction between such an adoption and a *keitima* adoption. In the latter kind of adoption there must be a distinct occasion on which the adoption takes place, it must be public and there is very often, though not always, a ceremony. The object of the adoption is generally to provide the adoptive parents with an heir. The reason for an *apaddittha* adoption is pity for the child, who is destitute, an orphan or abandoned by his parents. The adoption, though perhaps not necessarily so, is at any rate usually a gradual process, so that it is generally impossible to say at what precise moment a child taken into a family became an *apaddittha* child. All idea of a ceremony in such an adoption is excluded by the language of the definitions.

In the present case Maung Po and his first wife, Ma Hla Dun, were childless and no doubt wished for an heir to inherit their wealth. The plaintiff-respondent was Ma Hla Dun's own niece, there was a ceremony and after she was taken into the family she was treated as a *keitima* daughter would have been.

The next ground of appeal is that the lower Appellate Court contravened the provisions of the Evidence Act in that "whilst discarding all evidence of the document, it admitted oral evidence of Maung Pi and Maung Kyi Maung, who spoke to the execution of a deed of adoption."

But the learned Divisional Judge did not rely on the contents of the deed de-

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posed to, he relied on the evidence given by these witnesses that there was a public ceremony at which the plaintiff-respondent was adopted. An adoption, like a marriage, is not a mere contract, nor is it a grant or other disposition of property, nor does the law require an adoption to be in writing and, therefore, the fact that a deed of adoption was drawn up, does not preclude other evidence of the adoption.

The next two grounds of appeal are that the lower Appellate Court should have found that the filial tie, if one had ever existed, had been ruptured and that as separate living was proved it should have placed the burden of proof on the plaintiff-respondent.

To take the last point first, it was held in *Maung Shwe Thwe v. Ma Saing* (2) that in the case of a *keittina* son living apart from his adoptive parents, the burden of proving that he had maintained filial relations and that there had not been a severance of the adoptive tie was on him. But in that case the rulings *Maung Aing v. Ma Kin* (3) and *Ma Gyan v. Maung Kywin* (4) were approved. In the former case the late Mr. Burgess held that the requirement of joint residence could be safely relaxed in the case of an adopted child who was also a blood relation, and in the latter case he said, "the real issue for determination in such cases is whether the surrounding circumstances proved to exist establish an intentional severance of the family tie or not." This passage was quoted with approval by Mr. Justice (now Sir Herbet) Thirkell-White. In *Maung Shwe Thwe v. Ma Saing* (2), there is nothing to show whether the plaintiff was a blood relation of his adoptive mother or not, but he had been living apart from her for 11 years and during that time she had only visited him once and he had only paid her one visit and that was immediately before her death. It was held that the circumstances of the case indicated clearly an intentional severance of the adoptive tie. In *Maung Aing v. Ma Kin* (3), the adopted child after marriage lived in a house in the same compound

as the adoptive parents and it was held that the requirements of the *Dhammathats* in respect of the joint living were practically fulfilled. In *Ma Gyan v. Maung Kywin* (4) also, the adoptive daughter lived after her marriage not in her adoptive parents' house but in a house close by, and it was held that she was entitled to inherit.

In the present case, a year after her marriage the plaintiff-respondent lived in a granary in her adoptive father's compound, except for one year when she lived in her father-in-law's house, and for certain months in every year during which she lived in a field hut for the purpose of cultivating Maung Po's fields. Following *Maung Aing v. Ma Kin* (3) and *Ma Gyan v. Maung Kywin* (4), I hold that so far as joint living is concerned the requirements of the *Dhammathats* were sufficiently complied with, and consequently the burden of proving that the plaintiff-respondent was by undutiful conduct debarred from inheriting, was on the defendants-appellants.

Now it appears from the evidence that the plaintiff-respondent on one occasion unearthed some money which Maung Po had buried and apparently misappropriated some of it and was turned out of the house in consequence, and it is alleged that the adoptive tie was then ruptured. But when turned out, plaintiff-respondent went and lived not with her natural parents but in her father-in-law's house and she subsequently returned and again lived in Maung Po's compound. It is clear from the evidence that they were reconciled before Maung Po married the first defendant-appellant, and I agree with the learned Divisional Judge that the circumstances do not point to a severance of the adoptive tie or disentitle plaintiff-respondent from inheriting.

The next ground of appeal is that the lower Appellate Court erred in relying upon the *thathameda* roll for 1906-07, in which plaintiff-respondent is shown as Maung Po's daughter, whereas in the roll for 1908-09 she is shown as living separately and assessed accordingly.

1908-09 was apparently the year during which plaintiff-respondent lived with her father-in-law. Three extracts from *thatha-*

(2) U. B. R. (1897-01), II, p. 135.

(3) U. B. R. (1892-96), II, p. 22.

(4) U. B. R. (1897-96), II, 176.

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meda rolls were filed, viz., for 1906-07, 1907-08 and 1909-10, in each of which the plaintiff-respondent is shown as Maung Po's daughter and is assessed with him as one household. The extract from the roll for 1909-10 is in accordance with the evidence that plaintiff-respondent after being driven out of the house by Maung Po went and lived a year in her father-in-law's house and then returned and lived with Maung Po again, i.e., in his compound.

The next ground of appeal is that the lower Appellate Court did not consider all the evidence for the defence. The witnesses for the defence tried to make out that the plaintiff-respondent went to live in Maung Po's house as servant and that at the end she was his tenant and worked his land.

But it is quite certain that if plaintiff-respondent had merely gone to live in Maung Po's house as a servant, the occasion would not have been celebrated by a ceremony to which *pongyis* were invited and defendants-appellants' own witness, Maung So, admitted that there was such a ceremony. A tenancy might explain plaintiff-respondent's living in Maung Po's field-but, but it would not be a sufficient explanation of her living in his compound.

The last ground of appeal is that the share awarded to the plaintiff-respondent, viz., three-fourths of the property taken to the second marriage and one-eighth of the *lettetpwa* of that marriage, is contrary to Buddhist Law as there is a son of the second marriage. It has not, however, been stated what the correct share is.

Texts from many *Dhammathats* dealing directly with this question are collected in section 229 of U Gaung's Digest, Volume I. These texts, however, are by no means unanimous and it is very noticeable that no text from the *Manukye* is included amongst them, and I have not been able to find any text in that *Dhammathat* bearing on this question. The text from the *Yazathat* quoted in section 229 gives the children of the first marriage one-half of the property taken to the second marriage and the widow and the children of the second marriage a quarter each, but the great majority of the *Dhammathats* are divided into two schools, of which one gives the children of the first marriage three-fourths of the property taken to the second mar-

riage and the widow one-fourth, and the other gives the children of the first marriage the larger share, the widow a share and the children of the second marriage a share, and the more numerous texts give these shares as five-eighths, two-eighths and one-eighth respectively. Apparently the latest ruling on the point is *Ma Leik v. Maung Nwa* (5). In that case a Bench of the Chief Court of Lower Burma held that as the majority of the texts cited in section 229 of U Gaung's Digest were in favour of the children of the first marriage getting three-fourths of the property taken to the second marriage, that rule should be adopted; it was, however, apparently not noticed that most of the texts that give this rule do not specifically state that this rule applies where there are children of the second marriage. The rule generally stated is that the children of the first marriage get three-fourths and the widow one-fourth and no reference whatever is made to the children of the second marriage. Section 220 of the *Attasankhepa Dhammathat* runs as follows: "Let the property brought by the father or mother be divided into four shares and let the children of the former marriage take three shares and the step-father or step-mother one share. This rule applies when there is no issue by the second marriage. If, however, children are born after the second marriage, let the property brought by the father or mother be divided into eight shares, and let the children of the former marriage take five shares, the step-father or step-mother two shares and the children of the second marriage one share." The *Attasankhepa Dhammathat* was compiled by the late Kinwun Mingyi, U Gaung, the compiler of the Digest. He was learned in Buddhist Law and had experience of its application and his opinion is entitled to very great weight. Unfortunately this particular work of his is dogmatic. No authorities are cited; throughout the work there is evidence of attempt to reconcile contradictory texts of the older *Dhammathats* without any hint of the method of reconciliation, and the tendency is to elaborate intricate rules of division of property, which are never followed in practice, e.g., the rule given in section 161.

(5) 4 L. B. R. 110.

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Now it is obvious enough that the rules given in the older *Dhammathats* for partition of property brought to a second marriage between the children of the first marriage, the widow and the children of the second marriage are contradictory, and putting aside a few of the texts, it looks at first sight as if the rule given in section 220 of the *Attasankhepa* successfully reconciled the majority of them, because the majority do not mention children of the second marriage when giving the rule regarding the partition of property taken to that marriage, and consequently it might be assumed that the rule of three-fourths and one-fourth only applies where there are no children of the second marriage, and that when there are such children, the rule of five-eighths, two-eighths and one-eighth given by the other *Dhammathats* applies. But in the first place, it seems to me impossible that the compilers of the former *Dhammathats* can have overlooked the point that there might be children of the second marriage, seeing that they proceed immediately to refer to such children when considering the partition of the *lettelpica* of the second marriage, and in the second place, the text from the *Manuyin* after giving the rule of three-fourths of the *atet* property to the children of the first marriage and one-fourth to the widow, continues, "such property shall not be given to the offspring of the second union," and the text from the *Dayajja* says "The mother having died, the father marries again and dies leaving issue by the second marriage. The children of the former marriage shall get three out of four shares of their own parents' property and the remaining share shall be given to their step-mother." It is further to be noted that the *Dhammathats* that give the five-eighths, two-eighths, and one-eighth rule are much older than the *Munyan* and the *Dayajja*.

Finally, the rule of three-fourths to the children of the first marriage is perfectly intelligible as was pointed out by Mr. Justice Moore in *Ma Leik v. Maung Nwa* (5). The children of the first marriage get their own mother's share, *viz.*, one-half, and they get their father's share, in all three fourths. The children of the second marriage get nothing because their

mother is still living, but on her death they get her share.

As regards the *lettelpica* of the second marriage the texts are almost unanimous that the children of the first marriage get one-eighth and this rule has not been disputed.

I thus agree with the lower Appellate Court on all points and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1566 of 1913.

August 18, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

NAVANNA VENA RAMA CHETTY—
DEFENDANT No. 1—APPELLANT

versus

A. L. A. R. R. M. ARUNACHALAM
CHETTIAR AND ANOTHER—PLAINTIFFS—

RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 151, scope of—Relief under s. 151, when granted—Circumstances to be considered.

Section 151, Madras Estates Land Act, is intended to give the landholder a right to sue for the reliefs mentioned therein only when the holding as a whole is rendered substantially unfit for agricultural purposes by the acts of the *ryot* committed on the whole or on any part of the holding. [p. 100, col. 1.]

In arriving at a decision as to whether the holding as a whole is so rendered unfit by the acts of the *ryot* on any part of the holding, reference must be had to the circumstances of individual cases, to the size of the holding, to the area withdrawn from actual cultivation and to the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation. [p. 100, cols. 1 & 2.]

Hari Mohan Misser v. Surendra Narayan Singh, 34 C. 718; 17 M. L. J. 361 (P. C.); 2 M. L. T. 399; 11 C. W. N. 794; 6 C. L. J. 19; 9 Bom. L. R. 750; 34 I. A. 133, followed.

Appeal against the decree of the District Court of Ramnad, in Appeal Suit No. 106 of 1913, preferred against that of the Court of the Deputy Collector of Devakota, in Summary Suit No. 556 of 1912.

Messrs. T. Rangachariar and R. Kuppuswami Aiyar, for the Appellant.

Mr. S. Srinivasa Aiyangar, for the Respondents.

This second appeal coming on for hearing on the 30th October 1914, and having stood over for consideration till the 6th November 1914, the Court delivered the following

JUDGMENT.—The 1st defendant is the appellant. The plaintiffs who are the land-

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lords of the plaint land brought this suit for the following reliefs:—

(a) that the permanent damage to the plaint land area of $\frac{1}{4}$ th *kurukkam*, inflicted by the defendants by their having erected two walls on the site and placed two stone pillars thereon, be removed at the defendants' expense;

(b) that the defendants may be made to pay the plaintiffs their costs.

The plaint $\frac{1}{4}$ th *kurukkam* area is in one corner of a big *tope* land measuring a little over 12 *kurukkams* in extent in the village of Kalakkudi. The plaintiffs' complaint is that as the 12 and odd *kurukkams* were granted as *tope* lands on *tope* *cowle* (that is for cultivation of fruit trees), the defendants had no right to convert any portion of the lands into a building site and the defendants by enclosing $\frac{1}{4}$ th *kurukkam* by walls, by raising its level and by fixing stone pillars have made that portion unfit for horticulture. The suit was brought in the Revenue Court under section 151 (2) of the Madras Estates Land Act.

The second issue raised in the case was whether the suit land or any portion of it has been materially impaired in its value for agricultural purposes and if so, when? The Suits Deputy Collector gave his finding as follows:—"It is clear from the evidence that the $\frac{1}{4}$ th *kurukkam* in question has been rendered unfit for cultivation. I, therefore, find this issue in favour of plaintiffs." Now the issue was whether the suit land or any portion of it has been materially impaired in its value for agricultural purposes and the finding is that $\frac{1}{4}$ th *kurukkam* in question has been rendered unfit for cultivation. There is no finding that the suit land of 12 and odd *kurukkams* taken as a whole has been materially rendered unfit for cultivation as a *tope*.

The lower Appellate Court in a very short judgment says: "It may be that the plot in question is only a small fraction of the holding but that circumstance would not take the case out of the purview of section 151 of the Madras Estates Land Act;" and on this finding, the Suits Deputy Collector's decree directing the defendants to remove the walls and to restore the land to its original state was confirmed.

Of the contentions in second appeal before us, only one need be considered, the others not being seriously pressed. That one contention is that the Courts below have not

considered and tackled the question whether there was a material impairing of the holding of 12 and odd *kurukkams* taken as a whole by acts done on the plaint $\frac{1}{4}$ th *kurukkam* area, and that is what they had to consider under section 151, clause 2, of the Madras Estates Land Act.

Section 151, clause 1, of the Act is as follows:—

"A landholder may institute a suit before the Collector to eject an occupancy *ryot* from his holding only on the ground that the *ryot* has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes." Clause 2 allows the landholder to sue not only for the relief of ejectment mentioned in clause 1 but also for injunction, or for the repair of the damage, or for compensation or for a combination of these three reliefs. I am unable to accept the ingenious argument of the respondents' learned Vakil, Mr. S. Srinivasa Aiyangar, that the right given by the second clause to the landholder allowing him to sue for an injunction, is not governed by the condition laid down in the first clause, namely, that the *ryot* must have materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for agricultural purposes. The second clause is clearly a supplement to the first clause, giving the supplementary and alternative reliefs to the relief of ejectment given by the first clause, the right to sue for these supplementary and alternative reliefs, however, being governed by the same conditions.

The provisions of section 151 were compared by learned Vakils on both sides during the arguments with the provisions of section 11. Section 11 says: "a *ryot* may use the lands in his holding in any manner which does not materially impair the value of the land or render it unfit for agricultural purposes." It will be seen that there is a slight difference between the wording of section 11 and the wording of clause 1 of section 151 in two points. The word "substantially" is omitted in section 11 before the words "unfit for agricultural purposes." Again the word "and" is substituted in section 151 for the word "or" before the word "render." Lastly the words "for agricultural purposes" appear only at the

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end of section 11, whereas they appear after both the verbal clauses in section 151, clause 1. I am unable to see what the difference between "materially impairing the value of the holding for agricultural purposes" and "rendering it substantially unfit for agricultural purposes" is or why the conjunction "and" was substituted for "or" in the latter section. I do not think that any real distinction was intended to be made by the slight differences in phraseology between section 11 and section 151, clause 1.

The substantial question for decision is, therefore, whether section 151 intended to give the landholder a right to sue for any of the reliefs mentioned therein in all cases, even if only a part of the holding was rendered unfit for agricultural purposes, or whether it intended to give the right to sue for any of those reliefs, only when the holding *as a whole* was rendered substantially unfit for agricultural purposes by the acts of the *ryot* committed on the whole or on any part of the holding. On this question I think we are bound by the decision of the Privy Council in *Hari Mohun Misser v. Surendra Narayan Singh* (1). In that case, the Calcutta High Court in construing section 23 of the Bengal Tenancy Act (on which section 11 of the Madras Estates Land Act is founded) laid down that the landholder is entitled to an injunction to remove an indigo vat built upon a portion of a large holding, "because that portion had become evidently unfit for agricultural purposes." Their Lordships of the Privy Council say that the proposition of law so laid down by the High Court, (namely, that even if a part of a holding had become unfit for agricultural purposes, the landlord is always entitled to an injunction to rectify the acts done on that part of the holding) cannot be upheld, as that proposition was laid down too broadly and unconditionally. Their Lordships say that "reference must be had to the circumstances of individual cases," "to the size of the holding," "to the area withdrawn from actual cultivation," and "to the effect of such withdrawal upon the fitness of the holding

taken as a whole for profitable cultivation" before the relief of injunction could be granted.

We are bound to follow this ruling of their Lordships and as we find that the lower Courts have in arriving at their conclusions merely considered the question whether the $\frac{1}{4}$ th *kurukkam* in dispute was rendered unfit for agricultural purposes, and have not considered the question whether with reference to the circumstances of this individual case with regard to the size of the holding, with regard to the area withdrawn from actual cultivation and with regard to the effect of such withdrawal upon the fitness of the holding, the value of the holding as a whole has been materially impaired for the purpose of the horticulture, we cannot confirm their decrees.

I would, therefore, call for a finding from the lower Appellate Court on the following issue on the evidence already on record: "Has the holding of 12 and odd acres taken as a whole been materially impaired in value for agricultural purposes" (which include horticultural purposes) "or rendered substantially unfit for the said purposes owing to the acts found to have been committed by the defendants on the $\frac{1}{4}$ th *kurukkam* referred to in the plaint, having reference to the circumstances of this case, having regard to the size of the holding as a whole and to the size of the area withdrawn from actual cultivation and to the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation." The finding should be submitted within six weeks from the receipt of records and 10 days will be allowed for filing objections.

In compliance with the order contained in the above judgment of this Court the District Judge of Ramnad submitted the following

FINDING.

In the circumstances pointed out above, I find the issue in the negative and against plaintiffs.

This second appeal coming on for final bearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court

(1) 17 M. L. J. 381; 34 C. 718 (P. C.); 2 M. L. T. 299; 11 C. W. N. 794; 6 C. L. J. 19; 6 Bom. L. R. 750; 84 L. A. 183.

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delivered the following

JUDGMENT.—We accept the finding and setting aside the decrees of the lower Courts, we dismiss the plaintiffs' suit with costs in all Courts payable by the plaintiffs to the 1st defendant.

Appeal allowed; Suit dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 176 OF 1913.

April 30, 1915.

Present:—Mr. Saunders, A. J. C.

NGA TWE AND ANOTHER—

DEFENDANTS—APPLICANTS

versus

NGA BA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 20—Payment towards interest—Intention.

In order to save limitation under section 20 of the Limitation Act, 1908, the payment towards interest must be the payment of interest as such, that is to say, the debtor should pay the amount with the intention that it should be paid towards interest and there must be something to indicate such an intention.

Mr. *Tha Gywe*, for the Applicants.

Mr. *C. G. S. Pillay*, for the Respondent.

JUDGMENT.—The defence of the defendants-applicants to this suit on the ground of non-execution and non-receipt of consideration was merely foolish, and though the lower Court's judgment barely complied with the provisions of the law, I think under the circumstances it may be accepted as complying. But on the question of limitation, both the Courts below appear to have gone wrong. The lower Appellate Court considered the point and appears to have thought that as the payments made by the defendants were appropriated to interest, limitation was thereby saved. But it was pointed out in *Maung Hlaing v. Maung Et Gyi* (1) that to save limitation the payment towards interest must be the payment of interest as such, in other words, there must be an intimation by the defendant that the payment made by him is to be appropriated to interest. The point was clearly explain-

ed in *Mohammad Abdulla Khan v. Bank Instalment Company, Limited, in Liquidation* (2). It was there explained that the payment of interest will save limitation when the payment is made as such, that is to say, when the debtor has paid the amount with the intention that it should be paid towards interest and there must be something to indicate such an intention. The mere appropriation by the creditor of these payments to interest is not such an indication as would enable a Court to hold that payments were made towards interest as such by the debtor.

It is suggested for the plaintiff respondent that the payments were made towards principal and that the endorsements may have been in the handwriting of the defendant. But this was not the plaintiff's case. The amounts paid were apparently less than the interest due upon the dates of payment, and from the calculations given in the plaint, none of the principal has yet been paid.

I do not think it is necessary to remand the case to the Court of first instance, inasmuch as there was an issue on the question whether the defendants-applicants made payments towards principal and interest. The promissory-note having been executed on the 23rd February 1910, and the suit filed on the 26th March 1913, the claim was barred by limitation, and the plaintiff's suit must be dismissed with costs.

Suit dismissed.

(2) 2 Ind. Cas. 379; 31 A. 495; 6 A. L. J. 611.

(1) U. B. R. (1892-96), II, 466.

MURUGESA MUDALI v. SAMA GOUNDAN.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 40
OF 1914.

August 16, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.MURUGESA MUDALI—PLAINTIFF—
DECREE-HOLDER—COUNTER-PETITIONER—
APPELLANT

VERSUS

SAMA GOUNDAN AND ANOTHER—

DEFENDANTS—PETITIONERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 47,
O. XXI, r. 101—Petition by judgment-debtor objecting to
sale in execution—Objections by third party as well—
Order, whether appealable.*

An order passed on an application by a judgment-debtor objecting to the sale of certain immoveable property in execution of a decree is, as between the parties to the suit, an order passed under section 47 of the Civil Procedure Code and is appealable even though it also disposes of objections made by third parties to the delivery of possession.

Civil Miscellaneous Second Appeal against the order of the District Court of North Arcot, in Appeal Suit No. 793 of 1913, preferred against that of the Court of the District Munsif of Tirupattur in Miscellaneous Petition No. 132 of 1913, in Execution Petition No. 128 of 1912, in Original Suit No. 464 of 1911.

Mr. V. Viswanatha Sastri, for the Appellant.

Mr. K. R. Subramania Sastri, for the Respondents.

JUDGMENT.—The respondents put in a petition in the Court of the District Munsif to cancel the delivery of certain shops purchased by the decree-holder in execution of a decree passed against the respondents as trustees of a temple.

The respondents contended that the shops did not belong to the judgment-debtor temple solely but to five other institutions and further contended that even the interest of the debtor temple in the corpus of the shop property could not have been and was not legally sold but only its right to receive a share of the rents and profits.

We must take it that the petition was filed partly under section 47 of the Civil Procedure Code (which has been held to apply also to disputes between decree-

holder-purchasers and judgment-debtors) and partly under Order XXI, rule 101. As only one order was passed in respect of both these contentions by each of the lower Courts and as that order has been based mainly on the contention raised by the respondents as trustees of the judgment-debtor temple, we hold that an appeal lies against the order of the District Munsif to the District Court and from the order of the District Court to this Court. We accordingly overrule the preliminary objection raised by the respondents' Vakil to the entertainment of this appeal.

As regards the merits, it is clear to us from the records that all the right, title and interest of the judgment-debtor temple in the shops could be brought to sale under the terms of the decree, and were so brought to sale in execution and were purchased by the decree-holder and not merely the right to share of the rents and profits.

The lower Courts' orders are set aside as based on an untenable preliminary ground.

The petition case will be remanded to the District Munsif for the passing of fresh orders after giving findings on the following points:—

(1) To what share in the corpus of the properties sold was the judgment-debtor temple entitled?

(2) If the respondents as trustees of the other institutions are entitled to occupy the shops in virtue of those institutions owning substantial shares in the shops, whether the appellant is not entitled even to the delivery of the shops under Order XXI, rule 96, of the Civil Procedure Code?

Costs hitherto will be costs in the cause.

Appeal allowed; Petition remanded.

MI SA U V. NGA MEIK.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 219 OF 1912.

May 10, 1915.

Present:—Mr. McColl, J. C.

MI SA U—PLAINTIFF—APPELLANT

versus

NGA MEIK AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expt. I
—Suit for possession and mesne profits—Claim as to future mesne profits not adjudicated upon—Subsequent suit for such profits, whether barred.

In a previous suit for possession the plaintiff claimed mesne profits which had already accrued as well as future mesne profits. He was awarded mesne profits already accrued, and the decree was silent as to future profits. On his bringing a fresh suit for future mesne profits the plea of *res judicata* was raised.

Held, that the mere omission of the Court to adjudicate upon the claim for future profits did not operate as a bar to a subsequent suit for such profits. [p. 104, col. 1.]

Ram Dayal v. Madan Mohan, 21 A. 425; A. W. N. (1899) 153, followed.

Mr. S. Mukerjee, for the Appellant.

Mr. J. C. Chatterjee, for the Respondents.

JUDGMENT.—In a previous suit the plaintiff-appellant sued the defendants-respondents and others for possession of some land of which, she alleged, the defendants-respondents were in wrongful possession. In her plaint she claimed mesne profits which had already accrued, *viz.*, for the years 1269 and 1270 and also future mesne profits.

She won her suit in the District Court and she was awarded mesne profits for the years 1269 and 1270, but the decree was silent as to future mesne profits.

She then brought the present suit for mesne profits for 1271 and 1272 which she estimated at Rs. 975. The only defence raised was that the suit was *res judicata*. On appeal the lower Appellate Court held, on the strength of a passage in Messrs. Ameer Ali and Woodroffe's Civil Procedure Code that the suit was *res judicata* and dismissed it.

Had the plaintiff not claimed future mesne profits in her previous suit, there can be no doubt that under the Code of 1882 she would have been entitled to bring a separate suit for them, *Nga Lu Pe v. Nga Shwe Yun* (1), but the lower Appel-

late Court has held that the fact that she did claim them and the omission in the present Code of certain words which appeared in section 244 of the Code of 1882 make a difference. In my opinion they do not.

The following words appeared in section 244 of the Civil Procedure Code of 1882, *viz.*, "nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree." In the corresponding section 47 of the present Code, these words have been omitted. In referring to this omission, in their notes to Order XX, rule 12, Messrs. Ameer Ali and Woodroffe say: "The penultimate section (*sic*) of section 244 of the last Code has not been re-enacted, and probably any claim made and not expressly granted in the decree will be deemed to have been refused within the meaning of Explanation V of section 11." It was on this passage that the lower Appellate Court relied. As the lower Appellate Court says, the opinion of the learned authors is entitled to very great weight, but not to the same weight as would have attached to it, had it been delivered from the Bench after the point had been argued before them.

Now it was not section 244 of the last Code that enabled a separate suit for mesne profits accruing due after institution of the suit to be brought. Section 244 (b) laid down that where such mesne profits had been granted by the decree any matter respecting them should be dealt with by the executing Court, and not in a separate suit, and the words referred to laid down that where such mesne profits had not been dealt with in the decree this section would not bar a separate suit, but they did not specifically sanction such a suit, they did not lay down that in spite of what appeared in other sections of the Code such a suit might be brought though these words implied that such a suit might be brought. Therefore, the right to bring such a suit did not depend upon these words but existed independently.

The omission of these words, therefore,

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could not by itself effect any change. The words were no doubt omitted because clause (b) was omitted. If such a suit as the present one would not have been barred by section 13 of the Code of 1882, there appears to be no reason why it should be barred under the present Code, because Explanation III to section 13 of the Code of 1882 is identical with Explanation V of section 11 of the present Code.

The Allahabad High Court held under the old Code in *Ram Dayal v. Madan Mohan* (2), which was a suit for possession of immoveable property and for mesne profits both before and after suit, that the mere omission of the Court to adjudicate upon the claim for future mesne profits would not by reason of section 13, Explanation III, operate as a bar to a subsequent suit for mesne profits accruing due after the institution of the former suit. In referring to this ruling, apparently with approval, Messrs. Ameer Ali and Woodroffe quote the following passage from the judgment: "The words 'relief claimed' apply only to something which forms part of the 'claim' strictly so called, that is, something which the plaintiff may claim as of right, something included in his cause of action and which if he establishes his cause of action, the Court has no discretion to refuse. They do not include something which the plaintiff cannot in the suit claim as of right, but can only claim in the sense of an appeal to the discretion of the Court and which the Court may refuse in the exercise of its discretion on grounds of general expediency or otherwise, even if the cause of action is fully established." These words express better than any words of mine could do my exact view, and I would only add, a Court has a discretion to refuse to include future mesne profits in a decree for possession of immoveable property merely because they are not yet and never may be due, and that, therefore, to bar on this ground a fresh suit for such profits after they have become due would be to deny the plaintiff his obvious rights.

The amount of mesne profits has not been denied.

In Civil Appeal No. 165 of 1911, however, it was held that the plaintiff-appellant

was entitled to two-thirds only of the land. The decretal amount should, therefore, be Rs. 650.

The decree of the lower Appellate Court is set aside and the plaintiff-appellant is granted a decree for Rs. 650 and proportionate costs in all Courts.

Appeal accepted.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 275 AND 276 OF 1914.

September 20, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

G. NARAYANASWAMI NAIDU GARU,
RECEIVER OF NIDADAVOLE AND MADUR
ESTATES—PLAINTIFF—APPELLANT IN BOTH

versus

IN L. P. A. No. 275 OF 1914

VENNAVALI SESHAGIRI RAO—

DEFENDANT—RESPONDENT.

IN L. P. A. No. 276 OF 1914

PANUALA AMMAYYA SASTRULU—

DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870) as amended by Act (VI of 1905), s. 7, cl. V (d), XI (cc)—Suit to recover possession of immoveable property from tenant—Valuation for purpose of jurisdiction—Suits Valuation Act (VII of 1887), s. 8—Madras Civil Courts Act (III of 1873), s. 14, applicability of.

The Legislature by enacting Act VI of 1905 has not only amended the Court Fees Act, but has incidentally withdrawn a class of suits from the provisions of section 14 of the Madras Civil Courts Act and added it to those falling under section 8 of the Suits Valuation Act. [p 105, col. 2.]

Nandan Singh v. Debi Din, 25 Ind. Cas 975; 12 A. L. J. 933; *Chalasamy Ramiah v. Chalasamy Ramaswami*, 13 Ind. Cas. 903; 11 M. L. T. 155; (1912) M. W. N. 199, referred to.

The valuation, therefore, for purposes of jurisdiction of a suit to recover possession of land from a tenant is not its market value under section 14 of the Madras Civil Courts Act or section 7, clause V(d) of the Court Fees Act, but one year's rental payable by the tenant, for the year next before the date of presenting the plaint under section 7, clause XI (cc), of the Court Fees Act. [p 105, col. 2.]

Appeals under clause 15 of the Letters Patent against the order and judgment of the Hon'ble Mr. Justice Ayling, in Civil Revision Petitions Nos. 312 and 313 of 1913, reported in 24 Ind. Cas. 374, preferred against the order of the District Court of Kistna at Masulipatam in Miscellaneous Appeals Nos. 6 and 7 of 1914, (preferred against the order of the Court of the Subordinate Judge of Ellore, in Original Suits Nos. 18 and 19 of 1912).

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FACTS of the case appear clearly from the judgment.

Mr. P. Nagabhushanam, for the Appellant:—The Amending Act VI of 1905 has not the effect of withdrawing suits for the recovery of immoveable property from a tenant from the provisions of section 14 of the Madras Civil Courts Act. Madras Act III of 1873 is the Act of a Local Legislature and the Amending Act VI of 1905 is that of the Supreme Legislature. The Legislature may have intended that its provisions should not be affected by an Act of the Government of India *Naudan Singh v. Debi Din* (1), *Chalasamy Ramiah v. Chalasamy Ramaswami* (2).

Mr. K. S. Aravamudan Aiyangar, for the Hon'ble Mr. B. N. Sarma, for the Respondents:—Anyhow the result of Act VI of 1905 is that section 7, clause V (d) of the Court Fees Act is amended and the scope of section 8 of the Suits Valuation Act is enlarged.

JUDGMENT.

PHILLIPS, J.—The appellant brought a suit for recovery of the suit lands and for rent against a tenant and valued his suit for purposes of jurisdiction according to the market value of the land in accordance with the provisions of section 14 of the Madras Civil Courts Act (III of 1873) and section 7V (d) of the Court Fees Act (VII of 1870). He accordingly presented the plaint before the Subordinate Judge, but it was returned for presentation before the District Munsif on the ground that, if valued under the provisions of section 8 of the Suits Valuation Act, the value of the suit would be below Rs. 2,500, and the question has now come up in Letters Patent Appeal as to which provision of law should be applied in valuing the suit for purposes of jurisdiction.

The Court Fees Act was amended by Act VI of 1905 and a new category of suits was added to section 7 of the Court Fees Act as clause XI (cc), i.e., for the recovery of immoveable property from a tenant. Undoubtedly the present suit comes under this category, and the effect of the amendment is to remove such a suit from section 7, clause V, to section 7, clause XI, of the Court Fees Act. All suits falling under section 7 (v) of the Court Fees Act are

excluded from the provisions of section 8 of the Suits Valuation Act VII of 1887, which provides that the valuation of suits for the computation of Court-fees shall be the same as for purposes of jurisdiction. The suits excluded from the provisions of section 8 are those falling under section 7, clauses V, VI, IX and X (d) of the Court Fees Act, and until the passing of Act VI of 1905 a suit for the recovery of immoveable property from a tenant would not have been valued in accordance with section 8 of the Suits Valuation Act, but in accordance with section 14 of the Civil Courts Act. Section 14 has not been expressly repealed and the only question we have to determine now is, whether it has been impliedly repealed by Act VI of 1905 in respect of suits under section 7 XI (cc). This latter Act is only an amendment of the Court Fees Act, and only incidentally affects the Suits Valuation Act by creating a new category of suits falling under section 8 of that Act, and impliedly removing such suits from the provisions of section 14 of the Madras Civil Courts Act. In the Suits Valuation Act it is expressly laid down in section 6 that when rules are framed under section 3, section 14 of the Civil Courts Act shall be repealed. From this it is obvious that the Suits Valuation Act, when passed, was not intended to repeal section 14 until a certain event happened, and that event has not happened, but by enacting Act VI of 1905 the Legislature has not only amended the Court Fees Act, but has incidentally withdrawn a certain class of suits, the one under consideration, from the provisions of section 14, Civil Courts Act, and added it to those falling under section 8 of the Suits Valuation Act. Whether the Legislature intended Act VI of 1905 to have this effect or not, it is clear that the effect has been caused, and consequently the law must be deemed to have been changed by the later enactment. The fact that the Civil Courts Act is an Act applicable only to the Presidency of Fort St. George, whereas the amending Act applies to the whole of India, does not in my opinion affect the question, for the greater contains the less, and the law laid down in the amending Act is applicable to Madras as well as to other parts of India. The ruling reported as *Chalasamy Ramiah*

(1) 25 Ind. Cas. 975; 12 A. L. J. 933

(2) 13 Ind. Cas. 903; 11 M. L. T. 155; (1912) M. W. N. 199.

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v. *Chalasamy Ramaswami* (2) has very little bearing on this case, for it does not deal with section 7, clause XI (cc) and all that can be said is that some of the observations in the judgment to certain extent support appellant's line of argument. The ruling in *Nandan Singh v. Debi Din* (1) is if anything, against him. I would, therefore, dismiss the appeal with costs. Letters Patent Appeal No. 276 follows.

SADASIVA AIYAR, J.—I concur in dismissing the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 367, 368 & 369 OF 1914.

August 11, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

SUKRAMANIA MUDALI AND OTHERS—
DEFENDANTS—APPELLANTS

versus

KUPPAMMAL—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sec. 1, Art. 91—Sale. Deed giving no present interest in property—Suit to set aside deed on ground of fraud—Starting point of limitation.

A suit to set aside a sale-deed on the ground of fraud, where the deed does not give any present interest in the property is within time if brought within three years from the date of the defendants' attempt to take unlawful possession of the property.

Singarappa v. Talari Sanjivappa, 15 M. L. J. 228; 28 M. 349, followed.

Appeals against the order of the District Court of North Arcot, in Appeal Suits Nos. 87, 88 and 113 of 1914, preferred against that of the Court of the District Munsif of Vellore, in Original Suits Nos. 360 to 362 of 1912.

Mr. W. V. Ranganayana Aiyengar, for the Appellants.

Messrs. N. S. Narasimhachariar and K. S. Ganesa Aiyar, for the Respondent.

JUDGMENT.—The decision in *Singarappa v. Talari Sanjivappa* (1) is exactly in point. At this stage we are not required to examine the averments in the plaint and to say whether plaintiff can succeed in the face of the deed she had executed. The plaint sets up a case of fraud, and states that the defendants were not given any present interest in the property. The cause of action is stated to be defendants' unlawfully taking possession of the property. Therefore, (1) 28 M. 349; 15 M. L. J. 228,

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according to the plaintiff, the necessity for suing to set aside the sale-deed arose on the attempt to take unlawful possession, which event happened within three years of the suit. The decision in *Singarappa v. Talari Sanjivappa* (1) follows an earlier ruling of this Court in *Sundaram v. Sithammal* (2), which has been accepted as good law in *Vithai v. Hari* (3); the decision of the Judicial Committee in *Janki Kumwar v. Ajit Singh* (4) has been considered in the Madras and Bombay cases. Our attention has not been drawn to any case in which *Singarappa v. Talari Sanjivappa* (1) has not been accepted. We must, therefore, dismiss the appeals with costs.

Appeals dismissed.

(2) 16 M. 311; 3 M. L. J. 144.

(3) 25 B. 78; 2 Bom. L. R. 638.

(4) 15 C. 58; 14 I. A. 148; 12 Ind. Jur. 9; 5 Sar. P. C. J. 92; Radque and Jackson's P. C. No. 99.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 859 OF 1913.

July 8, 1915.

Present:—Mr. Justice Beaman.

THE ADVOCATE GENERAL—

PLAINTIFF

versus

JIMBABAI AND OTHERS—DEFENDANTS.

Cutchi Memons—Custom—Personal law—Hindu Law—Muhammadan Law—Presumption—Will—Gift—Request—Interpretation—Disposition of whole property, power of—Conversion to Muhammadanism, effect of—Law, uniformity and certainty of—Courts, policy of—Joint Hindu family—Power of disposition by Will—Succession and inheritance, distinction between—Custom, revocation of—Trusts and life-estates in Muhammadan Law—Evidence of members of Bar, value of—Evidence Act (I of 1872), s. 48.

The Cutchi Memons have acquired by custom the power of disposing of the whole of their property by Will. [p. 121, col. 1; p. 148, col. 2; p. 152, col. 1.]

The Cutchi Memons have never adopted as part of their Customary Law the Hindu Law of the joint family, as a whole, or the distinction existing in that law between ancestral family, and joint family and self-acquired property. [p. 148, col. 2; p. 152, col. 1.]

The Cutchi Memons are subject by custom to the Hindu law of succession and inheritance as it would apply to the case of an intestate separated Hindu possessed of self-acquired property, and no more. [p. 148, col. 1; p. 152, col. 1.]

A Will by a Cutchi Memon recited—

(1) The executors "shall out of my 'punji' set apart three lacs," etc., "shall spend according to law the said sum or certain portions thereof in connection with some good works of charity in such manner as they may think just and proper such as sanitarium, *suvaddkhana* (lying-in-hospital), *musafarkhana* (resting house for travellers), *madressas* (schools), *scholarships*,

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dharamshalas, medical dispensaries, etc., (*i. e.*), in connection with any such *khaicat* (that is, charity work), that is in connection with such different works of charity."

(2) "Should no son be born to me agreeably to what is written above or should (one) be born (and) should (he) die without leaving a son or heir, . . . then as regards my whatever '*panji*' there may be left, they shall utilize the whole of the said '*panji*' or portions thereof in such manner as they in their discretion think proper in connection with the above-mentioned or any other good works of '*khaicat*' (charity):"

Held, that the Will was a good and valid Will in all respects, and that the bequests to charity were neither void for uncertainty nor bad under the Muhammadan Law as offending against the radical principle that a gift must be made *in presenti* and not conditioned *in futuro*. [p. 152, col. 1.]

On conversion to Muhammadanism, converts, no matter what their previous religion may have been, must be taken at that moment to have renounced all their former religious and personal law in so far as the latter flowed from and was inextricably bound up with their religion, and to have substituted for it the religion of Muhammad with so much of the personal law as necessarily flows from that religion. [p. 111, col. 2.]

The Wills of Cutchi Memons must be interpreted, where interpretation is necessary, in the light of the Muhammadan rather than of the Hindu Law. Where, therefore, it is a question whether a devise by a Cutchi Memon is good or bad, the answer must depend upon whether it conforms in essentials with the requirements of the Muhammadan Law of gift. [p. 149, col. 2; p. 116, cols. 1 & 2; p. 115, col. 2; p. 121, col. 1.]

A Court should rather look to uniformity of legal decisions than to nice logical or philosophical accuracy. Policy requires that there should be continuity in legal decisions, for nothing can be worse than keeping the law in perpetual uncertainty and so perhaps unsettling titles which have for many years been supposed to be thoroughly sound and marketable. [p. 148, col. 2.]

Muhammadans must, in the first instance, be presumed to be governed by the Muhammadan Law. [p. 109, col. 2; p. 115, col. 1.]

Bequests by Will are after all only gifts to take effect upon the death of the donor, and as such originally belong to the law of gift. [p. 116, col. 1.]

The power of disposing by Will of a man's property can have no logical connection whatever with the Hindu Law of the joint family. [p. 109, col. 2; p. 110, col. 2.]

Obiter.—As the adoption of a custom is by the volition of the party adopting, so it is equally in their volition to abandon any such custom and once again place themselves strictly under their proper unmodified law. [p. 112, col. 1.]

The distinction of the English Law between succession and inheritance does not exist in India. [p. 112, cols. 1 & 2.]

Trusts are utterly unknown to the Muhammadan Law and so, too, is the power of creating a succession of life-estates. [p. 116, col. 1.]

Quere.—Whether the making of Wills is part of the law of succession and inheritance? [p. 110, col. 1; p. 148, col. 2.]

Quere.—Whether on the question of sects of Muhammadans having adopted special customs of the Hindu Law, the opinion of the Bar is relevant under section 48 of the Indian Evidence Act? [p. 116, col. 2; p. 117, col. 1.]

FACTS.—A Cutchi Memon of Bombay died possessed of a very large estate, the major part of which was ancestral. About six months before his death he made a Will by which he bequeathed his whole property, self-acquired as well as ancestral, to

(1) charity;

(2) his mother, widow, two sisters, one sister's son and the other sister's daughter, all of whom survived the testator.

The Will recited *inter alia*:

The executors "shall out of my '*panji*' set apart three lacs", etc., "shall spend according to law the said sum or certain portions thereof in connection with some good works of charity, in such manner as they may think just and proper, such as hospitals, sanitarium, *samaradkhana* (lying-in-hospital), *musafar-khana* (resting house for travellers), *madressas* (schools), scholarships, *dharamshalas*, medical dispensaries, etc., *i. e.*, in connection with any such '*khaicat*' (that is, 'charity' work), that is, in connection with such different works of charity." (Clause 24.)

"I have no issue now whatever, as written above, but should hereafter, by the grace of God, any children be born of the womb of my present wife, or should I hereafter publicly marry another lady of my caste and creed according to the custom of my caste and creed and should any children be born of her womb hereafter, and should daughters be so born to me, I direct... shall set apart a sum of rupees one lac for each of my daughters, and they shall," etc. (Clause 25.)

"Should any son or sons be born to me agreeably to what is written above by my present or any other wife," etc., "then after paying, etc., my said son alone shall become the owner thereof should I have only one son, or my said sons shall become the owners thereof in equal shares should I have more than one, . . . but should any son whatever of mine die without leaving a child after his marriage but before attaining the age of eighteen years, his brother or brothers shall become his heir or heirs and should such deceased son have no brothers, then, under the circumstances first mentioned, the whole share of the deceased or, under the

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circumstances *secondly* mentioned, his remaining share shall be included in my remaining 'punji' and the same shall be utilized in 'khairat' (charity) in accordance with what I have hereinafter written." (Clause 26.)

"They shall utilize the whole of the said 'punji' or portion thereof in such manner as they, in their discretion, think proper in connection with the above-mentioned or any other good works of 'khairat' (charity)." (Clause 27.)

On account of a disagreement between the executors the provision of the Will relating to charity was not fully complied with. Therefore, the Advocate-General of Bombay filed an Administration suit, impleading all the legatees as defendants.

Mr. Bahadurji (Advocate-General) and Mr. Taraporevala, for the Plaintiff.

Messrs. Wadia and Mulla, for Defendant No. 1.

Messrs. Inverarity and Kanga, for Defendant No. 2.

Messrs. Bahadurji and Davar, for Defendants Nos. 3 and 4.

Messrs. Jinnah and Campbell, for Defendant No. 5.

Messrs. Setalvad and Desai, for Defendant No. 7.

JUDGMENT.—The substantial questions to be answered here are: (1) whether a Cutchi Memon is entitled to dispose of more than one-third of his property by Will; (2) whether certain bequests to charity in this Will are void or are good and valid bequests. Implied in these questions is a consideration of the long-standing controversy as to the precise extent to which the sect of Cutchi Memons is governed, not by the Muhammadan, but by the Hindu Law.

When the case came on for trial, it was hoped that it might be made a test case for the settlement of several points upon which a difference of opinion still exists in the mixed law administered by this High Court to the two sects of Khojas and Cutchi Memons; and it was with that object in view that all the learned Counsel concerned spared no efforts to collect and bring before the Court all available material and directed their arguments to an extensive and searching survey of this entire field of law.

Ever since Sir Erskine Perry's famous judgment delivered in the year 1847 in what

what is commonly known as the Khojas Memon's case, *Hirbae v. Sonubae* (1) it had become almost customary in this Court to treat these two sects as though they were on precisely the same footing and must necessarily be governed to the same extent by the mixed law declared by one decision after another to be applicable to them. In the course of the trial it became clear that however the questions directly in issue be approached, the evidence confined to practices and customs of the Khojas could not really be relevant. Assuming that the Court had to enquire here into an alleged custom of the Cutchi Memon sect its decision will have to be given upon evidence that such a custom had universally prevailed and been long established not amongst the Khojas, but amongst the Cutchi Memons. Nor could the mere fact that evidence was forthcoming to show that a similar custom has been adopted by the Khoja community make that evidence relevant in this case. It is perhaps unfortunate that the expectations, with which the trial was entered upon, have so far been frustrated, that the judgment can declare no more than what is shown to be the law governing the powers of Cutchi Memons to dispose of their property by Will. It is further to be noted that notwithstanding the habit of regarding the Khojas and Cutchi Memons as in all respects identical for the purposes of such a discussion, they are really distinguishable upon broad theoretical grounds which might have, if they have not had, practical consequences. While there are many peculiar features in the sectarianism of the Khojas, strongly marking them off from orthodox Muhammadanism the Cutchi Memons, except for the alleged historical fact that they were originally Hindus and were converted four hundred or five hundred years ago to Muhammadanism, are, at the present day, strict and good Moslems. In a recent case of *Jan Mahomed v. Datu Jaffar* (2), I examined the whole case-law touching both the Khojas and the Cutchi Memons critically and, I think, exhaustively. It was a great satisfaction to me to find that Macleod, J., is in entire agreement with the conclusions then reached. In a very recent case of

(1) (1847) Perry's O. C. 10; 4 Ind. Dec. (o. s.); 100ⁱ 2 Mor. Dig. 431.

(2) 22 Ind. Cas. 195; 15 Bom. L. R. 1044; 38 B. 449.

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Mangaldas v. Abdul Razak (3), that learned Judge had to deal with a cognate point indirectly arising out of the general proposition, which must be said to have been established by the decisions of this Court, that the Khojas and Cutchi Memons are governed by the Hindu Law in all matters of simple succession and inheritance. I think that Macleod, J.'s judgment in that case is theoretically correct and draws more than one very necessary distinction. The very same questions indirectly arise here, as, I think, they always must, until this Court has decided much more clearly than it ever yet has done within what limits the practical application of the proposition I have just cited must be confined; for it is obvious that in considering the testamentary capacity of a Cutchi Memon the Court will almost necessarily be brought at once into contact with the legal notions peculiar to the law of the joint Hindu family. I think it will be convenient to incorporate the whole of my judgment in the case of *Jan Mahomed v. Datu Jaffar* (2) by reference here. It would be mere idle waste of time and vain repetition to cover the ground again; and such criticism as has been directed against parts of that judgment in the present argument has only confirmed me in the conviction that it is substantially accurately reasoned and lays down correct conclusions. In minor points it might require modification here and there in the light of the fuller information given me during this trial regarding the procedure and details of the cases tried before Sir Erskine Perry in 1847 and Scott, J., in 1885. But as a *critique raisonnee* of the manner in which the legal doctrine grew in this High Court and came to be accepted by succeeding Judges and the profession generally, I still entirely adhere to it. It has been a source of great satisfaction to me that in the course of his able and interesting argument, the oldest, greatest and by far the most experienced Advocate of this High Court at the present time more than once admitted the general correctness of my reasoning throughout my judgment in the case of *Jan Mahomed v. Datu Jaffar* (2). He said that it had been his own view as far back

as 1885 when he advanced it tentatively before Scott, J., in the case of *Mahomed Sidick v. Haji Ahmed* (4). But he thought it was now much too late to undo what had already been done and had endured through these years into a settled doctrine of the Court and the accepted rule of practice with the profession. To that extent I am prepared to agree with Mr. Inverarity.

Speaking broadly, in dealing with any case of this kind arising among the Khojas or Cutchi Memons, I feel myself bound to start from the proposition that these sects are governed by the Hindu Law of simple succession and inheritance, but looking to what I still cannot help thinking the very loose and often very inaccurate manner in which that doctrine came to be established, I should insist on confining it within the narrowest permissible limits. Take, for example, the case tried by Scott, J., in 1885. There, as here, the question was as to the extent of the testamentary capacity of a Cutchi Memon. The learned Judge appears to have started actually with what I conceive to be the correct general proposition that Muhammadans must, in the first instance, be presumed to be governed by the Muhammadan Law; but, as he proceeded, as far as I can see, not upon evidence, but upon the case-law, to substitute the presumption that in all matters of succession and inheritance they were governed by the Hindu Law, the first presumption was in the case he actually had to try merely nugatory and need not have been stated. Enlarging his second proposition to an extent which I have endeavoured to show is not logically legitimate, he also presumed the existence amongst the Cutchi Memons of a very special feature of the law of the joint Hindu family; and he appears to have thrown on the party alleging that a Cutchi Memon had a right to dispose of his property by Will the burden of proving that that right included ancestral as well as self-acquired property. But the power of disposition by Will, as a general legal notion, can have nothing whatever to do with the very special notion of ancestral property as an integral part of the law of the joint Hindu family. The question really was not whether a Cutchi Memon could prove as special custom that he

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had the right of disposing by Will of joint ancestral family property, but a totally different question, *viz.*, whether the Hindu concept of the joint Hindu family had been adopted as a custom amongst the Cutchi Memons. The onus of proof, had the question been rightly stated, would then have been on the party alleging that the Cutchi Memons had adopted, as a custom, the whole law of the joint Hindu family. Nothing of that kind has ever been admitted. Nor does it follow from the proposition that the Cutchi Memons are governed by the Hindu Law of simple succession and inheritance that they are also governed by the whole law of the joint Hindu family. As I pointed out in my judgment in *Jan Mahomed v. Datu Jaffar* (2) it is extremely difficult, if indeed not impossible, to disentangle parts of the concept of the joint Hindu family from what might otherwise be called the Hindu Law of simple succession and inheritance. It may be doubted whether the making of a Will is, in strictness, part of the law of simple succession and inheritance. It has been strongly contended in this case that it must be so; and while I am prepared to accede, subject to reservations, to that contention, I should still insist upon imposing upon it very definitive limitations. In the first place, as I stated in summarising my analysis of the case-law in my judgment in *Jan Mahomed v. Datu Jaffar* (2), I think that logically the very loose general proposition should be thus qualified, that the Khojas and Cutchi Memons are governed by the Hindu Law of simple succession and inheritance as in the case of a separated Hindu disposing of his self-acquired property. Subject to that qualification, the rule would not be open to any very serious theoretical and to no practical objection at all. But as soon as it is supposed to imply other Hindu notions peculiar to the law of the joint Hindu family, it is open to both theoretical and practical objections of the most serious kind: theoretical, because the rule can only be said to rest upon proved customs, and no custom of this kind has ever been alleged, let alone proved; practical, because no Cutchi Memon or Khoja could ever then dispose of his property without the risk of having his Will attacked on the ground that the property disposed of was joint family property or joint ancestral family

property. The nucleus doctrine would come into play and the door would be opened to interminable inquiries as to the remote origin of the testator's wealth. I have said that, rigorously analysed, the power of disposing by Will of a man's property can have no logical connection whatever with the Hindu Law of the joint family. Just as in the case of a gift *inter vivos*, so a man can only dispose by Will of that which is his own. According to the very special and artificial concept of the joint Hindu family, no member of it can say that any part of his common wealth is his own. There can never, therefore, be any question of disposing of the joint family property either by Will or by gift *inter vivos*. But in the case of Muhammadans, who may have adopted from the Hindus the custom of disposing of their property by Will, it does not follow that any such difficulties need arise. Eliminate the notion of the joint Hindu family, and all the property which has come to a man from his father, although he might have children of his own, would, under the Muhammadan Law or any other than the Hindu Law, be his own to dispose of as he chose. Before, then, the power of disposition by Will could be controlled by the law of the joint Hindu family, it would be essential to prove that the testator had adopted the custom of the joint Hindu family and if it were found that he had disposed of the property which, under that law, would be joint family property, the result would be that his Will was *pro tanto* bad, simply because he had given away what was not his own. Observe further that as long as a joint Hindu family is in existence there can, strictly speaking, be no question of succession or inheritance at all. If then the result of the long series of cases in this High Court were no more than to establish a custom amongst the Khojas and Cutchi Memons in virtue of which they can be said to be governed by the Hindu Law of simple succession and inheritance, that custom *ex vi terminorum* must lie wholly outside the law of the Hindu joint family. Under the strict Muhammadan Law power to dispose of the property by Will is restricted to one third. Muhammadans claiming to have adopted the custom giving them larger powers of disposition from the Hindu Law

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might well prove that they had in consonance so far with that law customarily disposed of their whole property; and yet may also prove, attempt or desire to prove, that in any other respects they had not adopted the law of the Hindu joint family. In fact, as I have just said, so far from the latter being a necessary corollary to the former, it is, when closely scrutinised, properly antithetical to it.

Looking back over the cases decided by Sir Erskine Perry and Scott, J., I think it must be admitted now that the evidence in the former case went far beyond the scope of the question which alone fell to be determined. Taking the case of the daughters, for example, I believe Sir Erskine Perry really meant to find that a custom had been proved showing that the parties had virtually adopted the whole Hindu Law; or perhaps it will be more correct to say that he believed the evidence to prove that in spite of their conversion they had always substantially retained that law, and the special custom with which alone he was concerned was proved rather in derogation of the Hindu than of the Muhammadan Law; for, unless he had also meant to find in the case before him that all the parties concerned constituted a joint Hindu family, the exclusion of the daughters would have been as repugnant to the Hindu as to the Muhammadan Law. In the case before Scott, J., nearly 40 years later, the trial again appears to me to have proceeded on the presumption that many of the characteristic features of the law of the Hindu joint family had been adopted by the Cutchi Memons and very likely had those trials been more rigorously (I mean more rigorously in the logical sense) conducted, some such result might have been obtained. But in view of what was actually in controversy, I cannot help thinking that the results were unsatisfactory. I think it still remains impossible to say that in any single case reported in our law books up to the present day has it been alleged that either the Khojas or the Cutchi Memons have adopted by special custom the whole law of the joint Hindu family. Doubtless it has always run through the minds of the numerous eminent and learned Judges, who had to try this question in various forms, that these two sects of

the Khojas and Cutchi Memons were originally Hindus. They, therefore, appeared to have found it a very easy inference that in spite of their conversion to Muhammadanism they should have preserved their whole original personal law. But while such an inference might be used as lightening the burden of proof, it could not properly, in my opinion, be made the ground for such large conclusions as have been drawn from it. On conversion to Muhammadanism, converts, no matter what their previous religion may have been, must be taken at that moment to have renounced all their former religious and personal law in so far as the latter flowed from and was inextricably bound up with their religion, and to have substituted for it the religion of Muhammad with so much of the personal law as necessarily flows from that religion. Thus, when the Khojas and the Cutchi Memons were converted, I take it to be an universally true proposition that, in the eye of the law, they then became subject, in every respect, to the Muhammadan and not to the Hindu Law. Whatever may have happened later, there was at the time a break, a new starting point, from which all their legal relations must be re-adjusted. Remembering that these two sects were surrounded by their former Hindu co-religionists and were living frequently in a Hindu Raj with access only to Courts presided over and administered by Hindu Judges, it is extremely probable, apart from all other considerations that they should gradually have re-adopted much of their old law, not indeed as law but in the form of custom. It is quite possible that that process went very far, probably two or three centuries ago, when these people were few and, for the most part, poor. It cannot, however, be denied that in the case of both the sects, their adherence to Muhammadanism has withstood anything like a complete re-incorporation with their former Hindu co-religionists. I have pointed out in my judgment in *Jan Mahomed v. Datu Jaffar* (2) how intimately connected the whole theory of the joint Hindu family is with radical religious concepts, and for that reason if the Muhammadanism of these people was at any time a real religion, something more than an empty name, I do not see how it is possible that they could have reverted completely to

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the old Hindu family system. Many features they may have adopted, and probably did adopt, from it. This, I think, is quite evident from the depositions of the witnesses examined in the earlier cases. But the later tendency has been, I think, in the direction of stricter adherence to the Muhammadan and completer severance from the Hindu Law. In this connection it must never be forgotten, what was tersely stated by their Lordships of the Privy Council in the case of *Abraham v. Abraham* (5), that inasmuch as the adoption of a custom is by the volition of the parties adopting, so it is equally in their volition to abandon any such custom and once again place themselves strictly under their proper unmodified law. If that is the correct legal view, it will follow that in the case before me I have to consider whether the Cutchi Memons have proved a custom authorising them to make Wills, and, if so, what are the limits of that custom. Along with this question will have to be considered the further, though quite distinct, question whether they have also been proved to have adopted the law of the joint Hindu family. For, if the last question be answered in the affirmative, then the quantum of the property of which they might dispose by Will might be very different in any given case.

It will be observed that the sixteenth issue has been designedly worded in rather curious form, inviting the Court to decide whether the testamentary powers of a Cutchi Memon are not those of a Hindu; that is to say, impliedly, whether a Cutchi Memon is liable to certain disabilities in disposing of his wealth which attach to a Hindu under the law of the joint Hindu family. And it is the implication, I think, rather than what is expressed in the issue that the parties to this case feel to be of primary importance. Let me then consider a little more closely in what sense and how far making Wills can be said to be a part of the Hindu Law of simple succession and inheritance. Looking to our own Succession Act, which is largely concerned with devises, it cannot be doubted that, speaking loosely at any rate, Wills in the contemplation of lawyers belong to the law of succession and inheritance. Is there then any distinction between succession and

inheritance? At the present day probably none of practical importance. Viewed historically, succession was a term probably confined to moveables and inheritance to immoveable property; and under the old law of England different persons would succeed or inherit, respectively. It is difficult, however, to find any ground for such a distinction in this country. There is no common law of India in the same sense in which there is a common law of England. In dealing with Hindus and Muhammadans, where they are not expressly governed by Statutes, the business of the Courts is to apply to them, as far as possible, their own law. It is only where their own law does not apply and they are not under Statute that the Courts turn to the common law of England, or govern their decisions by what is very generally termed, the principles of equity and good conscience. Admitting that Wills belong more properly to the law of succession and inheritance than to any quite distinct law of their own, the question is not yet completely answered. In the first place, the power of disposing of property by Will is no more peculiar to the Hindu than to the Muhammadan Law. On the contrary it is in the latter system that we find more positive restrictions placed upon the disposing power, and apparently more definite ideas formulated in legal rules. For the purposes of the present enquiry what has to be considered is: (1) the Muhammadan rule prohibiting a man from disposing of more than one-third of his property by Will; (2) the limitation imposed upon the disposing power of individuals under the Hindu Law arising out of the legal conception of the estate of a Hindu joint family. I am not now concerned with further technical qualifications and conditions to be found in the Muhammadan Law of Wills. I have stated the main distinction in the most general terms. And, so stated, this at least becomes apparent, that what is in controversy really has nothing to do with the making of Wills *qua* Wills, but with what under the Hindu system defines the property which is a man's own and, therefore, capable of being devised by him. This is what is really meant by the plaintiff in this suit, who wishes to prove that the disposing power of

(5) 9 M. I. A. 195; 1 W. R. (P. C.) 1; 1 Suth. P. C. J. 591; 2 Ser. P. O. J. 10; 19 E. R. 716.

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a Cutchi Memon is in all respects that of a Hindu. But before such a proposition can be established, those contending for it must prove that the Cutchi Memons have adopted the law which embodies the concept of joint family property. And here I should like to add a few observations upon what I have stated a little more generally in the opening part of this judgment. When I said that no such custom as that of having adopted the entire law of the joint Hindu family had ever been alleged, much less proved, in our Courts, I am not to be supposed to have overlooked what appears to have been in controversy, the procedure adopted and the conclusions reached in such cases as those of *Mahomed Sidick v. Haji Ahmed* (4) and *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy* (6). The latter is a Khoja case. In the latter case a son sued his father for partition. Both the parties appear to have gone to trial upon the footing that the law of the joint Hindu family had been accepted as part of the Customary Law of the sect to which they belonged. In the first Court, the trial was, therefore, principally directed to ascertaining whether the property in suit was ancestral or self-acquired. On appeal, however, the case was decided on a narrower ground suggesting a reversion to an earlier stage of the law, in which it still lay upon Muhammadans alleging themselves to have adopted any peculiar feature of the Hindu law to prove it. Merely expressing *obiter* an opinion as to the character of the property in suit, the Appeal Court held that the parties had not proved that their sect had adopted so much of the Hindu Law of the joint family as would entitle a son to demand partition of his father. I am not here concerned with the reasoning by which that conclusion was reached. The only comment I need make upon it is that it involves much of that large process of inference, unsupported by direct proof, which has characterised the whole long course of litigation affecting in this respect the Khoja and Cutchi Memon sects. Further, if the Khojas had really, as appears to have been taken for granted, adopted the rest of the law of the Hindu joint family, while they had not adopted that part of

it which gives the son a right to enforce partition against his father, it is obvious that the resultant system amongst them must be radically different from the recognised system prevailing among the Hindus under the Hindu Law of the joint family. It is an essential feature of that law that every member of the joint Hindu family takes an interest in the joint family property at birth; and it is a correlate of that proposition that a member invested with such rights can, if at the head of his stirp, enforce it by partition. The broad principle, perfectly clear and intelligible in itself, became obscured in the controversy arising upon the right of a son to enforce partition between his father and his uncles. Partition in a Hindu joint family being always *per stirpes*, such a right would conflict with the fundamental principles upon which the whole system rests. And it appears to me that there is very little relevance in introducing the divergent opinions of Judges upon such a point into a consideration of a much wider and simpler proposition. I do not know that in this Presidency any doubt exists as to the right of a son to enforce partition of joint family property against his father; and as I pointed out in my judgment in *San Mahomed v. Datu Jaffar* (2), the Privy Council have emphatically insisted upon the correlation of the two rights, that is to say, acquiring an interest by birth and enforcing it by partition, as being inseparable from, and complementary of, each other making up the basic principle of this part of the law of the joint family. By introducing such a variant as that the son amongst the Khojas has not the right to enforce partition during his father's life-time, the radical difference between any such law of the Hindu joint family as the Khojas may really have adopted and that law as it exists in its complete form amongst the Hindus, has been established. Nor is it always possible to say that the customary law of these people in respect of the legal concept of the joint family is the same as the Hindu Law. The point is of capital importance because it indicates that similar radical divergences might be, and probably would be, found, had the question ever been specifically raised between the customary law of the Khojas and Memons,

(6) 13 B. 534.

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and the Hindu Law regarding the distinctions drawn in the latter between joint ancestral, joint family and self-acquired property. And what I was insisting upon in my general observations was that neither amongst the Khojas nor the Cutchi Memons is any reported case to be found in which a party has expressly alleged that the Hindu Law of the joint family, containing the peculiar legal concept of the joint ancestral or joint family property, has ever been adopted by these sects. On the contrary, in the two cases I have mentioned, it has been assumed, and assumed merely inferentially from the earlier decisions, that such wholesale adoption of the complicated Hindu Law of the joint family had been made by both the Cutchi Memons and the Khojas. In the case before Scott, J., the question again turned directly upon the character of the property alleged to have been disposed of by the impugned Will; and again it was taken for granted that if it was ancestral, the burden of proving that the testator had power of disposing of it lay upon the party so alleging. Now, it is obvious that the same kind of inquiry might as well be entered into in the case of any English Will, once a presupposition is made that if the property disposed of complies with certain requirements it also gains a peculiar legal character. An enormous percentage of property disposed of by English Wills in England might be shown to be ancestral family property, in the sense that it has come into the hands of the testator under conditions which in Hindu Law would imprint that character upon it; but it would be absurd to say that, unless it could also be shown that the English Law had adopted the concept of the Hindu joint family, the resulting corresponding legal consequences from the facts proved arose. That is a point which I wish to emphasise. If it had not been virtually assumed by the Courts that amongst the Khojas and Cutchi Memons, property falling within the definition of ancestral family property or joint family property in the Hindu Law also acquired the peculiar characteristics given to it under the special law of the joint Hindu family, there would have been no point at all in the enquiries made by the Courts in the two cases I have mentioned.

To this the answer would naturally be, that unless the parties themselves had been fully aware that their sects had adopted the whole Hindu Law of the joint family, they would never have gone to trial on the issues raised in these cases. That answer is plausible but, in my opinion, not conclusive. As regards the particular contestants their admissions might suffice, but the admissions of parties in any given case would hardly be an adequate equivalent for that strict and elaborate proof which the law requires when such special custom is set up and disputed in derogation of the general law governing litigants. I have also pointed out in my previous judgment that forty years after Sir Erskine Perry's decision in the *Khojas and Memons'* case (1) it would have been virtually impossible for any member of these sects to obtain legal advice at this Bar except upon the footing that they were, to all intents and purposes, Hindus and not Muhammadans. That opinion had struck deep roots and no doubt gathered some support from the nature of the evidence recorded before Sir Erskine Perry, confirmed by the long and virtually settled practice on the Ecclesiastical Side of the Court, and it is indisputable that long before 1885 the Courts and the whole profession here had settled down to the unshakeable belief that the decisions of the Court had firmly established the rule that the Khojas and Cutchi Memons were, in respect of their entire family system, Hindus and not Muhammadans. I have already criticised the value of the long-established practice on the Ecclesiastical Side of the Court and it would be waste of time to repeat that criticism here. I still think that far too much importance was attached to those materials in every case in which they were referred to. It probably is true that when such questions first came before this High Court a very large number of Khojas and Cutchi Memons were saturated with Hindu notions regarding the law of the joint family. They would be predisposed to accept the decisions of the Courts as interpreted by the profession generally and so gradually habituate themselves to the belief that in law, at any rate, rather owing to the decisions of the Court than any volition of their own,

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they were subject to the whole law of the joint Hindu family. In the course of the argument here, it has frequently been said that my former judgment insisted too much upon this law having been forced upon the reluctant sects of the Khojas and Cutchi Memons by the Judges and the profession. In 1847 I do not think that either sect would have thought it a very serious hardship had the Courts decided that in the eye of the law they were Hindus and not Muhammadans. The Courts never did decide anything of the kind; but I concede that, on the evidence before him, Sir Erskine Perry probably thought that the Khojas and Cutchi Memons had virtually retained the whole of their domestic and personal law as distinct from religion. No one could then have foreseen the length to which the judgments in those cases would afterwards be carried. And it is no doubt true to some extent, as contended by Mr. Inverarity in this case, that the most serious grievance which the Khojas and Cutchi Memons now have is, not that they have been placed definitely under the Hindu Law, but that they are perpetually being called upon to prove this or that custom in derogation both of the Muhammadan and of the Hindu Law. They stand now in the unfortunate position of being governed in many most important relations in life neither by the Hindu nor by the Muhammadan Law. Legally their condition is one more or less of chaos and that undoubtedly has been brought about by the loose and often inaccurate reasoning and wide inferential processes upon which I have commented in my criticism of the case-law. Had that law been constructed step by step as each case came before the Courts by strict logical process, always starting from the first presumption that, as Muhammadans, these people were governed by the Muhammadan Law, and any alleged custom in derogation of it must be proved, the result might have been, and I think it would probably have been, very different. In a sense then I do think that this law has been forced upon the Khojas and Cutchi Memons by the Courts and the profession, although it is arguable whether during the process, at any rate in its

earlier stages, the bulk of the communities realized what was going on, or took any strong objection to it. As they increased in wealth and intelligence, however, indications are not wanting of some resentment at being thus compelled to appear in the Courts as Hindus rather than Muhammadans. The Cutchi Memons, with whom I am presently concerned, are undoubtedly good Moslems and feel deeply the imputations cast upon them by their co-religionists on account of the length they have gone, or are supposed to have gone, in substituting the Hindu Law of the joint family for the laws of the Quran. Speaking of the Quran, I may note in passing that the restrictions imposed upon the power of a Muhammadan to bequeath more than one-third of his property by Will are not to be found in the Quran at all. Yet this has been so long an integral part of their own Muhammadan Law and is supposed to be based upon a view of family obligation and duty approved by the Prophet, that any departure from it now can hardly be altogether dissociated from the profoundly religious sentiment which forms the basis of and interpenetrates the whole of the systems of the Muhammadan and the Hindu Law respectively. In this connection another point also arises. Assuming that the Cutchi Memons have adopted and proved the custom of making Wills at present of their whole property, are such Wills to be interpreted by the Muhammadan or the Hindu Law? Upon this point, I believe, no considered judgment is to be found in our Courts. I was told in the course of the argument that in a very recent case Macleod, J., had held that a Khoja Will must be construed by reference to the Muhammadan Law. I am strongly inclined to the same opinion. I see no solid ground for holding that even if a larger power of disposition had been acquired by the Khojas or the Cutchi Memons than they would ordinarily have under the Muhammadan Law, that law, nevertheless, should not govern all the dispositions they make in exercise of that enlarged power. Assuming for a moment that, apart from the question of joint family property, which, as I said, lies outside the scope of the law of Wills

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altogether, different constructions and different effects would have to be put upon and given to bequests under the Hindu and Muhammadan Law, then in the absence of proof of custom in each particular case, I should still hold that Memons' Wills must be interpreted and construed under the Muhammadan and not the Hindu Law. And I think that the Courts would be slow to encourage attempts to prove interminable variant customs of this kind even where the Khojas and Cutchi Memons are themselves desirous of setting them up. I entertain some doubt whether the point really has much practical importance. It is true that the Courts appear to have conceded much more liberal powers for creating various estates by Will to Hindus than Muhammadans. But I am not aware that the distinction rests upon any solid theoretical ground. Bequests by Will are after all only gifts to take effect upon the death of the donor, and as such originally belonged to the law of gift. The Muhammadan Law is much more precise in detail in dealing with gifts than the Hindu Law. And that is probably why the Courts have regarded a Muhammadan's testamentary power more jealously than that of a Hindu. But in every civilized society which has attained the point of recognizing general principles of law, however crude and elementary these may now appear, the theory of gift is originally much the same. As social relations become more complicated and require a more complex system of law, various elaborate and artificial enlargements of the simple power of gift make their appearance. I think, however, that it would be untrue to say that anything in the least corresponding with such highly evolved and extended powers as are to be found at the present day in the English Law, can be discovered in the authoritative legal writings either of the Hindus or of the Muhammadans. Trusts, for example, are, as I have had occasion to say in more than one judgment, utterly unknown to the Muhammadan Law. So, too, is the power of creating a succession of life-estates. My own conviction is that such powers were equally unknown to the early Hindu law-givers. All these, in effect, have been the creations

of the English Courts, and the fact that they have been more loosely and widely extended to Hindus than to Muhammadans is probably due, as I have just said, not to any inherent difference of principle to be found in the pronouncements of the early law-givers, but in the fact that the Muhammadans were much more precise and fuller in enunciating limitations upon the power of gift. If, however, there is any valid legal distinction to which effect ought to be given between the powers of Muhammadans and Hindus in regard to the creation of artificial estates by Will, I should say unhesitatingly that no matter what other Hindu customs the Cutchi Memons may or may not have adopted, every Will they make must be interpreted, for the purposes of ascertaining the validity or otherwise of bequests therein contained, according to the Muhammadan, and not the Hindu Law.

In this case, for the first time, an attempt has been made to prove that the Cutchi Memons have adopted the Hindu Law of the joint family virtually in its entirety; that is to say, that they recognise the peculiar quality given to joint family property by the Hindu lawyers. Further, it is sought to prove that they have adopted, as a custom, the power of disposing of the whole of their own property by Will. The burden of proving both these points, notwithstanding the previous decisions of the Courts, clearly still lies, in my opinion, upon the parties so alleging. I have, therefore, now to consider the evidence laid before me with the object of ascertaining whether it discharges all the requirements imposed by the highest judicial authority upon parties setting up special family, tribal, or local custom in derogation of their general law. The evidence naturally breaks up into three main groups: (1) the Wills, Exhibits B, B1 to B101; (2) the oral testimony of the leading Cutchi Memons; (3) the opinion of the so-called experts. As to the latter, Mr. F. E. Dinshah and Mr. Inverarity, for example, I entertain considerable doubt whether it is relevant at all under section 48 of the Indian Evidence Act. Certainly, in the case of Mr. Dinshah, even if it be relevant, it can be of little or no value. Doubtless, in questions of this kind, the

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Courts in England have always given respectful attention to the long-established practice of the profession and the opinion of eminent Counsel, as, for example, upon points of conveyancing. But where it is, as here, a question of sects of Muhammadans having adopted special customs of the Hindu Law, I feel very great doubt whether it can logically be said that even so eminent and experienced a Counsel as Mr. Inverarity is likely to know of the existence of such rights or customs. It is said that Counsel learn from their clients in the course of advising professionally of the existence or otherwise of such a right or custom as was in controversy. But I doubt very much whether that was intended by the framers of section 48. In truth, what has actually happened probably is that Mr. Inverarity's advice throughout the long period of his professional activities has done much more than any volitional act of the community themselves to imprint upon them the belief that, at any rate, for all purposes of litigation, they must accept the position of Hindus governed by the law of the joint Hindu family. Speaking for myself, I do not think that the opinion of the Bar collectively or any member of it is of any real value upon such a point. We all know what the opinion of the Bar has been, and I have endeavoured to show how it has grown up. In the course of his long and interesting argument Mr. Inverarity, notwithstanding his repeated admissions that he inclines strongly to accept the correctness of my own reasoning in the case of *Jan Mahomad v. Datu Jaffar* (2), yet strove strenuously to prove that the various cases I have criticized were quite rightly decided. It needs, however, only to study the cases themselves to discover the many flaws and fallacies in the reasoning more or less commonly accepted throughout the series which gave rise to conclusions thereafter wholeheartedly and unquestioningly adopted by the profession. But had the case no other importance, it would obtain a peculiar interest from the evidence given by Mr. Inverarity, in which the Court has had the benefit of much intimate and personal opinion growing out of his exceptionally long, distinguished and honourable practice at this Bar. If I seem not to attach as much weight to that evidence as its authorship might deserve, it is simply because I doubt whether it is the kind

of evidence which the law requires, certainly not because I undervalue Mr. Inverarity's great personal qualities and reputation.

I will now consider the proof afforded by the Wills. These are 105 in number (five of these *viz.*, B8, B14, B60, B65 and B80 were afterwards withdrawn) B, B1 to B101 and F, J and K. They commenced from the year 1845, Exhibit B, two years before Sir Erskine Perry's judgment. And here I may incidentally note that the practice of making Wills is not very ancient even amongst the Hindus. It may be doubted whether any true Hindu Will dates back more than one hundred years; and we have here a Muhammadan Will seventy years old. It is not, therefore, a case of the Muhammadans borrowing the custom from some ancient and well-established branch of the Hindu Law, but rather, as it would appear, small sects of Muhammadans, living under Hindu rule and surrounded by Hindus, adopting almost contemporaneously with their Hindu co-religionists an entirely new practice. This body of Wills has been carefully analysed by learned Counsels engaged on both sides, and minutely criticised in detail. The broad lines of attack and defence were: (a) that this long, consistent series of Wills disposing of the whole property proved conclusively that the Cutchi Memons had entirely abandoned the Muhammadan Law of Wills; (b) on the other hand, that an analysis of these Wills will show that they are hardly, if at all, inconsistent with the principles of the Muhammadan Law, and that a very large percentage of them might have been made consistently under that law. It is pointed out by the plaintiff, relying on these Wills, that they not only dispose of the whole property but also contain many allusions to self-acquired and joint ancestral family property. Further, that they create many estates opposed to the fundamental principles of the Muhammadan Law (and supposedly permissible under the Hindu Law). Neither of these lines of attack or defence appears to me to be very forcible. I shall, however, have to deal with this material a little more in detail.

Mr. Setalvad, on the other hand, tendered eighteen, but put in five, Wills said to have been made by orthodox Muhammadans. None of these Wills has been proved. When they were tendered, it was agreed in order to shorten the proceedings and lessen the cost, that they should be examined by the Counsel.

on the other side and, if necessary, admitted. At the close of the case, Mr. Taraporewalla said that he was not prepared to admit that some of the makers of these Wills might not belong to the classes of Muhammadans declared to be amenable to the Hindu Law by Mr. Justice Ranade in the case of *Bai Baiji v. Bai Santok* (7). Subject to that the Wills were allowed in, Exhibit No. 7. The suggestion is that even orthodox Muhammadans sometimes make Wills in contravention of the Muhammadan Law, although it cannot be, and never has been, inferred from that fact alone that they were in that or in any other respect subject to the Hindu Law of the joint family. The effect of the Wills put in by the plaintiff is, I think, to prove conclusively that the Cutchi Memons have adopted the custom of disposing of the whole of their property by Will. The series covers a long period and it appears to be practically uniform and consistent. To that extent, these Wills alone would, I think, be sufficient to prove the existence of the custom in derogation of the strict principles of the Muhammadan Law. The further question remains to be answered, how far, if at all, these Wills prove anything more; as, for instance, that by custom the Cutchi Memons have not actually discarded the Muhammadan Law of Wills, but have adopted the Hindu Law of the joint family. This will not be established merely by the fact that the Wills dispose of the testator's property in a manner inconsistent with the Muhammadan Law, for we have already reached the conclusion that the practice has grown up in the form of a custom in derogation of the Muhammadan Law. That being so, it is not to be expected that the societies or communities, who have intentionally abandoned so far the principle of the Muhammadan Law, feel constrained to rehabilitate it in detail by conforming, notwithstanding the practice, strictly to its precepts. This really disposes of by far the greater part of Mr. Setalvad's elaborate criticism on this part of the case. He endeavoured to show by attacking these Wills that, if in form inconsistent with the general principle of the Muhammadan Law, there was nothing in the testators' dispositions which could be taken as deliberate recognition of the whole Hindu Law. The point, however, is that every one of these Wills purports to dispose of all the disposable

property of the testator. The same line of argument used by the plaintiff is equally infirm for his purposes. Nothing appears to me to be gained by showing that a great number of these Wills create series of successive estates in opposition to the principles of the Muhammadan Law of gift. Once it is conceded that the custom of disposing of the whole of the testator's property by Will has been adopted by the Cutchi Memon sect, it is idle to scrutinise too closely the manner in which such dispositions have been made or to draw inferences from the closeness with which they sometimes correspond with, or the wideness with which they sometimes diverge from, the recognised principles of the Muhammadan Law. It is, however, significant to note that seven of these Wills bequeath one-third of the property specifically and the remaining two-thirds to the testator's heirs according to the Muhammadan Law. The first of these is B29, dated the 7th July 1886, and the last is B88, dated the 26th January 1911. By 1886 just after Scott, J.'s judgment in the case of *Mahomed Sidick v. Haji Ahmed* (4), there can be little doubt but that a strong revulsion of feeling had set in amongst the better class of Cutchi Memons and that many of them much regretted the length the Courts had gone in subjecting them to the Hindu Law of succession and inheritance and so giving cause of offence to the faithful and estranging them from their more orthodox co-religionists. The Wills I have just mentioned exhibit a strong regard for the strictest Muhammadan Law, and the reason why the testators adopt the peculiar form found in these Wills doubtless was a desire to give practical effect to what they believe to be the injunctions of their religion. Nothing could well be more anomalous than their position as it was then understood in respect of this power of making Wills. It was by no means certain in the opinion of lawyers whether the Cutchi Memons could dispose of more than one-third of their property by Will. Those amongst them who were strict Muhammadans probably did not desire to do so; but they were in this dilemma: If they left two-thirds of their property undisposed of as the Muhammadan Law compelled them to do, in order that it might be distributed amongst those whom the Quran considered to have the best right to share it, the result brought about by the case-law upto that period was that the

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undisposed of two-thirds would be taken not by the heirs designated by the Muhammadan religion and morality, but by the heirs ascertained in accordance with the principles of the Hindu Law. It is not strange then to find some pious Cutchi Memons availing themselves of the powers of full disposition, which they appear to have been in a fair way of acquiring by custom at that period, in order to comply practically, at any rate, with the commandments of their religion. Bearing in mind the large part which volition must always play in bringing a custom into existence or allowing it to fall into desuetude, indications of this kind, just at the time when the case-law on the subject seemed likely to expand most dangerously and inimically to Muhammadan religious sentiment, are of no little value. On the other hand, the plaintiff, who relies upon these Wills to prove that the Cutchi Memon community had adopted in its entirety the Hindu Law of the joint family, points to many passages in them, in which express allusion is made to self-acquired, as opposed to ancestral, family property. Thus, in B17, dated the 26th February 1878, the testator says that the "whole is my self-acquired property." So also B31, B37, B47, B50, B53, B58, B68 and B73. Reading these nine Wills, covering a period from 1878 to 1903, it certainly appears that the testators, whether of their own initiative or under legal advice, were keeping in view the peculiar attributes of joint ancestral as distinguished from self-acquired property under the Hindu Law. It is noteworthy that the first Will in which any allusion of the kind is to be found is thirty years after the date of Sir Erskine Perry's judgment, when the doctrine of the Courts was supposed to be settled and the opinion of the Bar had long been uniformly in favour of the proposition that Cutchi Memons were, for the purposes of this argument, to all intents and purposes Hindus. Whether such indications ought to be taken as conclusive of the fact suggested is quite another question. I think, it must be admitted, that the Cutchi Memons generally were fairly alive to what was implied in the term "joint ancestral family property" as forming part of the Hindu Law of the joint family. This was only natural in view of their origin and later environment. It is quite possible that in a confused and general way

they have re-adopted notions peculiar to the Hindu Law, from which at the time of their conversion and immediately thereafter they had never completely and intelligibly freed themselves. That this was done by deliberate act of volition I gravely doubt. To whatever extent the old Hindu Law of the joint family regained currency and application amongst the Cutchi Memons, it must be attributed, I should prefer to think, rather to unconscious re-absorption under pressure of the predominant Hindu environment, notions and habits long familiar, than to any conscious preference for and substitution of those notions and habits for the laws commanded by their new religion. It may indeed be doubted that either the Khojas or the Cutchi Memons were, for centuries after their conversion, thoroughly conversant with the whole of the Muhammadan Law. In the infancy of their existence they were probably not in a position to discriminate between some of the moral precepts of their new and their old religion, particularly when such were required to be practically applied in some of the most intimate relations of ordinary life. At that period too their material condition, if we may be permitted to conjecture, was probably one of almost universal poverty and insignificance. In such circumstances they might easily and unconsciously have fallen back into the old grooves of Hinduism in regulating their family life and petty personal affairs. It is quite likely that just as Muhammadans do to this day, the members of the same family lived together making no nice distinctions between the quantum of the earnings of each, and not caring to separate the personal acquisitions, such as they might have been, of every member of the family from the fund upon which they all lived. Living under such conditions they would naturally find no difficulty in believing that they were still regulated by the principles of the Hindu Law of the joint family, which would seem to be peculiarly appropriate. Nevertheless, inasmuch as they have not only retained but accentuated and heightened their religious divergence from their original co-religionists, I find it difficult to believe that they could synchronously have consented to merge so much that is essential to the Muhammadan Law in a conscious re-absorption of the Hindu Law of the joint family. By the year 1878,

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any Cutchi Memon making a Will must have been fully alive to the necessity of explaining that the property he purported to dispose of, was his own. In view of the strong line taken by the Courts, he could not have been ignorant of the danger attending the disposition of the whole of his property on the analogy of the Hindu Law. Still, so far approving of it as to desire an equal liberty of full disposition of his own property, he probably knew himself and, if he did not, would certainly have been advised, that if any property so disposed of had fulfilled the definition of ancestral family property in the Hindu sense, his Will purporting to dispose of it would have been *pro tanto* invalid. It is true that the use of such expressions would appear superfluous in the case of any one except a Hindu, subject to the law of the joint Hindu family. Even in the latter case they could be merely declaratory not carrying with them, strictly speaking, any legal consequences. The difference between a Hindu and any other person disposing of the property which had come to him from his father would be in the former case that the property was not his own to dispose of, while in the latter case it ordinarily would be. And the fact that we find in these Cutchi Memons' Wills declaratory emphasis laid on the fact that the property was not ancestral but self-acquired, certainly proves that in and after 1878, at any rate, the sect was fully aware that it was in danger of finding itself under the entire law of the joint Hindu family. That it in fact was so is conclusively proved by the course of litigation in 1885 and amongst the Khojas in 1887. I may further give by way of illustration a very recent case of *Ahmedbhoy Habibbhoy v. Sir Dinshaw M. Petit* (8), in which the same question was sought to be re-agitated indirectly. The suit was nominally for specific performance of a contract to buy certain property belonging to the plaintiff. Indirectly the plaintiff sought to obtain a judicial decision that the said property was his self-acquired property and that his sons had no interest in it as members of a joint undivided Hindu family. I tried that case and I refused to go into the question thus indirectly raised. But

the fact that it was raised, elaborately argued, and a great deal of evidence given on it as late as 1909, shows to what extent members of the Khoja and Cutchi Memon sects are, at the present time, involved in grave uncertainties as to their legal position in the present state of the case-law. It is no exaggeration to say that the accepted notions, never clearly excogitated, developed as time went on into something like chaos as regards many incidents peculiar to the Hindu Law of the joint Hindu family, which may or may not be incorporated in the Customary Law, real or supposed, of these sects. Thus, for instance, this is the first case, nearly seventy years after Sir Erskine Perry's judgment, in which the competency of Cutchi Memons to dispose of the whole of their property by Will has ever been put directly in issue. Furthermore, it is the first case in which the much more important question, whether or not merely by implication both Khojas and Cutchi Memons are subject to the complete law of the joint Hindu family, has invited express decision. It is obviously, therefore, high time that these questions of such vital importance to the two sects, who are constantly growing in intelligence and importance, were definitely answered and their legal position clearly defined. At the present day no Khoja or Memon, and many of them have accumulated great fortunes, knows how far his property is his own, or what, if any, limits are imposed upon his power of disposing of it by Will. If it be a fact, as suggested by the five Wills put in by the other side, that orthodox Muhammadans, who have nothing whatever to do with the law of the joint Hindu family, have also been in the habit of disposing of their entire property by Will, then the inference which I am asked to draw from these 105 Wills, namely, that the mere fact of disposing of the whole property of Memons by Will connotes the adoption of the whole law of the Hindu joint family, is immediately destroyed. It is not, however, on that ground only, or, indeed, chiefly that I should refuse to accede to so much of the plaintiff's arguments. In the absence of any previous case-law on the subject, and treating the matter before me as *res integra*, I should not feel even pressed by the

(8) 3 Ind. Cas. 124; 11 Bom. L. R. 545; 6 M. L. T. 200.

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production of these Wills to the conclusion that they prove, not only a custom in the matter of making Wills opposed to the stricter Muhammadan Law, but that they prove much more, namely, that the makers had also adopted the whole law of the joint Hindu family. Nothing in them, except the language of the seven Wills, I specially noted, points to any such conclusion, and that language can, I think, be easily explained by reference to the historical origin of the sect, to circumstances in which the first centuries of their existence were passed, and, lastly, the attitude of the Courts for forty years preceding the first of them without the need of making any such violent inference. My conclusion upon this body of evidence is that it proves no more than that the Cutchi Memons have adopted the custom of disposing of the whole of their property by Will. It does not prove that they have adopted the notion of joint ancestral family property with all its legal attributes and incidents as exhibited in the law of the Hindu joint family. And indirectly it affords indications of the strong leaning towards the strict Muhammadan Law which has been enlarged in favour of the Cutchi Memon community by the adoption of their special custom.

Before considering the oral evidence recorded in this case, I should like to make some general observations on those Wills in which it is declared that the testator is only disposing of his own self-acquired property. We have no means at the present day of ascertaining what the property was and how it was acquired. Naturally, with some knowledge of the Hindu Law of the joint family, a man who was disposing of what he knew to be ancestral family property in that sense, would declare in his Will that it was his self-acquired property whether in fact it was so or not. I expect that if the whole truth was known, an ingredient of the joint family property or joint ancestral property, as these terms are used in the Hindu Law, would be found in what was disposed of by these Wills. At any rate a great number of them must include much property to which such notions were at

least potentially applicable. From the mere fact that such declarations have been thought necessary, it is at least as inferable that the testator was disposing of what under the Hindu Law of the joint family was not his own to dispose of as that he was making a simple truthful declaration of fact.

The first witness examined was Sidick Ebrahim Nakoda, who is a Cutchi Memon aged fifty-three. He is a man of no consequence or social position. He says that he sells turbans and caps, and says he keeps a very small shop and pays no income tax. He begins by saying that the Cutchi Memons will away their property as they please, sometimes the whole and sometimes a part. In answer to the Court he says that the Cutchi Memons cannot dispose of ancestral property by Will. He says that his own father made a Will of his property valued about Rs. 16,000 and that he himself was disinherited. He says that this property was self-acquired. He gives no particulars as to how his father started these self-acquisitions. He then goes on to depose to the making of Wills of large estates by Cutchi Memons. This is of no great importance. In cross-examination he says that the law of succession is included in the Quran, but the custom has gone the other way. He then goes on to explain how the custom went the other way. He says that the Cutchi Memons were originally Hindus, who were converted in Sind and migrated to Cutch. He says that they were under a Raja and if they had disputes, they had to go to the Raja's Court and they were disposed of according to the law of the Raja, i. e., the Hindu Law; and that practice was still going on. He says that they applied twice to the Sirkar to place them under the Muhammadan Law, but they failed. Speaking for himself, he says that he would prefer the law of succession laid down in the Quran, but he cannot speak for the sect generally. He says that the exclusion of wives and daughters from the succession originated in the Raja's Court. If this were really so, it must have been, I suppose, on the footing that the litigants constituted a joint Hindu family at the time. The question was then put to him:

"Do you say that the law of the Hindu

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joint family has been introduced into your sect by custom?

A. Yes. If there is no Will."

Then the next question:

"Do you mean to say that the law of survivorship is applicable to you?"

(After some explanation of what was meant by the law of survivorship)

"A. No. That law does not apply, because the son of a pre-deceased son takes with his uncles. The daughter does not take with the sons."

(It is clear that the witness does not understand what he is talking about here.)

"Q. Do you say that the Hindu Law of partition applies?"

A. Yes. If one dies without a Will."

He then goes on to say that the son can claim partition of ancestral family property during the life-time of his father.

"Q. Can you give a single instance of such a partition?"

A. Yes. Abdul Rahim Haji Mussa Suleiman. His son, Ibrahim, took some money and separated; he took some Rs. 60,000. That was about two years ago.

The father gave him the Rs. 60,000. Abdul Rahim was then, and still is, doing business. His son was in the business with him, a business in piece-goods.

Q. What was the ancestral property of which this Rs. 60,000 was a share?

A. That I do not know."

[It is clear that this is not necessarily an instance of partition at all, but rather of the ancient practice of portioning a son off out of his father's wealth: see the remarks of Sargent, C. J., in *Ahmedbhoy Hubibbhoy v. Cusumbhoy Ahmedbhoy* (6)].

Further, he says that Wills have been made for the last fifty years or sixty years, only after the community migrated to Bombay.

Reviewing the evidence of this witness, as a whole, it must be admitted that it is rather emphatic in favour of the adoption of the law of the joint Hindu family, but the man himself is hardly of a character to command much confidence. Many of his answers in cross-examination suggest that he has not fully appreciated all that is involved in his earlier statements. It is not definitely so stated in his evidence, but I suppose he has spent the

whole of his life in Bombay; so that he has naturally fallen under the belief, rooted in the decisions of this Court and the practice of the profession, that the law is generally as he declares it to have become by custom. I cannot say that I attach much importance to his evidence upon the custom as a custom.

The next witness is Haji Adam Haji Usman Noorani, fifty-two years of age and a Cutchi Memon and a Shetia of the Jamat:

"Q. Do you know the custom of your community about the making of Wills?"

A. Yes.

Q. Describe it.

A. If a Cutchi Memon has self-acquired property, he can dispose of it as he pleases.

Q. Of the whole?

A. Yes. But this does not apply to ancestral property. He cannot make a Will disposing of any part of the ancestral property.

Q. How long has such a custom prevailed?

A. Since I have been in Bombay, I have observed it, that is, for forty years."

The rest of his examination-in-chief merely relates to instances of Cutchi Memons who had made Wills and is of no importance. In cross-examination, he says that he is disputing his brother's Will on the ground that the property disposed of was ancestral property. And this might account for his statement in the earlier part of his evidence that the ancestral property cannot be disposed of by Cutchi Memons by Wills. In his cross-examination, he says that he would be greatly pleased if the Government put them under the Muhammadan Law again.

"Q. You now want power to dispose of all your self-acquired property because you are told that the Courts hold that you are under the Hindu Law, and in this way you may be able to give the remainder of your property to your heirs according to the Muhammadan Law?"

A. Yes.

Q. In your community you have always been told that the Courts have held that the Hindu law governs you?

A. Yes.

Q. The whole Hindu Law?

A. Yes.

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Q. And in that belief your people have been making these Wills?

A. Yes."

He says:

"I know that Saboo Sidick left his property to his son, Mohamed. Mohamed can dispose of that property by Will."

(If the witness is right here, what becomes of his reiterated statements that the ancestral property cannot be disposed of by Will?)

Q. But if it came from his father it would be ancestral?

A. No. The father had acquired it, and the son was a partner of the father."

This again makes it quite clear that these people's notion about what is meant by the term "ancestral family property" in the Hindu Law is hopelessly confused. This witness appears to be a respectable man, but the quotations I have made from his evidence show that he has no very clear idea upon the main point to which his evidence is directed. He does not really know, in the case of the Wills he speaks to, whether the property left was, or was not, ancestral in the Hindu sense of that word. It is to be remembered that he is only fifty-two years of age and his intelligent memory can, therefore, hardly go back more than thirty years. By that time, the Bombay opinion was already definitely formed, and the witness's evidence shows how he received that opinion from the decisions of the Courts and the like sources in Bombay itself. In my opinion his evidence is worth little or nothing upon the alleged custom.

The next witness is Mohamed Cassim Lakhtani, a Cutchi Memon fifty years of age and a landed proprietor. He says that Cutchi Memons can will away all their self-acquired property, but if it be ancestral no Will can be made. He then proceeds to give instances of numerous Wills, including Wills by Cutchi Memon widows. Such Wills certainly would not be valid under the Hindu Law in the ordinary circumstances, nor would they consist with notions underlying the law of the joint Hindu family. I am speaking here in the most general terms and am not overlooking cases in which Hindu women dispose of their own *Stridhan* property by Will, but if I understand the witness aright, the widows who

made Wills here were wealthy Memon widows who disposed of their whole property in which, under the Hindu Law, they would only have had a life-estate. In the absence of an explanation as to how they came by their property, this comment must be taken as in a measure merely conjectural. One thing is, however, to be noted and that is that none of these Wills, and, as far as I know, none of the Wills exhibited in the case which I have already examined were disputed. From this it is open to the plaintiff to argue that the custom was so well settled that no one thought of calling it in question. On the other hand, if the custom had really been in exact accordance with the law of the joint Hindu family, it seems in the highest degree improbable that the Wills disposing of so large wealth should have gone unchallenged on the ground that ancestral or joint family property made up part of the testators' estate.

In cross-examination he says:

"I mean by 'ancestral property' property got from the father or grandfather. If the property is left to the son by Will, then it is not ancestral in the hands of the son, but is his own.

Q. Your community believes that the Courts have held that the whole Hindu Law governs them?

A. Yes. But that also is the custom."

He says:

"I heard from my grandfathers and my ancestors that there had been suits in the High Court here and that that custom had been deposited to and proved.

Q. What custom?

A. I do not know what evidence they gave.

Q. What custom?

A. The whole Hindu Law.

The Court: Including adoption?

A. No. I have not seen any adoption case. I do remember one instance of adoption.

He says:

"I had a brother. He is dead. He left a widow.

Q. You have taken that property claiming that it was joint?

A. Yes, because it was got out of my father's money.

Q. But you have claimed it by survivorship?

A. But that was ancestral property. My

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paternal cousins are joint with me. But I have my son, and he is likewise entitled to it. I cannot deal with that property; else my son would come in and oppose me".

If this is correct, it really does represent the adoption of the law of the joint Hindu family pretty completely. This witness is very strongly in favour of the contention that the whole Hindu Law of the joint family had been adopted by the Cutchi Memons. He is entitled to more weight because it might affect a very large property of his own.

The next and perhaps the most important of this group of witnesses is Suleman Abdul Wahed, aged sixty-seven. He is not a Shetia but is one of the leading members of the Cutchi Memon Jamat. He says:

"I know our custom about making Wills. We cannot make a Will of ancestral property, but we can make a Will of self-acquired property, according to the Hindu or Muhammadan Law. We can dispose of the whole of the self-acquired property by Will. A Cutchi Memon cannot dispose of any part of ancestral property by Will"....

Next follow a number of instances of Wills most of which are found among the Wills recorded. In reference to one of them he says:

"But I think that at present unfortunately we are, to that extent, under the Hindu Law."

To the Court.—"I think so, because I have been told so ever since I came to Bombay from Poona in 1874, and those decisions of the Judges made us subject to the Hindu Law". "I never heard from the Jamat in Bombay that there had been such a custom before the Courts here made it for us". "The Jamat told me that the Courts had decided that we were governed by such a custom. I did not ask the Jamat what custom had governed them in Cutch before they came to Bombay....I have not heard of any case of the Cutchi Memon dying intestate where his property was divided among his heirs according to the Muhammadan Law....I can only say that in Poona the estate goes upon an intestacy to the heirs under the Hindu Law; in Cochin, to the heirs according to the Muhammadan Law, and, in Cutch, I do not know how it goes. I cannot give a single instance of a Cutchi Memon dying in Poona without leaving a Will, and the property going according to the Hindu Law; the families in such

cases would ordinarily be very poor, and the property might be divided according to either the Hindu or the Muhammadan Law."

He then goes on to describe the circumstances of his own family, saying that they were "joint" in the Hindu sense:

"My nephew filed a suit for partition of this joint family estate, and the property was partitioned under a decree of the Court". "I gave my son, Abdul Rahman, his share of the ancestral property and took a release from him".

After this follows the cross-examination in which the witness says:

"I am an orthodox Muhammadan, I believe firmly in the Quran. Memons are orthodox Muhammadans, they all believe in the Quran.

Q. You and they would consider it sinful to depart from what is laid down in the Quran?

A. Yes. The Quran only allows us to dispose of one-third of our property by Will. I and the members of our community would much like to follow that rule of the Quran.

Q. But your people have been doing the contrary for some years because they have been told that the Courts have made the Hindu Law binding on them?

A. Yes.

Q. Your people have been told that ever since Sir Erskine Perry's decision?

A. Yes. I much regret, and I know that others do too, that the Courts should have thus imposed the Hindu Law upon us.

Q. If you were told that the Courts had never held that, how would you dispose of your property?

A. According to the Quran.

Q. Your community has never got reconciled in all these years to the Courts having imposed the Hindu Law upon them?

A. No.

Q. A large majority of you have striven all these years to get those decisions upset?

A. Yes. Most certainly our people would wish to follow the Quran if they were allowed to; they feel that they are helpless because they have been told that the Hindu Law of intestate succession governs them. We got this idea of ancestral property from the Bombay Barristers, Solicitors and other like vultures. Until I came to Bombay I never heard of this distinction; as strict Muhammadans we know nothing of it.

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Q. What do you mean by ancestral property?

A. Property which comes from the grandfather, whether the grandfather made a Will of it or not. In Mecca and other holy places they will not allow that we are Muhammadans at all, because we have had this Hindu Law forced upon us. I feel very strongly upon all these points, and I much regret that the Courts should ever have decided as they have done. I say that the son takes a vested right in ancestral property at birth is an idea made for us by the Courts. It may be called a custom as it has been followed here for many years, since the Courts decided that way."

In re-examination the witness says:

"I would like the Muhammadan Law to be applied in all cases of intestacy as well as in testamentary disposition. I should not like any part of the Hindu Law to be left."

I have quoted from this witness *in extenso*, because his evidence, as a whole, is striking and characteristic, I think, of the real and best sentiment of the community. It is clear from the opening portions that the root ideas of the Hindu family have struck deep in spite of religious protest, and that much against their Will the strictest Muhammadans among the Cutchi Memons have accepted, though it can hardly be said that they have become reconciled to, the Hindu Law so liberally made for them by the Courts. It cannot be denied that, in the first instance, there was none of this marked repugnance to the Hindu Law of the joint family. And when I come to look a little more closely into the previous cases, I dare say I shall have to admit that at any rate, when the question first came before Sir Erskine Perry that learned and eminent Judge was right in supposing that by enlarging in some directions the restrictions imposed by the Muhammadan Law, and giving the Cutchi Memons a part, if not the whole, of the Hindu Law of succession including that of the joint Hindu family, he was meeting the wishes of a majority of the community as well as validating a single proved custom in derogation of the Muhammadan (and the Hindu) Law. But in view of the growing wealth and intelligence of the community and the development of a strong re-action in favour of strict adhesion to the Muhammadan

Law, I can entertain no doubt but that the opinion has now been proved mistaken. In the evidence of this witness we find *in petto* a reflection, and I submit a complete confirmation, of most of the general views I ventured to express regarding the real attitude of this community towards the case-made law in my former judgment.

The witness is a very intelligent and influential old man of undoubted probity, who has held the high office of Sheriff of Bombay. The effect of his evidence is, I think, that while, in his opinion, his community is, at the present day, under the Hindu Law of the joint family, that has not been brought about by the deliberate and volitional adoption of that law as a custom, but by the too precipitate action of the Courts. And the feeling of the better part of the sect to-day is strongly in favour of throwing off every feature of the Hindu Law with which it has gradually been fettered. I have said that in the course of the arguments addressed me on behalf of the plaintiff in this case, I have been reproached over and over again with having insisted, upon a misconception of what actually happened at the trials, the procedure and the form of the issues, that the Courts and the profession forced a most unwelcome law upon reluctant Muhammadan sects. I think that I am vindicated, to some extent, by the strong feeling shown by this witness. It may well be that the law was not so unwelcome in 1847 as it has since become, and I certainly do not mean to suggest that the eminent Judges and Counsel mainly responsible for bringing it to its present state were not guided in each and every trial by the most correct judicial principles. But I do say, and shall remain for ever convinced, that over and over again much, too much, was taken for granted, and that it was as much the decisions of the Courts and the opinion, of course the perfectly honest opinion of the profession, as any real customary adoption by either Khojas or Cutchi Memons of part or the whole of the Hindu Law of the joint family, that have made the law as it is generally supposed to be to-day. One thing at least is made clear beyond all possibility of dispute, that if Mr. Wahed is a true spokesman for his sect, this sect, would, if left to itself, and not pinned down by judicial decision, renounce any such custom

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(admitting that it had ever been adopted) as that which the legal doctrine of this Court has now made an integral, and indeed the dominating factor of their personal law.

The next witness examined was Ali Mahomed Haji Yusuf, a Cutchi Memon fifty years old. He is a person of little importance compared with the last witness. He says he is a dealer in salt:

"I know the custom of our community as to making Wills. Cutchi Memons make their Wills according to Hindu Law. They can dispose of the whole of their self-acquired property."

The Court. "When did you first hear of self-acquired property?"

A. I was born in Bombay, so I have heard of it all my life. We cannot dispose of our ancestral property by Will."

In cross-examination the witness says:

"Q. Your custom exists because you have been told that the Courts have decided that the Hindu Law of Wills, etc., applied?"

A. Yes.

Q. You have been told so all these years by the lawyers?"

A. No member of the legal profession has talked to me about it. My community, however, has been told that this was settled by the Courts?"

Q. They were told that the Courts had applied the Hindu Law in all particulars?"

A. No. Only about Wills, and about property and inheritance and succession. There is a feeling in our community that the Courts have been wrong in applying the Hindu Law to us.

Q. And but for this they would follow the Muhammadan Law?"

A. Yes."

The next witness is Haji Yusuf Subhani, aged sixty. He says he is an ordinary member of his community, a mill-owner and the President of the Anjuman-i-Islam.

"I know the custom of our community in the matter of making Wills. A Cutchi Memon can dispose of his self-acquired property by Will, the whole of it. He cannot dispose of ancestral property. I have never heard it said that a Cutchi Memon cannot dispose of more than a third of his self-acquired property."

In cross-examination he says:

"I have been told that a custom had been

established in the Courts. That is why we have made the Wills in the manner I have described."

After some cautious answers which do not commit him much to any great preference for the Muhammadan Law, he says:

"From a religious point of view I should prefer the Muhammadan Law. I would prefer the rule laid down by the Quran."

We gain little information from this witness. His last answers show that he is a peace-loving man, sitting on the fence for the present, waiting to throw in his lot with the winning side.

The next witness is Abdul Satar Gaya, a Doctor, aged thirty-two. He says that he knows the custom of his community about making Wills

"A Cutchi Memon can dispose of his self-acquired property as he pleases. A Cutchi Memon cannot make a Will of his ancestral property."

The Court. "What do you mean by ancestral property?"

A. Property coming from great-grandfather, grandfather, father."

In cross-examination he says:

"I have been told ever since I was grown up that the Courts had held that the Hindu Law governs Cutchi Memons generally in matters of inheritance or property."

Q. If the Courts had not decided, as they have, you Memons would prefer to follow the Muhammadan Law?"

A. I think so.

Q. If they were left free now, would they follow the Muhammadan Law?"

A. I think the majority would, I myself would. I do believe that in giving the go-by to the Quran and forcing the Hindu Law on us, the Courts have done wrong. I should say that that was the feeling of the majority of our community."

The next witness is Ibrahim Haji Sidik, aged thirty-five, a landed proprietor:

"I know the custom of our people in making Wills. Sometimes they make their Wills according to custom."

Q. What is the custom?"

A. I have heard that the Hindu Law applies.

Q. Do you mean the whole Hindu Law?"

A. I do not know that. We can make our Wills as we please, whatever the property is.

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We cannot dispose of ancestral property by Will. Grandfather's property becomes joint family property. I include father, grandfather, great-grandfather, etc."

In cross-examination after showing an intelligent understanding of what is meant generally by ancestral and joint property, he says:

"I have heard that the Courts have held that the Hindu Law of Wills applies to us. That is the belief in our community. That is why we make our Wills in that way. The Hindu Law of property and inheritance has been held by the Courts to apply to us, that is what is generally believed in the community. I am an orthodox Muhammadan, so are most of us Memons. We should like to follow the precepts of the Quran."

The next witness is Tyeb Haji Gul Mahomed, aged sixty-two, a merchant and a contractor. He says:

"I know our custom about making Wills. We can dispose of our self-acquired and our ancestral property too. Was born at Malabar."

(N. B. This is the only one of these witnesses, I think, who says that Cutchi Memons can dispose of their ancestral as well as their self-acquired property by Will. Possibly because, being from Malabar, he is not so saturated as the rest with the legal doctrine of this High Court.)

In cross-examination, he says:

"The custom had been in force many years before the decisions of the Court gave legal effect to it."

I may observe on that that the witness could here only be speaking from hearsay, as the decisions of the Court began before he was born.

"Q. If the Courts had not so decided, you would have preferred to follow the Muhammadan Law?"

A. But the custom had been in vogue for a long time.

Q. Who told you that this was the custom when you came to Bombay?

A. My grandfather told me. He was then in Bombay. I came here first in 1918 (1860). It was when I was here in 1930 (A.D. 1874) that I first heard of this custom."

The next witness is Abdul Rahim Haji Ibrahim, aged thirty-six, not a leading member of the community, a hosier. He

says a Memon can will away his self-acquired property as he pleases. He cannot will away his ancestral property. In cross-examination:

"I would like to follow the Muhammadan Law of Wills. I have always been told that the Courts have held that the Hindu Law of Wills governs us. That is what all the members of my community believe."

The next witness is Abubakar Haji Mahomed, aged fifty-four, owns landed property in Bombay and says he knows the custom of his community about making Wills:

"I have made a Will according to the Muhammadan Law. I have disposed of the whole of my property. I have said that the distribution is to be made according to the Muhammadan Law. The decisions of the Courts in our cases have put us under the Hindu Law. Among the Memons the custom is that the Hindu Law applies."

Q. What is the power of the Cutchi Memon to make Wills?

A. The thing is this, as the Hindu Law prevails they make Wills so that their widows and daughters may get something out of the estate.

Q. Do you know whether these Cutchi Memons recognize the law of ancestral family property?

A. Yes. A Cutchi Memon cannot will away ancestral property."

In cross-examination he says that the Courts have decided that the Cutchi Memons are governed by the Hindu Law in all matters of succession, inheritance, Wills, etc.:

"We think that if we do not make a Will our property will go by Hindu Law."

Q. You think then that the Courts have wrongly applied the Hindu Law?

A. All I know is that this has been the custom from the time of my forefathers."

This concludes the evidence of this kind given before the Court. It must be admitted that it points directly to a considerable and settled opinion, however unpalatable, that much, if not the whole, law of the joint Hindu family governs Cutchi Memons. But it is to be remembered that over the period covered by the lives and personal experience of all the witnesses, it was virtually impossible for any Cutchi Memon to approach the Courts except upon the footing of a Hindu

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in all the essentials of the personal law of the joint Hindu family. And it cannot be denied that the decisions of the Courts had done more than anything else to contribute to that result. It is only when we turn back to the origin of the wide rule, which had thus been established, and follow as I did in my former judgment the various steps of the process, that we shall be in a position to discriminate, if indeed this be now possible, between what was a real custom and what was rapidly added to it by judicial decision.

As I have said, the points actually in controversy between the litigants before Sir Erskine Perry lay within a very narrow compass. I think it very unfortunate, looking back over this piece of legal history, that that great Chief Justice should have delivered one judgment in the cases before him thus, at the very outset, introducing elements of logical confusion which rapidly bred and multiplied. I think, too, that the procedure followed put the preliminary enquiry on much too wide and loose a base. For all essential purposes, the points in controversy need not have been so extended as to lead the learned Chief Justice to believe that in order to deal with them it was necessary to open a general enquiry into the question whether the two sects of Khojas and Cutchi Memons had by that time adopted, as a custom, the whole Hindu Law of the joint family, with all its derivative legal notions and consequences, as directly affecting the law of succession and inheritance.

But with the fuller information given me in the course of this trial at my disposal, it seems to me that something of this kind happened. The result was not very satisfactory even for the limited purposes of the two trials, since the learned Chief Justice, in his judgment which, after all, is all that now concerns us, confined himself to a very cautious opinion that these sects had adopted a law analogous to the Hindu Law. How closely analogous, or in what main points diverging from it, and if so diverging, then whether back to the Muhammadan Law or in the direction of merely analogous customs, nothing, I think, is said. But what the learned Chief Justice meant to hold was, I believe, that Khojas and Cutchi Memons were under a Customary Law closely akin to, if not identical with, the Hindu Law of their former co-religionists, and that from that

starting point, it lay on them to prove customs in derogation not of their own, the Muhammadan, but of this rather vaguely adopted analogue of the Hindu Law.

The *Cutchi Memon* case (1) tried before Sir Erskine Perry arose out of a dispute between the widow, Rahimatbai, of one Haji Nur Mahomed and three uncles of the deceased. Following the procedure of those days it appears that the Chief Justice sent certain issues down to be tried before himself on the Plea Side of the Court. These are very instructive as showing how the subject, then virtually *res integra* in this High Court, was then approached.

The issues were:

"1. Whether the set of Muhammadans commonly called or known by the name of Cutchi Memons is subject to a valid usage or law of inheritance and succession different from the general Muhammadan Law of inheritance and succession to goods?

2. Whether, from the death intestate of Haji Nur Mahomed in the pleadings of this cause mentioned, his uncles, etc., succeeded to his estate as his heirs or otherwise, in exclusion of the said complainant, and one Tezbai, another widow of the said Haji Nur Mahomed, subject, however, to providing for their maintenance?

3. Whether upon the death intestate of the said Haji Nur Mahomed, the said complainant as one of his two widows became entitled by succession to a share consisting of one-sixteenth part of his estate?

And it is ordered that the complainant here shall be the plaintiff on the trial of such issue on the Plea Side of this Court and that the said defendants, etc.,...and if the Court at such trial shall find any other special matter, the same shall be indorsed on the *postea*."

So far this appears to be perfectly correct, and to establish the general proposition from the very beginning of this litigation that any one alleging a special custom in derogation of the law of the parties must prove it. We find, accordingly, that the defendant opened with witnesses in support of the plea.

The first of these witnesses was Haji Yusuf Haji Baludina, who says that "he had lived in Bombay for seventy years, was regarded as a sort of head of

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his sect." (N. B. The witness talks of 'caste'). He says, "there is a particular custom of inheritance among them, namely, that a widow is entitled to maintenance as long as she remains unmarried. Some say that the Cutchi Memons were converted to Muhammadanism two, three or four hundred years ago. They were Hindus before, Lohanas." He then speaks of the custom prevailing among Lohanas proper. But no one has ever alleged in these Courts, I believe, that they are not subject to the ordinary Hindu Law, and it is plain from what the witness says, namely, that among Lohanas a widow is maintained by her sons, etc., that he is thinking of the condition of widows in an undivided Hindu family. He says:

"I am not particularly informed of the custom among the Lohanas. Divorce is not allowed among Memons, plurality of wives is allowed in case of sterility. According to Muhammadan Law, females ought to inherit, but we have not allowed any female as yet to inherit."

In cross-examination he says:

"No disputes regarding inheritance have ever occurred with us in Cutch;" "the husband and wife were expelled from the caste, they were expelled because this custom had never been disputed before."

This was the first instance I ever knew."

(Note. As the husband appears to have died intestate, thus giving rise to the dispute, it is not easy to understand why he was expelled from the "caste.")

To the Court; "I say that the Muhammadan Law lays down the rules as to inheritance, but we have not observed it. Our custom is not of recent origin but has prevailed four or five hundred years."

The next witness is Abdulla Rakhia, who says that there are many tribes of Cutchi Memons but they are all of one "caste:"

"We do not follow the Mussulman Law as laid down in the Quran. I do not know what the Hindu Law is. We do not allow females to inherit with us. If a man leaves a widow and brothers she is not allowed any particular share."

(This again would only be true under

the Hindu Law in the case of a joint family.)

"We do not allow daughters to inherit. If a man died leaving brothers and sons, if the family is divided, the sons take alone; if undivided, the brothers equally. If four brothers should be in partnership, and one dies leaving sons, the sons inherit."

(Observe the loose confusion between partnership and the true "joint Hindu family.")

"I have often heard that part of the Quran read which lays down the rule of inheritance, but we do not follow it because it is not our custom. We did not set the Quran aside but our custom did. This custom of inheritance has existed among us always. If a man left his property to his widow the *panch* would give effect to it. Divorce is not allowed among us. When this case was brought into Court the *panch* expelled the husband and the woman."

The next witness is Haji Fazul Jaffir, says, he is one of the *panch*, came from Bhuj:

"With us women do not inherit, when a man leaves a widow she remains in the house and gets maintenance."

In cross-examination adds nothing of note

The next witness is Haji Absakur, says, he knows the law of inheritance laid down in the Quran but the Cutchi Memons do not follow it. According to the law Cutchis follow, women do not inherit.

At this point I find the note by the learned Chief Justice:—

"I intimate that a *prima facie* case is launched of custom amongst Cutchi Memons, and if they have evidence to show it (*sic*) they should call witnesses."

Then Haji Mahommed Haji Ibrahim is called and says, that he is a Cutchi Memon and that his father died three months ago leaving brothers, nephews, daughters and a widow. He made a Will (this is called for).

Another witness is then called, Mulluk Haji Umar, who gives an instance in which it would seem that some sort of distribution was made of the deceased's property

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but not strictly according to the Muhammadan Law—:

"I have not heard of any widow in our caste being allowed a share as Muhammadan widows are."

Another witness appears to have been offered but not examined, and the Advocate-General then admits that his evidence does not go further to disprove the custom set up.

That is the whole evidence upon which a judgment was based that has had such astonishingly wide consequences. I should observe that at this trial the evidence in former cases was tendered and it was found to take up so much time discussing it sentence by sentence, in order to determine whether or not it was against the declarants' interest, that much was let upon the record, subject to stricter examination when the case was over.

After the above analysis I cannot say that I think any of this record of previous depositions is relevant under section 32, clause 3. I do not find in these depositions *per se* any declarations against the interest of the makers. Nor do I think that these depositions of men long dead are admissible under any other provision of the Indian Evidence Act. I have examined them, however, with the object of bringing out clearly what really were the materials before Sir Erskine Perry in 1847. Many statements do suggest that the witnesses were saturated with the Hindu Law, or, at any rate, that they had accepted, with modifications, some salient features of it. But I do not think it would be correct to say that anything to be found in the trial on the plea side before Sir Erskine Perry establishes a conscious adoption of the whole law of the Hindu joint family. The witnesses appear to draw no distinction between the position of females in an undivided and a divided Hindu family. They appear to have been imbued generally with the stringent limitations imposed by the early Hindu law-givers on a woman's capacity. But the custom they set up, goes very much further than the true Hindu Law. It does not appear to recognize the widow's estate and peremptorily excludes daughters altogether and in all circumstances.

I cannot understand how upon these issues and this evidence, it ever could have been supposed that the Chief Justice found that the Cutchi Memons were not only not governed by the strict Muhammadan Law of succession and inheritance, but that they were governed by the Hindu Law of succession and inheritance. All that the issues suggest and the evidence proves is that there was a valid custom or usage inconsistent with the Muhammadan Law. Sir Erskine Perry appears to have thought that it was, in a measure, analogous with the Hindu Law of succession and inheritance. Further than that, I do not think he went in the way of generalization *obiter*. He certainly found it proved, as a special custom, that among the Cutchi Memons widows would not take, and that uncles would exclude them upon the intestacy of husband or nephew. That was all that he was asked to decide, and that was all that he did decide. I do not suppose that it will be contended, *e.g.*, that this case decided *inter alia* that the Cutchi Memons had proved a special custom in supersession of the Muhammadan Law of divorce or marriage.

The evidence recorded in the case of *Mahomed Sidick v. Haji Ahmed* (4) has been given in evidence here, as it is pretty certain that a great deal of it, at any rate, must have been against the interest of the declarants. Before running over it, I may make one or two general observations on the case. The Court was asked to try the validity of two Wills made by two Cutchi Memon brothers, who, with two more brothers, had, for a considerable time, carried on a large and flourishing partnership business. The objection was that the property was ancestral, and that the testators had no power to dispose of any part of it by Will. An attempt was made by Mr. Inverarity to re-open the whole question with reference to the power of making Wills and the restrictions upon that power arising out of the legal notion of ancestral property peculiar to the Hindu Law, which was supposed to have been included in the law of "succession and inheritance," consistently applied (in theory) since Sir Erskine Perry's judgment in 1847 to the Cutchi

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Memons. But this attempt was not successful. The issues are, however, interesting in this connection. The learned Judge, notwithstanding the principles he sets forth in the opening passage of his judgment, virtually conducted the trial on the second of his presumptions, treating the first as already disposed of. What actually happened was that the learned Judge took it for granted, as far as I can see, that the Hindu Law of succession and inheritance had been judicially and finally decided to govern Cutchi Memons. That being so, it was mere surplusage to mention, as a fundamental principle, that in all cases arising between Muhammadans, the Muhammadan Law must, in the first instance, be presumed to govern. That is a perfectly correct principle, but at the time of this trial, the learned Judge was evidently convinced that it had been completely displaced and that trials of the kind he was conducting, must start from the second principle, namely, that Cutchi Memons are to be presumed to be governed by the Hindu Law of succession and inheritance. Along with this, he appears to have taken it for granted that the distinction between ancestral and self-acquired property is an integral part of that law. The burden of proving, therefore, that among the Cutchi Memons a custom had been established ignoring any such distinction, was thrown upon the parties alleging it. This is in conformity with the third of the learned Judge's principles, namely, that it will be open to this community to prove any special custom whatever even in matters of succession and inheritance in derogation of the ordinary Hindu Law. It appears that a good deal of the old evidence, taken from the records of the Ecclesiastical Side of the Court, was again laid before the Judge at this trial, as though upon the trial of an issue arising under his first principle. But it is as clear that he regarded that original presumption as wholly displaced by the decisions of the Court from Sir Erskine Perry's time onwards. And I think that the evidence of witnesses recorded at this trial was all directed to proving the special custom relied upon in derogation of the Hindu Law of succession and inheritance. Such a "custom" is, of course, no more than a

part of the Muhammadan Law which has never known any distinction between joint ancestral, joint family and self-acquired property. But then for the double assumption (a) that the Hindu Law and not the Muhammadan Law governed this sect in all matters of inheritance and succession, and (b) that included in that branch of Hindu Law was the whole legal notion of the joint Hindu family, it is clear that the trial must have taken another course. I repeat that had the onus been thrown, as in my opinion it clearly ought to have been thrown, on those who alleged that, even conceding Wills formed a part of the Hindu Law of succession and inheritance, the Cutchi Memons had further imposed upon themselves the Hindu Law of the joint family with its dominant conceptions of ancestral and joint family property, the result of the trial might, and probably would, have been very different. I am supported in that opinion by the remarks of the learned Judge himself upon the character of much of the evidence recorded and the light it threw upon the attitude of the community, as a whole, towards this substitution of Hindu for their own Muhammadan Law.

I think it is impossible to say that anything by way of proof, coming from the right quarter and directly given for that purpose, is added by this trial to the extremely meagre and inconsequent proofs formerly collected and made the foundation of the Court's doctrine that the Cutchi Memons were in all respects governed by the Hindu Law of succession and inheritance. The learned Judge, indeed, remarks that a good deal of the evidence led to prove the special custom confirms in his opinion the correctness of the Court's previous decisions on this point. While that may be so, it is equally clear that none of it has any bearing (I mean none that is quoted in the judgment) upon the actual point under investigation. If the law of succession and inheritance governing this sect is understood to be the Hindu Law of succession and inheritance, as limited to the case of a divided Hindu disposing of, or leaving, self-acquired property, then the succession would, in all cases, be the same and the only contentious question that could arise would be, not as to

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the testamentary power of the deceased, for that is always full under the Hindu Law, but as to the ownership of the property bequeathed. No man can give by Will what is not his own. No Hindu can, of course, dispose by Will of any part of the joint family property whether moveable or immoveable, for the simplest of all reasons that it is not his own during his life-time to give away. Precisely the same principle would, in theory, regulate gifts *inter vivos*, but in practice a good deal of confusion and obscurity has been introduced into the Hindu Law here, because of the inaccurate and unsystematic habits of thought which make every original treatise on the Hindu Law the despair of exact thinkers. The question which the learned Judge had to answer was the narrow and sharply defined question, whether the Cutchi Memons had ever voluntarily imposed upon themselves, as a custom, the Hindu Law of the joint family, as exhibited particularly in the distinction between ancestral, joint and self-acquired property. Because they are supposed to have imposed upon themselves a law of inheritance and succession corresponding with that which would be applied to the case of a separated Hindu in possession of self-acquired property, it does not follow that they had also adopted a totally different feature of the Hindu Law which, speaking strictly, has nothing to do with succession and inheritance at all.

I will now go over this evidence, or parts of it, critically, for my purposes in the present case.

Mahomed Sidick Haji Abdulla, plaintiff, says: "We all lived together as a joint undivided family", but in cross-examination he was asked what he meant by an undivided family, and answered: "I only meant by it that I and my father lived together and ate together. If there had been no property we should have done so." Slight though this is, it is very instructive. The learned Judge has noted that when the witness was given the word for "undivided" in the sense of the Hindu Law, he did not know what it meant. What he says in cross-examination, clearly sets the limits upon his idea of a joint Hindu family. And it is, I have no doubt, perfectly true, that the archaic custom of families living

together to the third and even fourth generation, a patriarchal custom noticed by Sir Charles Sargent in his judgment in *Ahmed bhoj's case* (6), prevailed almost as universally among Bombay Muhammadans as Hindus. But it does not follow from this that the former had any knowledge of, or desire to adopt, the peculiar legal consequences attaching to, the Hindu concept of the joint Hindu family. After this witness was examined, the record shows that Mr. Inverarity was called upon to open for the defendant, that is to say, to prove the custom among Cutchi Memons of not making any distinction between joint family and self-acquired property. At the outset it may be noted that it would be almost impossible to prove such a custom. Instance after instance might be given of sons and brothers inheriting, but in every such instance, *ex hypothesi*, the property in question must be assumed to have been self-acquired in the Hindu sense. On the other hand, it would have been comparatively easy to prove the custom affirmed by the Court as a custom, namely, that this sect had adopted the Hindu Law of the joint family. Of course had it been open to the defendant to prove that, *e.g.*, daughters had inherited, that would have been in point to show that the property there could not have been joint family property. But all instances of that kind had long ago been ruled out by the first decision. Nor can there be much doubt, I think, but that to that extent the Cutchi Memons had long ago and on the whole consistently renounced the Muhammadan Law. It is instructive, too, to note how Mr. Inverarity opened his case. He said that the questions to be answered were questions of fact: (1) Was Ismail's property ancestral? (2) Whether among Cutchi Memons there is ancestral property in the sense that the son takes a right by birth? He goes on to say that if the property is ancestral, then the Will does not operate against the plaintiff, which seems to be giving up his main defence.

Haji Hassan, who appears to be the defendant, says:

"There are not many instances of sons and father dividing the ancestral property in their life-time. I never heard of any. I know Haji Cassum Haji Ibrahim; he separated from his father during his father's life. Cassum had a share in the trade. The

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father gave a share in the estate of his own accord. He got a share out of his father's property, not out of the ancestral property. He got it, not as a share of what his father got from his grandfather, but as a share of his father's own property... I know Haji Adam Haji Rahim Alwani. He had four sons. They did not get a share out of the grandfather's property, but out of the father's property which he had received from his father. I heard that they gave their father releases. I know Haji Hussan Abdul Rahim. He has either three or four sons. All his sons separated from him. They got a share, but at the father's own pleasure, not by suit. The property of the father may have come from the grandfather. I mention Haji Elias Haji Jusub. I heard he made a Will. He was my uncle's son. He had a son, Haji Saleh Mahommed. This son separated in his father's life-time. He got a partition from his father, but when sons get a partition they hold it to come from their father at his pleasure. The son gave his father a release. Memons have made Wills for many years, I cannot say how many. We have fixed customs; all that our *jamat* follows, is fixed. So extremely uncertain are the customs that there is no difficulty in producing any number of witnesses on either side."

[N. B. That is probably true.]

Haji Ahmad Haji Abdulla is asked:

"Among the Cutchi Memon community is there no distinction made between self-acquired and property derived from the father as to the power of alienation?"

A. After him, it should go to his son. What a man gets from his ancestors, he gets as his own property, and he can deal with it as he pleases in his life time. He can will it. According to our usages a son does not acquire by birth a right to the ancestor's property."

He then gives the names of testators all of whom "had received property from their fathers." "They all had sons at the time of their death."

In cross-examination he says:

"We Memons are governed by Mussulman Law. So long as there are sons, no one else will get the property. If there are two sons living and a grandson of a third son, the two brothers could give to the son of the third son."

[N. B. Here we have a considerable confusion of thought, but an indication, it must be admitted, that some infiltration of ideas from the law of the Hindu joint family had taken place.]

"The Court adopted Hindu Law, and made *stridhan*, but we do not agree to the Hindu Law. Whenever a Memon suit comes into Court, nearly always a custom is set up. There is no difficulty in getting any number of witnesses on either side. Since Sir Erskine Perry's time I do not know of any instance of a custom being established in a Court of law."

[N. B. Here the witness is not so far wrong.]

Haji Tyeb Rahimatulla says he is one of the principal members of the Cutchi Memon community. Asked as to whether according to the usages of the community there is no distinction between ancestral and self-acquired property, he replies:

"The son becomes the *mukhtyar* on the death of the father. The father may do what he likes with his property. If he does not give it to his son he may give it to any one. He can will it away. Among Cutchi Memons a son does not acquire by birth a right to his father's property. As to the ancestral property in the Hindu sense, if there is a son, he gets it after his father. The son can get it in the father's life if the father gives it of his own accord; but not against his father's will. So long as the father is alive, the son cannot prevent him from giving it away."

Very little comes out in cross-examination, but the witness says with emphasis:

"We are not governed by Hindu Law. All our customs are related to Muhammadan Law, but there are some differences in our customs."

Haji Alana Vaidina says that he is one of the principal members of his sect:

"There is no ancestral property in the Hindu sense of the word. The son does not acquire any right by birth in the property of the father. The father can make a Will of the property if he likes."

In cross-examination:

"It is true that when there is a suit in Court the caste divides into sections, and you can get witnesses to say anything in support of a suit. ... The Memons are govern-

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ed by the law of the Quran. A man can will away his property from his relatives, but it is contrary to the law of the Quran. Nobody can prevent him."

Tar Mahommed Haji Arab says:

"Among Cutchi Memons there is no ancestral family property in the Hindu sense. A son acquires no right by birth in the property of his father. A Cutchi Memon can leave away by Will the property left him by his father. Such a Will is in accordance with our usages."

Gives instances. In cross-examination he says:

"I mean by there being no ancestral property in the Hindu sense, that the grandson has no right in the grandfather's property. I do not understand Hindu Law. I do not know what Hindu ancestral property is. We are Muhammadans and we want Muhammadan Law. . . . I know only a little of Muhammadan Law. We have hitherto, by custom, made sons inherit to the exclusion of all the other sharers. Muhammadan Law out of Court can be applied, but a few go to Court to get Hindu Law since 1847. I have never heard of the Will of a Cutchi Memon which has given the property away from the sons."

In re-examination:

"The application of Hindu Law to us is not according to our usages. A grandson has no right by birth in the grandfather's property. A living son would exclude the son of a dead son, by Muhammadan Law, and so among the Memons."

Rahimtullah Junas says, he is a man of position, a tailor:

"If a Cutchi Memon received property from his father he can give or will it away and his son cannot prevent him. According to Hindu Law I do not know the rights of the grandson to his grandfather's property. Among the Cutchi Memons, a grandson has no right to share in property inherited from his grandfather. A Will made by his father in such circumstances is valid according to our usages. The application of the Hindu Law by the Court is not according to our usages. . . . We observe the Muhammadan Law of marriage and divorce; we are much stricter than Khojas. We observe all the feasts."

In cross-examination he says:

"According to inheritance formerly we did not conduct ourselves according to Muhammadan Law. Formerly our law of inheritance was according to Hindu Law. For a long time, thirty or forty years, we were governed by the Hindu Law of inheritance. For many years Wills have been in use among us."

Gives instances. In re-examination he says:

"We have been governed by Hindu Law of inheritance since the case decided by Sir Erskine Perry."

Sabu Sidick (the ancestor of the present litigants, I think) says that he is a principal member of the Cutchi Memon community, and a large merchant:

"Cutchi Memons who inherit from a father can, according to our usages, will it away even if there are sons. A son has no right to share in the property which his father has got from the grandfather. A son acquires no right among us to the property inherited by his father. If the father wills away the property according to our usages, the Will is valid."

Gives instances. In cross-examination he says:

"The Cutchi Memons have been governed by our law, that is, the Muhammadan Law, ever since we became Memons. There is no other law given us. Those who do not obey that law are sinners. I observe that law. If others do not, they go to hell. Nothing about inheritance has happened in my family, but I would act according to Muhammadan Law. My father has power to give away all his property to the exclusion of his heirs."

[N. B. This is not of course in accordance with the Muhammadan Law.]

"There are customs among us which differ from the Muhammadan Law. It is not a fixed custom not to observe Muhammadan Law. There is no rule whatever in cases of inheritance: there are customs which agree with Muhammadan Law, and some which do not. There are no fixed customs which do not agree with Muhammadan Law. There has been a revival of the Muhammadan religion among us."

In re-examination he says:

"It has been religious zeal, not the Courts, which has caused our movement. We

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object to the Courts deciding according to Hindu Law."

I have quoted freely from the evidence of this witness, partly because he was a man of considerable importance and the ancestor of the present litigants, but more because his evidence is so strongly indicative of what was then the feeling among the community about the extent to which it had been brought under the Hindu Law.

Haji Jusub Haji Ahmad says:

"Among Cutchi Memons, a man who has inherited property, I do not know what he can do with it."

But instances the case of his own father, who apparently inherited what, in the eye of the Hindu Law, would have been ancestral property, and yet was distributed under an oral Will.

In cross-examination says:

"The family comes from Cannanore. His father made no Will. Releases were not passed and the property was divided. I was joint with my father and grandfather, we were all joint in trade."

[N. B. This goes no further than the notion of partnership, which is quite familiar among the sect.]

Usman Alla Rakhia is a well-to-do Cutchi Memon merchant.

"If a Cutchi Memon inherits property from his father I have not seen anyone do what he likes with it. I do not know much about it, I do not attend the *jamat* much.

Q. Among Cutchi Memons are the customs and usages in force according to the Hindu or the Muhammadan Law?"

[The question was excluded as there was no issue and the plea was not taken in the pleadings, "moreover it is not for the witness but for the Judge to say what law is applicable." In view of what had already preceded, I must own that this strikes me as very strange. It appears to indicate that the learned Judge had made up his mind that, speaking generally, the whole Hindu Law of the joint family applied.]

"A son has no right to his father's property during his father's life. A son cannot prevent his father from doing what he likes with it."

In cross-examination he says:

"A father can will away his property to anybody. He has the right. He can will away the whole of his property; it is by Muhammadan Law that he can deal with his property as he pleases. A man dying and leaving ancestral property and sons can will his property away from them. I do not know of any such case."

Haji Satar Haji Ibrahim says he is a leading member of the Cutchi Memons, a merchant:

"According to the usages of the Cutchi Memons, a son has no right to his father's property until the father gives him property. Son cannot prevent the father from willing it away. It makes no difference if the property was derived from the grandfather."

In cross-examination:

"A man may give away all his property from his heirs, such is the *mushaa* (custom) of our *jamat*. I do not know Muhammadan Law. The power to will away from the heirs is a special custom of the Memons."

In re-examination he says:

"We have Muhammadan Law now, but the practice of the Court is, that daughters do not get a share."

Haji Jakaria Muledina says that he is a dealer in European goods, and is reputed to be a leading member of the community:

"According to the usages of the Cutchi Memon community, we can make a Will if we like. Son cannot prevent father from making a Will. There is no difference between what a man has made himself and what he has inherited."

In cross-examination:

"The son always gets his father's property after the death of his father. If the Muhammadan Law takes away testamentary power it must go. We want Muhammadan Law."

Aba Fakir Mahommed says:

"Among Cutchi Memons a father has power to make a Will of his property. I have not heard of such a thing being done if he has inherited the property from his father. It depends upon his pleasure, no one could prevent it. A son could ask his father for partition; it is at the pleasure of his father, a father has power over all property whether inherited or not."

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In cross-examination:

"When a man makes a Will he follows his pleasure. I have never heard of property being willed away from the sons. A Cutchi Memon in his life has power to give his property to anybody. I have never heard about a Will."

Nur Mahommed Haji Jakaria says he is a merchant on a large scale in Calcutta:

"Cutchi Memons rules in Bombay and Calcutta differ, in Calcutta there is Muhammadan Law for all Cutchi Memons. I do not know about the law in Bombay."

In cross-examination:

"All Muhammadaus of all kinds in Calcutta are governed by Muhammadan Law."

This is interesting, as showing that in the small offshoot of the sect settled in Calcutta (there are said to be only about one hundred and twenty in all) no material departure from the orthodox Muhammadan Law has taken place.

Jusub Lakha says, he is a large Cutchi Memon shop-keeper:

"Cutchi Memons can make a Will and give the property to whom it ought to be given. It makes no difference whether he acquired property or inherited it. Among us Cutchi Memons, a son has no right to the father's property during the latter's life."

In cross-examination:

"I have never known a case of a Memon willing his property away from his sons; he has power to will away one-third of his property. The rest goes to those who are entitled."

[N. B. That is the true Muhammadan Law; but this is the first witness yet who has declared that the law is strictly observed on this point.]

"I have never known of a case of a Memon giving away by Will all his property. Our questions have been decided according to Hindu Law, and to that we do not agree. We Memons bring suits on one or another set of customs; we can get any number of witnesses on either side."

In re-examination:

"The suit decided in the Courts a few months ago against the Muhammadan Law, made us get up our petition. I do not know our usages well, but we go by Muhammadan Law."

Mahommed Ahmed says he is a well-to-do Cutchi Memon merchant:

"A Memon can make a Will of his property if he likes, inherited as well as other property. A son cannot prevent his father dealing with his property as he likes."

In cross-examination:

"A Memon can make a Will excluding his sons, he is the owner . . . has never heard of the property being willed away from the sons."

Sidik Parpaiya, a landowner, says his property is self-acquired:

"According to our usages, I can make a Will of that property. It would be just the same if I had inherited it. According to our usages, a son cannot prevent his father from willing it away. A son has no right to property inherited by his father from his father."

In cross-examination:

"A man can will away his property to whom he pleases including the property inherited from his father. He can will it to a stranger. I do not remember an instance. If a son gets a share it depends upon the pleasure of the father. I remember Sir Erskine Perry's decision, it was well-known to all the members of the *jamat*."

Haji Jan Mahommed says:

"A Cutchi Memon can make a Will according to Muhammadan Law; there is no difference between inherited and self-acquired property."

In cross-examination:

"A Will according to Muhammadan Law can be made by a Cutchi Memon. I have never known property willed away from sons to strangers. There is no difference between inherited and self-acquired property, that is, according to Muhammadan Law."

Junas Sidik Ladha, a tailor, says:

"A Cutchi Memon can make a Will of his own property. Some make Wills if there is inherited property, but it cannot be done. I do not know that a Cutchi Memon cannot make a Will of inherited property. We follow Muhammadan Law, that is my opinion."

Haji Abdul Latif is the Kazi of Bombay:

"Cutchi Memons I know, they are undoubtedly Mussalmans; but those who have acted contrary to the Muhammadan Law must be excluded. In cases of divorce, Memons come to me and get it."

In cross-examination, nothing material. In re-examination he says:

Jusub who gave evidence before Sir

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Erskine Perry, C. J., repented publicly in the presence of many persons, on the third day ceremony of Abdul Harun's death, in the mosque."

Haji Ismail Mehdi had a grandfather who was Kazi of Bombay:

"The Cutchi Memon community are very orthodox Muhammadans."

Then follows rebutting evidence on behalf of the plaintiff.

Haji Kassim Sukkur, one of the Shettias of the Cutchi Memons, seventy-three years old

"I am well acquainted with the customs of the Cutchi Memons. A man who has inherited property from his father cannot make a Will giving it away, but it must go to his sons, (*Gives instances of sons getting a "share" from their fathers during the life-time of the latter*). We recognize ancestral property. It follows the same rule as ancestral property among the Hindus. Wills are a later institution among us."

In cross-examination:

"A son cannot prevent his father making a Will of his property. If a Cutchi Memon had inherited property from his father and made money out of it by trade, his son could not prevent his making a Will of it. If a Cutchi Memon inherited property from his father and made money in trade, the grandson by a deceased son has a right. If a son is born, he has a right. I am an orthodox Muhammadan, but the *Sirkar* will not let us be so. We would follow Muhammadan Law in everything but for the *Sirkar*. Before the *Sirkar* made us unorthodox we followed the Muhammadan Law. It was Sir Erskine Perry who made us unorthodox. Before that we followed Hindu Law. I cannot give you an instance of that. I never heard of our following the Hindu Law before that decision of Sir Erskine Perry."

[N. B. The evidence seems to have been taken down wrongly here, as it is contradictory on the face of it.]

"Hindu Law is applied to us in all questions concerning property. Sir Erskine Perry made it Hindu Law—Hindu Law—Hindu Law. I should not have said so before my nephew brought a suit against me."

In re-examination:

"Before the decision of Sir Erskine Perry Hindu Law was followed. A father cannot

will away ancestral property to the injury of his son or son's son."

Haji Ibrahim Saki Ladha is a Cutchi Memon shroff:

"I know what ancestral property is. A father cannot deprive his son by Will of his share of ancestral property. A son has a right by birth in it. Ancestral property is governed among us by Hindu Law. The custom of making Wills is new; it arose in 1844."

In cross-examination:

"A Cutchi Memon cannot make a Will disinheriting his son. All my property is self-acquired; if I had a son I could not disinherit him. We cannot disinherit any one, whether the property is self-acquired or ancestral. I first heard about Hindu Law about fifty years ago. All my life I have wished to carry out the precepts of the Quran; all Cutchi Memons are Mussalmans; if the *Sirkar* allowed it, we would all follow the Muhammadan Law. I do not know what the Hindu Law about ancestral property is. Before 1847 I can give no instance of property divided among Cutchi Memons."

Haji Abdul Rahim, a leading member of the community, says that he sold some immovable property and his sons were asked to join in executing the sale-deed, which they did. They were asked to do so by Abdulla. Payne was the Solicitor:

"A man who received property from his father cannot disinherit his sons of it by Will. I observe Hindu Law as regards ancestral property. There is no difference among us between ancestral and self-acquired property, the father's right over both is the same. Among Cutchi Memons the son has a right during the father's life to ancestral and self-acquired property. A father can make him a sub-partner and he afterwards gets it on the father's death. A father cannot disinherit his son of either kind of property because it is contrary to the Quran. It is the invariable practice of Cutchi Memons to obey the Quran and not to disinherit their sons. Many Cutchi Memons make Wills. I have never heard of one being disputed before this case. When Cutchi Memons make Wills, we observe Hindu Law. We give legacies in the way the Hindu Law gives the property."

Haji Alarakhia Dada:

"I do not know what ancestral property is. It is what is left by father or grandfather."

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In the case of a son and a grandson by a predeceased son all is divided between them. I cannot say whether a Memon with ancestral property can disinherit his sons."

In cross-examination:

"There is no difference between ancestral and self-acquired property; the sons have a right to both. The son's right arises on the death of the father. It depends on the father's pleasure; that is so whether the property is self-acquired or ancestral."

In re-examination.

"There is no difference between ancestral and self-acquired property. I do not know if it can be willed away. When a son is born he gets a right to the property, all the property, not only that of a special kind which belonged to his father."

I pause on this man's evidence to observe the curious light that it throws on the ideas prevalent among the poorer and less instructed members of the sect upon the question of disinheritance. The man is comparatively poor and of no consequence. But his evidence shows how easily legal ideas clothed in popular language are picked up, confused, and attributed to widely different sources. Thus while this witness is very emphatic in declaring that no Cutchi Memon can will his property away from his sons (heirs according to the Muhammadan Law), he bases this on the Muhammadan Law and refuses to acknowledge any distinction between ancestral and self-acquired property in this connection. And yet it is solely on this distinction that the Hindu Law rests. The Hindu Law shows no particular repugnance to the disinheritance of sons by a father who is disposing of his self-acquisitions.

Haji Harun Haji Adam says that he is acquainted with the law which governs inheritance among Cutchi Memons:

"It is Cutchi law, which is Hindu Law."

Here again we get a useful side light on the origin and development of this reversion to Hindu legal notions.

"Wills are now made by Cutchi Memons, it is a custom only a few years old. The Will is valid if made according to Hindu Law; it could not be made differently."

[This kind of statement is really meaningless, except as intended to introduce the distinction between classes of property of which a Hindu may or may not dispose by Will. But the prevalent idea in the minds of most

illiterate or imperfectly educated Hindus and Muhammadans is that a Will must follow the main lines of ordinary inheritance. This is not true either of Hindu or Muhammadan Law, for the simple reason that Wills were quite unknown to the Hindu Law, until recent times, while the provisions of the Muhammadan Law were intended to prevent arbitrary dispositions of more than a fraction of the property in defiance of religious and moral obligation.]

"Ancestral property is property belonging to ancestors, grandfather and so on. There is no custom different from Hindu Law as regards the disposal of ancestral property. A man cannot deprive sons, etc., of their share in ancestral property. He cannot leave his ancestral property to anyone but his son.

Of course he cannot really leave his "ancestral" property to any body.

"But the grandfather could make a Will if the property is self-acquired. He can will his own share of ancestral property after giving the sons their share."

This means, if it means anything, that after a partition each member of the family can dispose of his share by Will. (Gives instances of a partition enforced by sons.)

In cross-examination:

"Is insolvent and lives on what his wife allows him."

Haji Jalta Musa says he is acquainted with the laws and customs of Cutchi Memons with regard to property:

"I know what ancestral property is. It is ancestor's property. There is no custom regarding it which differs from Hindu Law. The son at birth acquires a right in it. A son can get partition during the life of the father. The father cannot will it away. I know cases where sons have obtained shares of ancestral property."

Gives instances. In cross-examination:

"I have no money whatsoever, I have been insolvent twice. I have never spoken to Cutchi Memons about the custom about ancestral property. I have always talked about this since I came to Bombay in 1915 circa (1861). Not because I had any doubt. I know it. If a man has sons he cannot leave his ancestral property from them by Will. He cannot deal with his self-acquired property. He cannot leave it to an outsider."

In re-examination:

"As to ancestral and self-acquired property

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the difference is that a man cannot give ancestral property save to his sons or grandsons, but if his property is self-acquired, he can give it to his widow or any other person. No one has ever given it to an outsider."

[N. B. Though the man is of no account, his evidence is interesting as showing that in spite of his strong leaning to the plaintiffs' case, he cannot trace the prohibition in the Hindu Law against alienation of ancestral property to any other notion than the sentiment, much stronger in the Muhammadan than, the Hindu Law, against depriving the natural heirs of the estate.]

Haji Sidik Jan Mahomed:

"I got a share of my uncle's property. I do not know anything of the customs of my community."

In cross-examination:

"Is a Molloo, a Muccadam of cargo boats... His father divided his estate in his life-time between his sons... He gave us our share willingly and we asked him to give something to the grandson. He made this division of his own accord. It is Muhammadan Law in respect of property. Those who have a right to it, get it. A Cutchi Memon can give property, he gets from his father to anyone he likes, he is full owner. I know of no instance of willing it away to strangers."

In cross-examination he says:

"According to the practice of our community the father is *mukhtyar* of both kinds of property, self-acquired and ancestral. The son has no right in inherited property unless the father gives it to him."

In re-examination:

"Self-acquired property is the money a man gets himself. I do not know of any other kind of property save what a man makes for himself. The property he has received from his father, is also property. In a father's life-time everything is joint, if sons be living with the father it is all joint, but the father is *mukhtyar* of everything."

Haji Jan Mahomed Hussain:

"Sells bundles of coir matting. Nobody knows about Wills in Cutch."

In cross-examination says:

"I know nothing about it. I am only a labourer. I only knew labourers in Cutch. I have never known people who had property either there or here."

Ibrahim Haji Jakaria appears to have been only eighteen years old.

[N. B. This is the witness upon whom the learned Judge lays much stress as showing that Hindu and not Muhammadan rules of succession were followed. But it is obvious that the witness's evidence has no bearing at all upon the main question, namely, whether there is any known distinction among Cutchi Memons between ancestral or self-acquired property since, in the circumstances, the succession to either kind of property would have been just the same.]

Saleh Mahommed Elias says:

"The custom among us is that if there is a property belonging to the father it comes to the son. There is no such thing known as a Will."

Describes a rule of succession akin to that of the Hindu Law, but having no bearing on the distinction between ancestral and self-acquired property:

"If a man has inherited property from his father and has none himself, he cannot leave it from his sons."

Haji Mahommed Saleh Mahommed says that:

"Wills are not known in Cutch. They are never made there. If a man with ancestral property has a son, I do not know whether the son has any right by birth. I know no difference between inherited and self-acquired property. There is no inheritance in Cutch, there is no money in Cutch. A Cutchi Memon widow cannot, in any circumstances, get more than maintenance whatever the husband's property was. If a man gets nothing from his father but makes money himself, he could not give it away from his sons unless he did it secretly... Our Quran says half should be given to daughters of what is given to sons. A father's property is his, let it come to him from anywhere."

[N. B. Again note how radical is the idea that in no circumstances and no matter what the property, can a father disinherit his sons, a Muhammadan rather than a Hindu notion.]

Hassan Dada:

"Amongst us Cutchi Memons, a man cannot make a Will disinheriting his son if he has ancestral property. A grandson has an equal right with the son to ancestral property if

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the ancestral property has descended through two or three generations. The sons have a right to it if they ask for it."

Haji Mahommed Haji Ismail:

"Ancestral property is property which the father has as grandfather's property. A son and grandson by a predeceased son would equally inherit ancestral property. I do not know whether the law is that sons can demand partition from the father."

In cross-examination:

"Among Cutchi Memons I do not think there is any difference between ancestral and self-acquired property as regards the father's power of disposal. I cannot even say what is in law the difference between ancestral and self-acquired property."

Elias Haji Abdulla:

"After my grandfather's death, his property was not divided; it is still undivided. How could I have a share? I was admitted to a right, so I kept quiet. We are joint. I do not know what right I was admitted to."

In cross-examination, it is clear that the witness's condition is one of ordinary partnership with his uncles rather than that of a member of an undivided Hindu family.

Haji Sidik Haji Ibrahim describes what happened in his own family. It appears that members of the family asked for a partition and the matter was referred to arbitration. But again the subject is inextricably mixed with what might have been the ordinary partnership rights of these persons:

"Among us Cutchi Memons a man cannot will away his ancestral property from his sons or grandsons. A man with ancestral property making a Will can only leave equal shares to his sons. The son has a right at birth in ancestral property."

In cross examination he says that his father's Will was valid according to the customs of the Cutchi Memons. In re-examination he says:

"A son acquires a right at birth in all kinds of property. But there is a distinction between ancestral and self-acquired property. A grandson can take the grandfather's property, but he takes self-acquired property too. A father cannot make a Will disinheriting his son of self-acquired property. A father cannot disinherit a grandson (*sic*) of self-acquired property."

[N. B. The concluding part of the witness's evidence points the same way as that of many others. Clearly he has no real idea of any difference between ancestral and self-acquired property, but he is deeply imbued with the Muhammadan sentiment against disinheriting the natural heirs, and that is about all his evidence, stripped of mere terms, comes to].

Hassan Dada re-called for cross-examination says:

"A man should give his ancestral and self-acquired property to his sons."

Maulvi Hissam-ud-Din:

"The Muhammadans always make converts when they can. Such converts always follow the Muhammadan Law, that law is contained in the Quran. I have considered the Cutchi Memons to be full Muhammadans even as regards the inheritance of females, till that day (*i.e.*, the day of the meeting in the mosque). That is the only difference I have heard of."

Haji Dada appears to have been re-called and he says:

"As regards ancestral and self-acquired property, the father can do what he likes with self-acquired property, but the son has a right in ancestral property. No one has willed self-acquired property away that I know of. How can a man give his property to other people? He cannot do it. If a Cutchi Memon had self-acquired property and five sons he ought to give every one of them. I cannot say if he can give it all to one. I do not know if he can. I do not know if a man with ancestral property can give it all to one. A man should give his ancestral and his self-acquired property to his sons."

I have now completed this long and tedious labour. Much of the evidence I have been examining is, in my opinion, inadmissible in the present suit; much of it, however, certainly is admissible. I have made an abstract of it all, partly because the trial I am engaged upon is of a somewhat unusual nature, possessing, for the limited purposes of this branch of law in this Court, what might perhaps be called an historical interest; partly because it was not easy without going over all the evidence to say what parts of it were, and what were not, relevant; partly again because Mr. Inverarity was extremely desirous that not only what was put on

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record to-day, but what had been recorded before Sir Erskine Perry nearly seventy, and before Scott, J., thirty, years ago, should also be available for the Court's information; and lastly, because I have permitted myself both in this and the incorporated judgment to comment upon Scott, J.'s judgment with some freedom. I have thought it best, then, to reproduce in the form of a mere abstract the most valuable (as it seemed to me) portions of the material upon which that learned Judge based his conclusions. Whatever may be advanced against the relevancy of much of this evidence, its general interest can hardly be denied, nor the importance, if this can be done in a controversy of the kind, of tracing the formation of opinion in the sect. Several points of importance emerge. This complete review of the evidence confirms, in my opinion, what I have said more than once in this and the incorporated judgment, that but for the strong judicial and professional prepossessions of long standing which existed at the date of this trial, its result would have been different. It can hardly be doubted that if the matter had been *res integra*, and the question raised had been, whether among a sect of Muhammadans an alleged custom recognizing and adopting the distinction between ancestral and self-acquired property in the sense of the Hindu Law of the joint family existed, no Court could have held on such evidence that the alleged custom was proved. But the Court started its real inquiry from the point that the decisions of the Court had settled the law so far, that this Muhammadan sect was governed in all matters of succession and inheritance by the Hindu Law, therefore, that it lay upon any one of them, who alleged that notwithstanding that the sect had never adopted the Hindu distinction between ancestral and self-acquired property, to prove it. Even so, the evidence was so conflicting and nicely balanced that the decision may be thought to have been determined by the placing of the onus. The learned Judge did not think that the defendants setting up the custom had proved it, that is to say, the negative of the custom, as, in my opinion, it ought to have been stated for decision. The defendants could not prove that "by a custom of the community" no regard was, or ever had been, paid to the distinction drawn by the Hindu Law of the joint family between ancestral and self-

acquired property. But suppose that, without making any assumptions at all, or taking anything for granted, the plaintiffs had been called on to prove affirmatively that the Cutchi Memons had, by custom, incorporated the complete legal notions of ancestral and self-acquired property, as applied in the law of the Hindu joint family, in their own law, can any one suppose that the evidence I have just reviewed; would have satisfied any Court, or proved the affirmative proposition to the satisfaction of any Judge?

I attribute the result of this trial, the first in which any serious attempt appears to have been made to prove (though from a wrong starting point) that the Cutchi Memons had adopted parts of the Hindu Law of the joint family ancillary to the general law of "simple succession and inheritance", whatever that may be, much more to the preceding case-law and the strong professional opinion which prevailed within the Court than to any proof of any custom whatever existing in reality and outside the legal atmosphere of this Court, among Cutchi Memons themselves.

Yet, if the decision had been the other way, as, in my opinion, it ought to have been and would have been but for the case-law, consider how different the position would be to-day.

One of the most striking features of the evidence, as a whole, taken before Scott, J., in 1885 is that it is far more uncertain, more contradictory, and evidently more unsettled than the evidence (such as it was) recorded forty years earlier before Sir Erskine Perry, or thirty years later before myself. So few witnesses were examined before Sir Erskine Perry and the points to which his enquiry was directed were, comparatively speaking, so narrow that it is little wonder that the evidence seemed so unanimous, and that Counsel on the other side soon gave up the attempt to rebut it. I also believe that in those days, the sect, as a whole, probably was more under the influence of Hindu ideas than it is to-day: more particularly in all points affecting the legal capacity of females to inherit or enjoy property. But the evidence shows that all the witnesses were, in the most general sense, under the impression that the Hindu Law of the joint family had, with other parts of the Hindu Law of

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succession and inheritance, been adopted by the Cutchi Memon sect, or revived (with modifications) by inherited propensity or gradual pre-assimilation from a predominantly Hindu environment.

But in the next forty years there had been a strong revulsion of feeling. And notwithstanding that for some centuries after their conversion, these isolated Muhammadans had very likely fallen back in practice under the example and pressure of great bodies of their former co-religionists, so that they hardly knew themselves to what extent their property law was, Hindu or Muhammadan, I should very gravely doubt whether they had, when the *Cutchi Memons'* case (1) came before Sir Erskine Perry, any definite notions at all upon such a complex of law as that which makes up the Hindu Law of the joint family and comprises the highly artificial notion of joint ancestral family property. For the most part, they probably did live together as long as families held together, more than one generation at the time finding place under the paternal rule of the elders. From a habit so universally prevalent among primitive Oriental people and so propitious for the assimilation of the specialized legal concept of the Hindu family, they might very easily, merely by imitation and under the pressure of greater mass, even had they not themselves been predisposed by long centuries of heredity, have conformed in many respects to the law and usages of the Hindu states and peoples among whom they lived. But looking only to strict law, it is clear that if they stated their customs correctly before Sir Erskine Perry, they had, while abandoning the Muhammadan Law on the one hand, gone some distance beyond the Hindu Law on the other. On one point there was and always has been practical unanimity, that widows can only enjoy maintenance, and that, speaking generally, females are excluded from inheritance. It is not true, of course, that females are so excluded under the Hindu Law. But for all practical purposes, as far as they were yielding to the pressure of circumjacent Hindu sentiment, that pressure probably transformed itself in idea into a reproduction of the joint Hindu family, without much regard to the cognate notion of the separated Hindu. But it is not to be too hastily inferred from

this conjecture, that while they realised with some precision the effect of that part of the law of the Hindu joint family which operates to restrict the legal capacity of females within the joint family, they had equally clear conceptions of the whole of that legal structure.

Rather I should be inclined to say that the evidence I have examined, taken as a whole, up to the year 1885, shows that the Cutchi Memons, wherever it was a question how property should be disposed of, or descend, were deeply penetrated by the religious sentiments of the Muhammadan Law, and that the determinant consideration (qualified as to women by the disfavour with which Hindu Law has consistently treated them so long as the status of the joint family continued) always was the Divine disapproval of disinheriting natural heirs. Although the words come glibly enough to their tongues, it is easy to read between the lines that hardly one of the witnesses who declare that no Cutchi Memon could deprive his sons of ancestral property, referred that doctrine to any technical legal distinction between ancestral and self-acquired property, or meant more than that a father had no right to Will his property away from his sons. But for the exclusion of females from this rule, and the need of qualifying it in favour of a testator's limited power of disposition permitted by the Muhammadan Law, such an opinion might be much more easily and naturally traced to the Quran and later logic of the Prophet or sages than to any principle of the Hindu Law of the joint family. Similarly, when a witness after witness says that sons acquire a right by birth in their father's ancestral property, I am pretty confident that, apart from the ready use of loose phraseology, they meant what might as well have been expressed without suggesting any distinction, in the Hindu sense, between ancestral, joint and self-acquired property, namely, that whatever a father had and however he had come by it belonged in a sense, and subject to a limited power of disposition, to his natural heirs, these appearing in the light of Hindu sentiment as primarily sons and grandsons. It is, of course, quite true to say loosely that, under the Muhammadan

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Law, sons acquire a right by birth in their father's property, since he cannot leave the whole of it away from them without their consent. And relieving the evidence of these witnesses, quite untrained in legal dialectic, from words having a special legal connotation, the gist of what they mean, as well as say, appears to me to be in closer conformity with the general Muhammadan than the special Hindu Law of the joint family. The probability of this being the true interpretative key of the conglomerate of confused and inconsistent testimony laid before the Courts, is seen to be the greater, when we allow ourselves to consider for a moment the root and binding principle of the unique legal concept of the Hindu joint family. This was undoubtedly religious, and divorced from its religious reasons and sanction, it is hardly thinkable that the elaborately artificial fabric of the Hindu joint family would have persisted and held its own to this day against so many violently disruptive and disintegrating secular influences.

No compelling force of that kind operates upon the Cutchi Memons; on the contrary, what of Hindu Law they have appropriated or retained, is in strong antagonism to Divine precept. And the stronger their religious feelings, the stronger must be their aversion from elements of Hindu Law carrying with them echoes of the old faith, which survived their conversion to Muhammadanism. This note is audible enough in the evidence before me, as well as in that taken before Scott, J. I seem to miss it in the earlier evidence given before Sir Erskine Perry. But that is probably because the few Cutchi Memons, who then gave their testimony, had not realized the full extent of their action, nor how far the apparently unimportant schism thus inaugurated might be carried. It is interesting to read forty years later, that some at least of the Cutchi Memons, who gave evidence before Sir Erskine Perry in favour of heretical customs and usages, were afterwards conscience-stricken and openly recanted, and did penance in the public mosques. It does not necessarily follow that they had not spoken the truth; but if this story be true, it throws a significant light upon the trend of the

will of the sect, as a whole, even so far back as 1847. By 1885, the evil of which the seeds were so thoughtlessly and selfishly sown in 1847 had assumed serious dimensions, and to-day we are told that the faithful refuse to acknowledge Cutchi Memons as true Muhammadans in the shadow of the holy places. No wonder if that is so, that the community, a thoroughly sound Moslem community to-day, notwithstanding their origin and the subsequent irruption of Hindu ideas, should bitterly resent the apparent irrevocability of early lapses, most unluckily brought prominently before the Courts and so clamped upon them by one judicial decision after another. No wonder they despair of any escape and salvation by the abandonment of every Hindu strain in their law and customs, and the unqualified re-adoption of the entire Muhammadan Law, unless the Legislature intervene.

A comparison of the feeling of the community, and I might say, the sense of the community too, as expressed in the evidence given in 1885 and that given in 1915 with its feeling and sense to-day shows, I think, how powerfully the decisions of the Courts and consensus of professional opinion have combined in operation to curb the reactionary movement that is so conspicuous in 1885. The ideas of some of the principal witnesses who have testified before me, are much clearer than any to be found on record in the earlier cases. They appear to understand much better than they did, all that is implied in the Hindu notion of joint ancestral family property. But I shrewdly suspect that that is not because they have in the intervening period become more Hinduized, but simply because, (a) they have become more intelligent, and (b) all the legal advice they can obtain, is based upon an exaggerated idea of the extent to which they have proved by custom in the Courts their subjection to the Hindu Law. Until Macleod, J., and I almost together struck the first loud note of dissent, it had become, and long been, virtually axiomatic in local professional circles that both Khojas and Cutchi Memons were governed not only by the Hindu Law of succession and inheritance as applied to an intestate separated Hindu, but the whole law with every one of its incidents and consequences of the Hindu joint family. In small measure, however distasteful

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this conviction undoubtedly must have been to a growing majority, many in the sect were reconciled to it by the compensatory consideration that they at least had full power of disposition over their "self-acquired" property. But we have seen reactionary tendencies at work even here. It is not very uncommon to find good Moslems of this sect making use of that extended power to defeat the custom which the Courts have imposed upon them. As the law stands to-day, I have pointed out that they are in this predicament. If they make a Will of the whole of their property, they run counter to their duties as good Moslems. But if they do not, the undisposed of two-thirds will certainly be given by the Courts not to the heirs designated by the Muhammadan, but to those designated by the Hindu Law. That is why we find Cutchi Memons giving away one-third of their property (usually to charity) and the other two-thirds to their heirs according to Muhammadan Law. No stronger proof is needed of the desire of such people, were they free to choose, of re-placing themselves under their own law. Even those who before me have admitted that the Courts have given them the Hindu Law of succession and inheritance, and that they to-day believe that they are governed by it, add, almost to a man, that if they had their own way, they would abide by the Muhammadan Law. Now if the decision of Scott, J., in 1885 had been the other way if he had held that the Cutchi Memons had no custom by which they recognized the Hindu legal distinction between ancestral and self-acquired property, I think it is certain that, fortified by that decision, they would cheerfully have reverted, as far as they could, to their own law, from which they had been gradually driven ever further and further by the current of legal authority which began to set in that direction in 1847.

Adverting, for a moment, to the evidence which, throughout the chain of case-law, seems to have been the determinant factor, I mean the records of the Ecclesiastical Registrar, I must admit that not having those records before me, I find it difficult to appreciate the light in which the learned Judges regarded them or the reasoning used upon them.

Thus in *Ashabai v. Haji Tyeb Haji Rah mtulla* (9 Sir Charles Sargent says:

"The Ecclesiastical records of this Court (9) 9 B. 115 at p. 120.

show that Khojas and Cutchi Memons have, ever since the decree in the case of the Khojas and Memons before Sir Erskine Perry in 1847, [*Hirbae v. Sonabae* (1)] been regarded in the Supreme Court and subsequently in this Court as Hindus who had been converted to Muhammadanism whilst retaining their Hindu Law of inheritance.....The above records are even richer in instances of the application of Hindu Law of inheritance to the estates of Memons than to those of Khojas, and establish a non-contentious practice extending over many years."

I quite admit that Khojas and Memons have, ever since Sir Erskine Perry's judgment, been regarded in the Supreme and afterwards in this Court as Hindus. What next follows is an historical fact which no one disputes. But it is apparently intended to support inferentially the immediately given conclusion that these sects had, in spite of their conversion, retained their old Hindu Law. But the point is not how these people were regarded in the Court, and by an officer of the Court, the real point is whether they were rightly so regarded. And no one, I think, who desires to be scrupulously careful in his reasoning, could say that the view necessarily or even rightly followed from the decision. Nor, except in cases of intestacy, am I able to understand what appears to have pressed so heavily on the minds of all these eminent Judges, except up to a point which falls very far short of the lengths to which they carried their conclusions. I think it may be correct to say that these records do establish the fact that members of the Khoja and Cutchi Memon sects had adopted the custom of making Wills of their whole property. That custom is consonant with the Hindu, and opposed to the Muhammadan, Law. But I am not at all clear what is meant by making Wills in conformity with Hindu, rather than Muhammadan, Law in any other sense, unless, indeed, we are here to import the conclusion, which is being sought to be proved in the present case, that the Wills also prove that the Cutchi Memons had adopted the Hindu distinction between ancestral, joint and self-acquired property. How a Will can prove that, except in preamble, where the testator states that the property

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disposed of, is his own self-acquired property, I do not know. And such a statement is almost certain to be made, where the trend of professional opinion was so decided and unanimous in favour of the doctrine that these people were, although Muhammadans, yet governed by the whole Hindu Law of the joint family. Apart from that, given a power of disposing of the whole property of the testator by Will, it appears to me futile to point to the nature of the dispositions and say, these are such as a Hindu, rather than a good Muhammadan, would make. The case is different, of course, where the records relate to the grant of Letters of Administration. As to this, Sir Michael Westropp observes in *Shivji Hasam v. Datu Marji Khoja* (10):—

"The Ecclesiastical Registrar has collected several precedents at that side,—some being cases disposed of by the Court and others by the Ecclesiastical Registrar. In all, the Hindu Law, as indicating the person entitled to succeed to the property, would seem to have been taken as the guide in granting Letters of Administration, except in one or two instances, in which the person so entitled expressly consented to the grant to another.

"In the case of *The goods of Vallu Musani* administration was granted by the Court, in 1855, to an undivided brother of the deceased in preference to the widow."

That may well have been, had it been taken for granted, as it undoubtedly was immediately after 1847, that the Cutchi Memons and Khojas were, to all intents and purposes, excluding those purely religious, Hindus not Muhammadans. But it is precisely against such large assumptions, taken *per saltum*, that I enter my own emphatic protest. The further and fuller enquiry and argument in this case have strengthened, rather than weakened, the opinions I expressed in my judgment in *Jan Mohamed v. Datu Jaffar* (2) on this point. Nothing could have been easier in the then state of professional opinion than to have satisfied the Court that any two brothers living together were "undivided" in the sense of the Hindu Law. And as the parties concerned were probably quite content to have their property dealt with at that time on that footing, and if they

were not, were certain to have been advised that it was no use protesting, the result was almost inevitable. Nevertheless it appears to me to represent an inversion of the proper sequence of cause and effect. The decisions of the Courts were not the effect of judicially proved customs, but the practice of the Court, most arbitrarily adopted, was the cause of these customs being submitted to for many years by the sects concerned.

Later on we find a much fuller statement by that most eminent and learned Judge, Sargent, J., upon this body of proof. He says in *Hirbai v. Gorbai* (11):

"But it was said that in any case, since the judgment of Sir Erskine Perry, a uniform practice has prevailed in this Court in the exercise of its Ecclesiastical Jurisdiction, both in its contentious and non-contentious business, of administering the Hindu Law of inheritance in the absence of proof of any special appeal custom to the contrary.

"Now an examination of the records of the Ecclesiastical Side of the Supreme Court (during the interval of 16 years which elapsed between the date of Sir Erskine Perry's decision and 1863) shows that there were as many as ten applications for Letters of Administration to Khoja Estates, seven of which were disposed of by the Registrar as non-contentious business and three by the Court itself.

"The first of these latter cases is that of *Vallu Musani* in 1855, who died leaving a widow, a son and daughter who were minors, a brother. The widow applied for administration. A caveat was entered by the brother, alleging that his brother had been his partner and joint in food and estate, and that the widow was illiterate and unfit to manage the estate, and that the widow of a Khoja leaving male issue was only entitled to maintenance. The Court granted Letters of Administration to the brother. The decision is in accordance with Hindu Law on whichever ground the Court proceeded.

"In the next case, that of *Pirbhai Manji*, the deceased left a widow and an infant son. Application was made by the widow, and at first opposed by persons who relied on a Will; but, the Will having been declared invalid,

(10) 12 B. H. C. R. 281 at p. 293.

(11) 12 B. H. C. R. 294 at p. 300.

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they alleged that the deceased had other relations, viz., a maternal grandmother and a maternal uncle, and his four sons. Administration was granted by the Court to the widow. The decision is in accordance with Hindu Law, and exclusively so, as by Muhammadan Law the widow would not be the natural guardian of her infant son for the purpose of managing his property, although she might be entitled to the custody of the child if under seven. And, as no custom was alleged, it is apparently a decision that the Court will apply Hindu Law.

"In the last case of *Dossa Nanji* in 1862, the deceased left a widow and a niece. The widow applied for administration, and the niece objected on the ground that the widow intended to sell the property; and the Court, consisting of Sir M. Sausse and Sir J. Arnould granted administration to the widow, she undertaking not to sell or mortgage. This is also in accordance with Hindu Law.

"Passing to the cases decided by the Registrar, the first is that of *Jairoj Dharramsi* in 1855, who died leaving a widow, four brothers, and no issue. A brother applied for administration, and the widow entered a caveat, but withdrew it, and Letters were granted to the brother. The second is that of *Mahomed Allowany*, where the application was by a brother, alleging that he had been joint in food and estate with his brother, and that a widow was only entitled to maintenance; and the Registrar, on consent of the widow, granted Letters to the brother. In the third case, *Pardhan Ravji*, the mother applied, there being a widow and an infant son, and the Registrar refused, unless the widow consented, which she ultimately did. The fourth is that of *Mithu Sonji*, where the family left consisted of three sisters, and administration was granted to one, the others being in Cutch. The fifth is that of *Vallubhai Alvany*, where Letters were granted to the widow, there being a mother and daughter. In the sixth, that of *Dada Alvanna* in 1859, the family consisted of a son, six daughters, and a grandson, and administration was given to the son. In the seventh, that of *Pachan Punjani*, administration was granted to the widow.

"It is to be remarked that in all these cases, with the exception of two the widow either applied for administration or entered a caveat,

and that in all administration was either given to the widow, or, if not, it was with her consent, or under special circumstances, analogous to those of an undivided Hindu family, as in the case of *Vallu Musani*.

"It may be said that it would be unsafe to draw any positive conclusion from these scanty materials as to what the practice of the Court really was, although they undoubtedly point to such a practice as I have stated, and are difficult to explain on any other supposition."

It is particularly instructive to note what was the nature of the caveat in *Vallu Musani's* case in 1855:

"A caveat was entered by the brother, alleging that his brother had been his partner and joint in food and estate and that the widow was illiterate and unfit to manage the estate, and that the widow of a Khoja leaving male issue was only entitled to maintenance."

I think it safe to conjecture that the first ground taken by the caveator was his own, and the true ground, while the others were suggested by his professional advisers in accordance with their own opinion. The second case cited certainly was decided rather in accordance with the Hindu than the Muhammadan Law. The third was a conflict between widow and niece, the latter's objection apparently being confined to apprehensions lest the widow should alienate the property. The widow was granted administration on undertaking not to sell or mortgage. I cannot say that that is a very convincing case either way. Those appear to have been the only three contentious cases which were procurable before 1863. That is to say, no better evidence than this could be got from these records, during the seventeen years next following Sir Erskine Perry's judgment. It is obvious, I think, that no positive conclusion could or ought to be drawn from the cases decided by the Registrar, or even from these with the three contentious cases added. But the learned Judge, while conceding so much, thought that there was much subsequent corroboration, and this corroboration consists of the decisions, beginning with that of Sir Mathew Sausse in *Ganghai v. Thavar Mulla* (12) which, I hope, I have sufficiently dealt

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with and disposed of in my previous judgment. These extracts will show clearly enough what I mean when I say that I find it hard sometimes to follow the reasoning of the learned Judges who one after the other built up the law administered by this Court to Khojas and Cutchi Memons. In my opinion and speaking with great respect to the many much greater Judges than I, who have handled the subject, these records of the Ecclesiastical Side of the Court appear to prove very little more than the ease and rapidity with which, within a small legal circle, a doctrine may be developed and settled. I think too that, at any rate in the earlier days, they suggest that there was great laxity of thought and indifference, to say no more, in distinguishing clearly between Muhammadan and Hindu Law, and where the latter was found to have invaded and superseded the former, setting precise limits upon these proved substitutions. Coming back to the case decided by Scott, J., in 1885 I find the learned Judge saying:

"In a series of exhibits put in by Mr. Starling Hindu Law is evidently considered the governing law of the sect. Thus out of sixty Cutchi Memon Wills, in only one the principles of Muhammadan Law seem to have guided the Registrar. That case did not go to the Court, but Will No. 8 was submitted to the Court and Perry, C. J., decided (14th January 1852) that the widow of a separated Memon is entitled to the property."

I repeat I do not know what the first part of the passage cited means. I do not know how the Registrar could have been guided by the principles of the Hindu, rather than the Muhammadan Law in dealing with these Wills. I suppose, though here I may be wrong, that all he had to do, was to see whether the Wills were duly executed. And as I have already said, if it be conceded that Muhammadans have so far departed from their own law as to have adopted the custom of willing away all their property, I am at a loss to understand upon what ground any distinction could be drawn in dealing with such Wills between principles of Muhammadan and principles of Hindu Law. It is curious to find that in 1852, five years after the decision of the *Khojas and Cutchi Memons'* case (1) Sir Erskine Perry holds that the widow of a "separated" Cutchi Memon is entitled to her

husband's estate. I have pointed out in this judgment that in all the sea of confused and conflicting testimony recorded, the single point upon which all witnesses appear to be unanimous is that in no circumstances can a widow among Cutchi Memons get more than maintenance. I do not know whether Sir Erskine Perry's decision rested on evidence, but, I should guess in the absence of certain information, that it was grounded on a mere inference drawn by him from his own decision in 1847.

The last point I propose to mention as a result of my close examination of the case of *Mohamed Sidick v. Haji Ahmed* (4) is that it finally laid to rest the doubts which up to that time Mr. Inverarity had felt upon the question whether Cutchi Memons were subjected to the same extent as Khojas to the Hindu Law, I will not say of simple succession and inheritance, but also of the Hindu joint family with all its legal incidents and consequences. How great must have been the formative influence of Mr. Inverarity's professional opinion through the succeeding thirty years of his brilliant and strenuous practice may be easily imagined. That may have had as much to do as any other single cause with consolidating local opinion, at any rate, and compelling, if not reconciling, Cutchi Memons of Bombay to regard themselves as virtually governed by the whole Hindu Law of succession and inheritance and the joint family. I shall not pause to discuss in detail the evidence given by Messrs. Inverarity and F. E. Dinshah in this case. I have gone over it carefully. I need not attach any importance to Mr. Dinshah's opinion. He is a comparatively young, though no doubt distinguished Attorney, and I do not consider that his opinion, the result of his practice for, say, the last thirteen years, is of much value. We all know what the Bar opinion has been during that period, and, I think, I know how it has come to be what it is. Mr. Inverarity's evidence is of a very different quality, and whether it be relevant or not, it assuredly is most interesting. But it does not help me much. It shows how a great Advocate forms his opinions, beginning by taking all that his seniors at the Bar told him for gospel, and gradually with ripening experience passing through a phase of critical doubt to a settled personal convic-

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tion. Even now I should doubt whether Mr. Inverarity is logically satisfied. I understand him to mean no more than that after 1885, he regarded the Law as settled both for Khojas and Memons, and perhaps I ought to add rightly settled, by the decisions of this Court. After that he accepted this position as the basis of all professional advice he gave. I think in this connection that I ought to say that, in my opinion, it must be conceded that the specific issue, whether or not the Hindu distinction between ancestral, joint and self-acquired property was part of the law governing the Cutchi Memons, was tried, and the learned Judge undoubtedly meant to find that it did. But as I have explained, I am quite sure that he would not have decided the issue as he did, had he not approached it under pressure of a strong professional prepossession, and what I believe to have been an unwarrantable presumption, that is to say, from an entirely wrong point. And, at best, the judgment is only that of a Court of co-ordinate authority. It is a judgment which deserves to be treated with the highest respect, not only because of its intrinsic qualities but also because of the eminence of its author. And I hope that I have evinced my respect sufficiently by the length of time I have given to a very close study and criticism of it. I can only say now that, with deference, I cannot agree with it.

I may now resume this judgment so far and state in a word or two my own conclusions. Accepting the proposition that the Cutchi Memons are governed by the Hindu Law of simple succession and inheritance, I find that it is not proved in this case, and never yet has been proved, in this Court affirmatively that they have adopted the Hindu Law of the joint family, or have made by custom the Hindu legal notions of ancestral joint family as distinguished from self-acquired property any part of their law. As these notions are foreign to their own law, not finding any countenance or place in true Muhammadan Law, I hold that they are not to be deemed to affect in any way the sect of Cutchi Memons either in the matter of making Wills or in matters of succession and inheritance. In so holding, I must refer to what has always been used as a weighty, if not a conclusive, argument, namely, that it is too late now to

alter the law, and that a Court should look rather to uniformity of legal decisions than to nice logical or philosophical accuracy. Policy requires that there should be continuity in legal decisions, for, nothing can be worse than keeping the law in perpetual uncertainty, and so perhaps unsettling titles which have, for many years, been supposed to be thoroughly sound and marketable. I agree I have no intention of unsettling a single title which has become good under the former decisions of this Court. If the principle for which I contend be uniformly accepted as good law, no member of the Cutchi Memon sect will have any reason to complain, nor will the titles under which they hold property to-day be in any risk of being destroyed or even impaired. For I next hold that the custom of making Wills of the whole of their property has now been proved to be a part of the law governing Cutchi Memons. And if we limit the old proposition to what I regard as the widest scope to which it has any right of legitimate application, namely this, that Cutchi Memons are governed by the Hindu Law of simple succession and inheritance as it would be applied to a separated Hindu with self-acquired property, it becomes apparent that the custom I find, fits in easily and naturally with that proposition, and cannot operate to vex or unsettle titles acquired under the earlier case-law. Heretofore it has been the general opinion, at any rate during the last forty years or so, that Cutchi Memons, while empowered to dispose of the whole of their property by Will, were yet precluded from disposing of any property which was joint ancestral or joint family property, in the sense of the Hindu Law of the joint family. If I am right that distinction must now disappear, and the proposition will be much wider, namely, that a Cutchi Memon may dispose of the whole of his own property, no matter how he got it, by Will. But that cannot undo anything which has been done under the more restricted power. Therefore, not a single title can be unsettled by adopting the rule of law I propose.

I do not think it necessary to decide whether the making of Wills, is part of the law of succession and inheritance. It is enough to find that the Cutchi Memons have proved that they have acquired by custom the power to dispose of all their property by

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Will. This does not compel them to disobey their Muhammadan Law. It leaves them free to give full effect to it, if they so desire, by doing what many have already done, that is, giving away one-third as they please and bequeathing the other two-thirds to their heirs according to Muhammadan Law. It is true that if they die intestate, the Courts will give their property to their heirs according to the Hindu and not according to the Muhammadan Law. The more reason why they should not die intestate if they are really anxious to carry out the sacred commands.

While, therefore, the law as I propose to declare it, is not open to any objection on the ground that it will unsettle settled titles, it has many great advantages. *First*, it is clear and easy of uniform application. *Second*, it will protect the Cutchi Memon sect against the worst danger to which they are now exposed, the liability to explain the accumulation of great wealth, often by successive generations over long periods, to avoid the application of the nucleus doctrine and generally to satisfy the Courts that in its present form it is self-acquired and not joint ancestral or joint family property. This is by far the most harassing and expensive litigation in which wealthy persons can become involved. *Third*, it will wipe out an existing anomaly, the isolated attitude of the Bombay High Court in dealing with Article 127 of the second Schedule of the Indian Limitation Act. Every other High Court in India has held that that Article does not apply to Muhammadans. The Bombay High Court alone has held that it does. I have shown in my previous judgment how that doctrine came to be accepted as settled law in this Court. It is surely desirable that upon such a question the law of the whole country should be uniform. And it would immediately become so as soon as all distinctions between ancestral, joint and self-acquired property among Cutchi Memons and Khojas were obliterated.

Further, it might help to remove certain other causes of doubt in regard to minor points of the Hindu Law, which appear to have been taken for granted by the Court here in isolated judgments as being included in the general proposition that Cutchi Memons and Khojas are in all respects governed by the Hindu Law of succession and inheritance.

I shall now deal, as briefly as I can, with the *second* question to be answered at this trial. The bequests to charity are impugned on two grounds: (1) that they are bad for uncertainty, (2) that they are bad because they are conditional. The latter point has special importance in connection with the very elaborate and precise Muhammadan Law of gift. I have said in an earlier part of this judgment that assuming I find that Cutchi Memons have by custom acquired the right of disposing of the whole of their property by Will, I should certainly incline to the opinion that such Wills must be interpreted, where interpretation is necessary, in the light of the Muhammadan, rather than of the Hindu, Law. Where, then, it is a question whether a devise by a Cutchi Memon is good or bad, the answer must depend upon whether it conforms in essentials with the requirements of the Muhammadan Law of gift. I feel no doubt on either of the points taken by the objectors. It has often been held that gifts to "*dharma*" are void for uncertainty. I have never been able to concur whole-heartedly in the niceties of legal distinction which have led to, and been used in support of, these decisions. In this country "*dharma*" does mean roughly, and almost invariably in the cases which have come up for legal decision, just "*charity*" and nothing else. It is true that an Oriental's idea of charity might be a little wider and looser than that of Lord Eldon, particularly amongst the lower and more illiterate classes of Hindus and Muhammadans. But a liberal use of the convenient doctrine of *cypres*, which is surely elastic enough to reach almost anything which Judges wish to reach, might have validated the technical defects, and cured the infirmity. The ground of the rule in England appears to have been that as all charities were the special care and under the direct control of the Court of Equity, that Court must refuse to accept as "*charity*" any gift which, by reason of the vagueness of the language in which it was expressed, left the Court in doubt as to how it was to be applied. I should hardly have thought that, outside the region of a rather hyper-refined legal pedantry, such considerations had any substance or real practical weight. But so the law undoubtedly stands, and where testators

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bequeath funds to "*dharma*," the Courts decline to validate the gift as a gift to "charity" in the English sense. But I do not think that the testator here leaves us in any doubt as to his meaning or true intention. We find in clause 24 of the Will that he thus expresses himself, "they shall out of my '*punji*' set apart three lacs," etc., "shall spend according to law the said sum or certain portions thereof in connection with some good works of charity, in such manner as they may think just and proper, such as hospitals, sanitarium, *sucavad khana* (lying-in-hospital), *musafar khana* (resting house for travellers), *madressas* (schools), scholarships, *dharmashalas*, medical dispensaries, etc., i. e., in connection with any such '*khairat*' (that is, 'charity' work), that is, in connection with such different works of charity." The use of the Persian word "*khairat*," followed by the English word "charity" as explanatory of "*dharma*" shows how solicitous the testator was to make it perfectly clear that he meant charities in the legal sense. And this is plain too from the enumeration of objects, upon which he desired that the fund should be spent. All of these are good charities. Again, in clause 27: "they shall utilize the whole of the said '*punji*' or portions thereof in such manner as they, in their discretion, think proper in connection with the above-mentioned or any other good works of '*khairat*' (charity)." Now, this must, I think, be read in connection with the fuller descriptions contained in the preceding clause 24. Thus, reading all together, I cannot see that there is any such uncertainty as would be a sufficient ground for declaring the bequests bad. In my opinion, they are very good charitable bequests.

The next objection is based upon the language of clause 27: "Should no son be born to me agreeably to what is written above, or should (one) be born (and) should (he) die without leaving a son or heir, ... then as regards my whatever '*punji*' there may be left," etc. It is argued that this is a conditional gift to charity and, therefore, unsustainable. First, let us see what was written "above," agreeably to which, what follows in clause 27, is to be understood Clause 25:

"I have no issue now whatever, as written above, but should hereafter, by the grace of God, any children be born of the womb of my present wife, or should I hereafter publicly marry another lady of my caste and creed according to the custom of my caste and creed and should any children be born of her womb hereafter, and should daughters be so born to me, I direct... shall set apart a sum of rupees one lac for each of my daughters, and they shall," etc., (continued in clause 26) "should any son or sons be born to me agreeably to what is written above by my present or any other wife, etc., then after paying, etc., my said son alone shall become the owner thereof should I have only one son, or my said sons shall become the owners thereof in equal shares should I have more than one, ... but should any son whatever of mine die without leaving a child after his marriage but before attaining the age of eighteen years, his brother or brothers shall become his heir or heirs and should such deceased son have no brothers, then, under the circumstances first mentioned, the whole share of the deceased or, under the circumstances secondly mentioned, his remaining share shall be included in my remaining '*punji*' and the same shall be utilized in '*khairat*' (charity) in accordance with what I have hereinafter written."

What is the total effect of these dispositions? The testator intends to provide for any daughters that may be born to him, but these are expressly excluded in clause 27 from among the heirs. Then he provides for sons being born to him by his present or future wife. There is a provision that should a son be born to the testator and die after marriage but before attaining the age of eighteen without leaving a child (the context shows that he means a son), his share is to go over to his brothers. This appears again in the concluding clause, where, however, the conditions disappear. Reading this with what follows in clause 27, I have no doubt that what the testator meant was that should he have a son at the time of his death that son would take absolutely and defeat the alternative gift to charity. Should he have had such a son and should he have died leaving a male child, alive at the testator's death, then the

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last-named grandson would defeat the gift to charity. The intention cannot, in my opinion, be that should a son be born to the testator and be alive at his death, he should take an estate conditioned against the charity by having a son of his own. I read the Will as intending to confer an absolute estate, against the charity, upon any son or grandson of the testator who might be alive when the Will came into force. But should there be no such son or grandson living, then the residue of the "punji" was to go at once and absolutely to charity. I do not understand the testator to have meant, or said, that even if he had a son at the time of his death, that son was only to take conditionally against the suspended gift to charity, the condition being that before his estate could become absolute, he must have a son of his own. In other words, I do not understand this to be a bequest to charity conditioned *in futuro* upon the testator's son, should he have left a son him surviving, in his turn having no son. In my opinion had there been a son of the testator alive at the date of the testator's death, the charity would have been at an end. In this view the gift is not conditioned *in futuro*, but an absolute gift in the alternative. If a son be alive at my death, then no gift to charity, but if there be neither son nor grandson alive at my death then an absolute and immediate gift to charity, such is what I understand the testator to have meant and said. In holding then that the gift is good, I am not contradicting anything I have said in a previous judgment of my own [*Jainabai v. R. D. Sethna* (13)], upon which Mr. Setalvad relied, or relaxing in any degree what I conceive to be the very strict limitations imposed upon gift by the Muhammadan Law. Nor do I think that this is a case governed by the recent decision of the Privy Council in *Chunilal Parvatishankar v. Bai Samrath* (14). With greatest deference to the highest judicial tribunal in the land, I can only say for myself that I find much difficulty in understanding how the principle which I understand to underlie that decision, could be given

anything like uniform practical application. There, there was a devise to the testator's two sons equally of the whole estate, and it was provided that in the event of one son predeceasing the other without male issue, the surviving brother should take the whole. Again, speaking with submission, I should, from a very long experience of the natives of this country, their habits of life, social ideas and testamentary notions generally, have had no hesitation in concluding, as the learned Judges of appeal here did conclude, that the intention was that if one of the testator's sons should die during the testator's life-time without leaving male issue, then the other son should take the whole estate and make due provision for the maintenance of his sister-in-law. But their Lordships of the Privy Council held, seemingly without hesitation or doubt, that the true construction of the Will was that even though both sons should have survived the testator, and each should have accordingly taken half of the estate, yet, upon the death of one of them without leaving male issue, the other was to take his share. The practical objection which I have ventured to suggest is that, after such a gift had vested, and to all seeming absolutely, it is difficult to understand how the donee could be prevented from wholly dissipating it if he chose to do so. In the case put, for example, let us suppose that the two sons had taken the estate in equal shares in the year, say, 1910, and both had lived to the year 1960, when one died. Let us suppose that in the meantime the son who died first in 1960 had been actively engaged in commerce or land speculation and had enormously added to what he had received in 1910, while at the same time leaving his whole estate so blended and intermixed that it would be utterly impossible to say how much of it had come to him under the Will in 1910, could it be held that the surviving brother was to take the whole against, say, a surviving widow or a daughter? Certainly not. But if not the whole, then how much? I will not pursue that subject. Suffice it to say that in the construction I put upon this Will no difficulty of that kind need arise nor need I consider the hard doctrine laid down in the case of *Chunilal Parvatishankar v. Bai Samrath* (14)

I hold therefore :

(13) 6 Ind. Cas. 513; 12 Bom. L. R. 341; 34 B. 604.

(14) 23 Ind. Cas. 646; 6 Bom. L. R. 366; 26 M. L. J. 647; 18 C. W. N. 844; 19 C. L. J. 563; 12 A. L. J. 742; 16 M. L. T. 59; 38 B. 399; 1 L. W. 762.

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That it is well established and conclusively proved in this trial that Cutchi Memons have acquired by custom the power of disposing of the whole of their property by Will.

I hold that it is not proved in this case and never has been proved affirmatively that the Cutchi Memons have ever adopted as part of their Customary Law the Hindu Law of the joint family, as a whole, or the distinction existing in that law between ancestral family, and joint family and self-acquired property.

I hold further that Cutchi Memons are subject by custom to the Hindu Law of succession and inheritance as it would apply to the case of an intestate separated Hindu possessed of self-acquired property, and no more.

I further hold that the Will challenged in this suit is a good and valid Will in all respects, and that the bequests to charity are neither void for uncertainty nor bad under the Muhammadan Law as offending against the radical principle that a gift must be made *in presenti*, and not conditioned in *futuro*.

Various other points were taken in the pleadings, and have been raised in the form of issues. With the exception of certain allegations made against Mr. Hormasji, Vakil, none of these were gone into at the trial, nor any mention made of them in the arguments. The allegations against Mr. Hormasji were, after his evidence had been recorded, withdrawn. As to the other points, I take it that the various parties who took them intentionally abandoned them, since no evidence was led upon any of them nor were they mentioned in the elaborate concluding arguments of Counsel. Some, I gathered, were left to be referred to the Commissioner, should a reference be found necessary, after judgment had been given on the main controversy. I am not, therefore, now in a position to say anything further upon, or attempt to decide any of those subordinate and incidental points.

By consent: The usual administration decree in terms of prayers (a), (b), (c) and (d) of the plaint. Referred to the Commissioner Issues Nos. 12 and 13 to be argued after the receipt of the Commissioner's report. Issue No. 14 also referred to the Commissioner.

All costs out of the estate including costs of a motion for Receiver. The costs of the Advocate-General between attorney and client. Those of the executors as between attorney and client.

On the strength of authorities [*Mills v. Farmer* (15), *Currie v. Pye* (16) and *Moggridge v. Thackwell* (17)], I think I may give defendant No. 7 her costs out of the estate as between attorney and client. So ordered.

Further costs and directions reserved.

Order accordingly.

(15) (1815) 19 Ves. (Jun.) 483; 1 Mer. 55; 13 R. R. 247; 34 E. R. 595.

(16) (1811) 17 Ves. (Jan.) 462 at p. 468; 34 E. R. 179.

(17) (1803) 7 Ves. (Jun.) 36; 32 E. R. 15; 6 R.R. 76.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 101 OF 1913.

August 20, 1915.

Present:—Mr. Justice Spencer, Mr. Justice Coutts-Trotter and Mr. Justice Napier.

Y. S. VENKATA SUBBIAH CHETTY—
PLAINTIFF—APPELLANT

versus

A. SUBBA NAIDU AND OTHERS—

DEFENDANTS—RESPONDENTS.

Construction of documents—Surrounding circumstances—Intention—All clauses to be given effect to—Assignment of debt—Debtor's assent communicated to assignee—Debtor, whether can subsequently plead any claim or charge—Transfer of Property Act (IV of 1882), s. 132—Actionable claim—Transfer prima facie subject to equities—Transferee, liability of, to ascertain extent of equities—Evidence Act (I of 1872), s. 23—"Without prejudice," meaning of, when used in a private document.

A Court is empowered to look to surrounding circumstances in deciding what the intention of the parties to a particular transaction was. [p. 155, col. 2.]

Parties are bound by the words they have used, however clear their intention may be. [p. 157, col. 2.]

In construing a document, a Court will not adopt such a construction as will reduce one important clause of it to a nullity. (*Ut res magis valeat quam pereat*.) [p. 158, col. 2.]

Where there is an assignment of moneys in the hands of a debtor and the debtor communicates to the assignee his assent to deliver the moneys in accordance with the terms of the assignment, he cannot afterwards assert, as against the assignee, any claim or charge in his own right, of which no notice had been given to the assignee. [p. 157, col. 1.]

Walker v. Roston, 9 M. & W. 411; 11 L. J. Ex. 173; 60 R. R. 770; 152 E. R. 174; *Griffin v. Weatherby*, 3 Q. B. 753; 9 B. & S. 726; 37 L. J. Q. B. 280; 18 L. T. 881; 17 W. R. 8 and *Macfarlane v. Lister*, 57 L. J. Ch. 92; 58 L. T. 201; 37 Ch. D. 88, followed.

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Liversidge v. Broadbent, (1859) 4 H. & N. 603; 7 W. R. 615; 28 L. J. Ex. 332; 118 R. R. 643, referred to.

Quere.—Whether this obligation is based on contract, estoppel, or waiver? [p. 157, col. 1.]

Under section 132 of the Transfer of Property Act, the assignee of an actionable claim *prima facie* takes it subject to all existing equities and it is his duty to ascertain their extent. [p. 157, col. 2.]

Mangles v. Dixon, (1852) 3 H. L. C. 702; 1 Mac. & G. 437; 1 Hall. & Tw. 542; 19 L. J. Ch. 247; 10 E. R. 278; 88 R. R. 296, referred to.

The onus of proving affirmatively that the assignment of an actionable claim is free from an existing right, is upon the assignee. [p. 157, col. 2.]

The words 'without prejudice' when used in private documents, have not the well-known meaning which they have when used in connection with an actual or impending litigation. [p. 158, col. 1.]

Letters Patent Appeal from the judgment of the Chief Justice and Oldfield, J., dated the 16th September 1913, in Original Side Appeal No. 44 of 1912 (Civil Suit No. 210 of 1909).

FACTS of the case appear from the judgment.

Messrs. T. Rangachariar and A. Suryanarayaniah, for the Appellant:—The learned Trial Judge erred in law in granting leave to amend the written statement as he did. Before that order, the case of the 3rd defendant Company was, that it was only a stake-holder. Otherwise it admitted the plaintiff's claim. Where, therefore, the claim of the 4th defendant was satisfied and he withdrew from the suit, the 3rd defendant had absolutely no defence. It was neither legal nor equitable under such circumstances, especially after the case had been pending for a very long time, that the 3rd defendant should have, at that late stage, been allowed to raise for the first time a new defence. The 3rd defendant Company must stand or fall by the position which it originally took up and since there were no longer any rival claimants before the Court, it ought not to be allowed to resist the plaintiff's claim on any ground other than the one originally put forward by it. The defendant Company is not entitled to anything more than commission. They are certainly not entitled to interest or disbursements. Exhibit A is very clear. It refers only to commission. The parties are bound by the words used. Their intention is immaterial. The addition of the words 'without prejudice' is meaningless and without any effect. Clause 12 of the agreement creates no lien. Clause 12 is subject to clause 11 and

under the latter clause the defendant Company has to pay all current balance, after satisfying certain claims, to the mine owners. Further under Exhibit E, as soon as the mine owners extracted any mica from the mines designated and put it in a deliverable state, the mica became appropriated to the purposes of the lien, and the plaintiff obtained a special property therein. It is not open to the defendant Company at this stage of the litigation to agitate the point as to the maintainability of suit. They did not raise it in the pleadings and no issue was joined thereon. On the other hand, the additional issue framed by Sankaran Nair, J., assumed the existence of such a contract. Wallis, J., as well as the Appellate Bench rightly refused to allow this point to be raised.

Admittedly there was a valid assignment in favour of the plaintiff. The assignment had been communicated by the defendant Company to the plaintiff. It is not competent to the defendant Company to assert any charge or claim of which they have not given notice to the plaintiff. See *Griffin v. Weatherby* (1); *Walker v. Rostron* (2) and *Macfarlane v. Lister* (3).

Mr. D. Chamiar and Dr. K. Pandarai, instructed by Messrs. Short, Bewes & Co., for the Respondents:—The suit itself is not maintainable. *First*, there was no contract between the defendant Company and the plaintiff and *secondly*, between the mine owners and the defendant Company which could give the plaintiff a right to sue. See *Liversidge v. Broadbent* (4). The order granting leave to amend the written statement is perfectly legal and equitable. The defendant Company never admitted the plaintiff's claim. By using the word 'commission' in Exhibit A, it was never intended to give up the rights of the defendant Company under the agreement of 1906. The discrepancy between the language of the agreement and that of the assignment was not discovered until after the action was well started. See also Ex-

(1) 3 Q. B. 753; 9 B. & S. 726; 37 L. J. Q. B. 280 18 L. T. 881; 17 W. R. 8.

(2) 9 M. & W. 411; 11 L. J. Ex. 173; 60 R. R. 770; 152 E. R. 174.

(3) 37 Ch. D. 86; 57 L. J. Ch. 92; 58 L. T. 201.

(4) (1859) 28 L. J. Ex. 232; 4 H. & N. 603; 7 W. R. 615; 118 R. R. 643.

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hibits B, D, F and G for similar inaccuracies. The expression there used, viz., 'proceeds of mica' means, even according to plaintiff, 'net proceeds after deducting commission.' Under section 132 of the Transfer of Property Act an assignee of an actionable claim takes it subject to all existing equities. *Mangles v. Dixon* (5). The onus of proving that the assignment is free from the existing right of the defendant Company, is on the plaintiff. He has had notice of the contract between the defendant Company and the mine owners, under which the former were entitled to deduct not only commission but also interest and disbursements. The addition of the words 'without prejudice' to Exhibit A and A1 is significant. They cannot be treated as mere surplusage. The writer must certainly have meant something. From the context in which they are used, it is clear that they are not used in the ordinary sense in which they are used in connection with pending litigation. As the writer says, what was meant by the words was 'without prejudice to the existing rights of the Company.'

JUDGMENT.—This was an action brought by a merchant in Cuddapah, called Venkata Subbiah Chetty, against two persons, who may for brevity be called the "Naidus," the South Indian Export Company and Heinrich Brandt. The facts giving rise to the action are as follows:—

The Naidus were the owners of some mica mines in Nellore. On the 17th of February 1906, they entered into an agreement, Exhibit I, with the South Indian Export Company regarding the working of the mines and disposal of the produce. The general nature of the agreement was that the Company should receive the produce of the mines and sell it, should receive a commission on the gross amounts realized by sale and certain specified disbursements incurred in connection therewith. They were further to give the owners a standing advance of Rs. 55,000, and were to receive on that sum and on any further sums they might advance, interest at 6 per cent. (Clause 5). It was provided by clause 11 that the Company should first pay the commission, interest and dis-

(5) (1852) 3 H. L. C. 702; 1 Mac. & G. 437; 1 Hall. & Tw. 542; 19 L. J. Ch. 240; 10 E. R. 278; 88 R. R. 296.

bursements due to themselves out of the realized proceeds of the mica sales, then pay various creditors of the Naidus in certain proportions and hand the balance, if any, to the Naidus. Clause 12 provided that the Company should, subject to clause 11, have a lien on all cash and mica in their hands as security for the repayment of all sums which might fall due under the agreement. The agreement was to continue to be in force for five years from 1st of March 1906, and all moneys due to the Company, including the standing advance of Rs. 55,000, were to be paid off and discharged not later than two months before the expiration of the agreement, i. e., by the 1st of January 1911.

The agreement duly came into force, and under it quantities of mica were sold and payments made by the Company to the various creditors of the Naidus, including the plaintiff. Meanwhile the Naidus were being pressed by the plaintiff for further security and a further share of the proceeds of the mines. He had apparently obtained decrees against them to an amount exceeding a lakh of rupees. In these circumstances the Naidus entered into an arrangement with the plaintiff, which is set out in a letter dated the 20th of November 1908 (Exhibit E). The material part of that letter is as follows:—

"We undertake that all the mica produced in our mines at Kalichedu and Tellabodu will be delivered only through the South Indian Export Company; and that the net sale-proceeds after deducting their commission will be paid to you only by the said Company. In confirmation of this our undertaking, we have this day caused the Manager, South Indian Export Company, to give you an undertaking that the sale-proceeds will be paid to you by him as aforesaid. We hereby agree and give you a lien on the mica now in our hands and future mica from the above said mines till the above said amounts are fully repaid."

On the same date the Naidus wrote to the South Indian Export Company a letter (Exhibit A1) which contains the following passage:

"We request you to give an undertaking to Venkata Subbiah Chetty that you will pay him from time to time the net sale-proceeds, after deducting your commission, of all the mica produced in our mines at Kalichedu

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and Tellabodu that we shall deliver through you as per agreement between ourselves."

On the following day, the 21st of November, the South Indian Export Company wrote to the plaintiff a letter (Exhibit A) in these terms:

"We have received a letter from Messrs. Subba Naidu and Kondappa Naidu, dated the 20th November, copy of which we enclose for your information. The contents of this letter have been duly noted by us and the instructions given therein, will be carried out as occasion arises."

Enclosed with this letter was a copy of the Naidus' letter of the 20th November to the Company (Exhibit A1) and both documents were headed "without prejudice."

It will be observed that, whereas the agreement of the 17th February 1906 enabled the Company to deduct their commission, disbursements and interest in the first instance out of the sale-proceeds of the mica, Exhibit A is a direction to the Company to pay the net sale proceeds after deducting commission only, without any mention of disbursements or interest. It seems quite clear in the light of what happened subsequently that 'commission' was in fact used as a compendious term to include interest and disbursements as well, and that neither the Company nor the Naidus, who were parties to the agreement of February 1906, nor the plaintiff, who was also acquainted with it, noticed the variation in phraseology. It has been suggested in this Court that we ought to suppose that the parties deliberately and with intention altered the rights of the Company under the agreement of February 1906 by this correspondence, and that we may assume that some forbearance on the part of the plaintiff in pursuing his remedies against the Naidus was the inducement offered to the Company for giving up their right of priority in payment of interest and disbursements. There is no trace of anything of the sort in any of the documents, and no evidence to that effect was sought to be given at the trial. Mr. Simson, the Managing Director of the Company, was examined as a witness, and even although it was not directly in issue, it is almost impossible to believe that he would not have been asked some question about it if any such tripartite arrangement had taken place. In accordance

with the instructions contained in the letter of the 20th November 1908 (Exhibit A1), the Company proceeded to remit the balance of the proceeds of the Kalichedu and Tellabodu mica to the plaintiff. It is not in evidence what deductions they made from it in respect of their own charges. But again it is difficult to believe that, if they had in fact discontinued the deduction of interest and disbursements, that fact would not have been brought out at the trial. Their interpretation of what their rights were, would not, of course, determine them, but it is an element in the history of the case. While we are on this point, we may say that we do not share the doubt expressed by one of the learned Judges who heard the first appeal as to our power to look to surrounding circumstances in deciding what the intention of the parties was [See *River Wear Commissioners v. Adamson* (6)].

All went well until June 1909, when the Company received instructions from the Naidus to deliver the proceeds of certain cases of mica to one Ramachandra Chetty. They at once by a letter of the 24th of June (*vide* Exhibit B) notified the plaintiff of these instructions; and on the 26th of June Mr. Ramachandra Raju, the plaintiff's then Vakil, answered by a letter (Exhibit F) of that date protesting against the proposed delivery to Ramachandra Chetty, informing the Company that the proposal was an unlawful one and demanding delivery of the sale-proceeds to the plaintiff. The Company, thereupon, communicated with the Naidus, who informed them [*vide* Exhibit H] (1) that the 37 cases of mica did not come from Kalichedu or Tellabodu; and (2) that the plaintiff had broken his contract with the Naidus and consequently absolved them from the further carrying out of the arrangement of 1908. In fact both these statements proved to be untrue, though doubtless the Company had not then the means of knowing their falsity. At any rate, on the 16th of July, by a letter of that date (Exhibit J), the Company informed the plaintiff that they had been instructed that the mica did not come from Kalichedu or Tellabodu, and that they were, therefore, about to deliver to

(6) 2 A. C. 743 at p. 763; 47 L. J. Q. B. 193; 37 L. T. 543; 26 W. R. 217.

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Ramachandra Chetty. This brought the matter to a head, and, after some further correspondence, the plaintiff instituted this suit, joining as defendants, the two Naidus and the South Indian Export Company as the 3rd defendant. The plaintiff in his plaint set out the effect of the correspondence of November 1908, claimed specific performance 'of the contract evidenced by' that correspondence, and payment to him of the net sale-proceeds of the 36 cases of mica. The Company then applied to the Court to have Heinrich Brandt, the 4th defendant, added to the suit on the ground that he, as a secured creditor of the Naidus, had claims against the proceeds of the mica, which might conflict with the claims of the plaintiff. They also filed a written statement in which they set out the provisions of the agreement of February 1906, and asserted their claim to deduct interest, commission and disbursements under that agreement and disclaimed any interest in the balance, asking only to be protected against the rival claims of the plaintiff and the Naidus and the 4th defendant (*vide* paragraphs Nos. 11, 13 and 16). Subsequently the claim of the 4th defendant was in some manner satisfied and withdrawn; and an application was made to Bakewell, J., by the defendant Company to amend their written statement. Leave was given and certain amendments were made. It was strenuously argued by Mr. Rangachariar on behalf of the plaintiff that this leave ought never to have been given and that the amendments should be disregarded, on the ground that until the amendments were made the defendant Company had only taken up the position of stake-holders, and that on the withdrawal of the 4th defendant from the suit, they ceased, on their own showing, to have any defence and that they ought not, after the action had been pending for a considerable time, to be allowed for the first time to resist the plaintiff's claim on any other ground than the presence of rival claimants. If it were the fact that the defendant Company had conceded the plaintiff's claim as now formulated, except as subject to the claims of the 4th defendant, this contention would have great force. But it is not the fact that the defendant Company ever submitted to the claim ultimately made

by the plaintiff in this action. The claim made in the plaint appears on examination to be one thing, the submission in the defence another, the claim being for the net proceeds less commission only, the submission being to pay the net proceeds less not only commission but interest and disbursements as well. We very much doubt whether the parties or their Pleaders had at this time realized this discrepancy, or whether any question as to the nature or extent of the deductions was present to the mind of the plaintiff at the time that the suit was filed. But whether the parties had realized it or not, there it was on the pleadings and it is not correct to say that the amendment allowed, enabled the defendant Company to resist the claim finally made, that they were not entitled to deduct disbursements and interest. What the amendment did effect was to enable the Company to claim for the first time an alleged lien on the mica and its proceeds by reason of the termination, reached during the pendency of the suit, of the agreement of February 1906. All sums repayable under that agreement had fallen due on the 1st of January 1911, including the standing advance of Rs. 55,000; and if their lien was valid, the debt in respect of which it was exercised would be increased by at least Rs. 55,000 as from that date. This was a claim, good or bad, which the Company could not have made in their original written statement, and it cannot be seriously pressed that we ought to interfere with the discretion of the learned Judge allowing the amendment which raised it.

A long discussion took place in the argument before us as to whether the present action was maintainable at all. Mr. Chamier contended on behalf of the defendant Company that there was no contract between the defendant Company and the plaintiff and, assuming that to be established, there was no contract between the Naidus and the defendant Company on which the plaintiff could sue. Mr. Rangachariar for the plaintiff, while resisting those propositions, further contended that the point was not open to the defendant Company, as it was not raised in the pleadings and that the first additional issue settled by Sankaran Nair, J., after the 3rd defendant had amended his written statement, implied

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the existence of a valid contract between the plaintiff and the defendant Company. It is no doubt a strong thing to allow the defendant to take a point which does not appear in the pleadings and the issues, and both the trial Judge, Wallis, J., and the Bench before whom this appeal was originally heard, refused to allow them to do so. This, however, is a very exceptional case, because, in our opinion, it is reasonably clear that, at the time of the drafting of the pleadings and the first settlement of issues, certainly the defendant Company and probably the plaintiff, and their respective advisers, had not grasped the extent of the plaintiff's ultimate claim. However, in the view we take of this case, it is not necessary to decide the point whether it is open to the defendant Company or not, or whether either of the alleged contracts were made. There was—and this is not disputed—at any rate a valid assignment in favour of the plaintiff, and the real question is, what, on the true construction of the documents, was it that passed by the assignment?

It seems to be clear law that where there is an assignment of moneys in the hands of a debtor and the debtor communicates to the assignee his assent to deliver the moneys in accordance with the terms of the assignment, he cannot afterwards assert, as against the assignee, any claim or charge in his own right, of which he has given the assignee no notice. It is not quite clear from the authorities whether this obligation is based upon contract, estoppel or waiver, but the existence of the obligation is clearly recognised in the English authorities both before and after the Judicature Act. See *Walker v. Rostron* (2) and *Griffin v. Weatherby* (1). These cases are not altogether easy to reconcile with *Liversidge v. Broadbent* (4). But the decision in *Macfarlane v. Lister* (3) seems quite unequivocal.

It seems reasonably clear that the simple word 'commission', used in Exhibit A1, to describe deductions to be made by the defendant Company, was used *per incuriam*; and that there was no intention to cut down the defendant Company's right under the agreement of February 1906. Moreover, as has been pointed out, it was not until the action was well started that the discrepancy between the language of the assignment and the agreement was discovered. Similar in-

accuracies occur elsewhere in the correspondence. For instance, in Exhibits B, D, F and G, "the proceeds of the mica" is used where what was meant was 'the net proceeds after deduction (even on the plaintiff's own showing) of the commission fees.' However clear the intention of the parties may be, they are bound by the words they have used, and it is impossible to say that commission means commission *plus* something else. If, therefore, there were nothing to qualify or amplify the word 'commission' in Exhibit A1, or in the defendant Company's adoption of it in Exhibit A, we should be constrained to hold that the defendant Company had given away their right to interest and disbursements. It is to be observed that by section 132 of the Transfer of Property Act, the assignee *prima facie* takes subject to all existing equities. It is the duty of the assignee to ascertain the extent of the existing equities [*Vide Mangles v. Dixon* (5)] and where there is an existing right, the onus will be upon the assignee to show affirmatively that the assignment to him was free of it. We have come to the conclusion that Exhibits A and A1, when carefully examined, do not amount to an assignment free from the claims of the defendant Company to interest and disbursements. In the first place Exhibit A1 speaks of the mica as being "delivered as per agreement between ourselves." That clearly informed the plaintiff that mica was being delivered in accordance with a contract subsisting between the Naidus and the defendant Company. It is in evidence that the plaintiff was cognizant of the terms of that contract under which indeed he took a direct benefit (See clause 11—II). It must, we think, be taken that this brought to his knowledge the fact that there was an agreement under which the defendant Company had a right to deduct interest and disbursements as well as commission. The business purpose of Exhibit A was to inform the plaintiff that in future the proceeds of the Kalichedu and Tellabodu mines would go to him in their entirety after they left the defendant Company's hands and not to the Naidus and further, would not be depleted by prior payments to other creditors of the Naidus. Still, again, though that may have been the business object of the letter, if it really purported to cut down the Company's rights,

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the plaintiff is entitled to take advantage of that.

Finally, both to Exhibit A and Exhibit Al the Company prefixed the words "without prejudice." When used in connection with actual or impending litigation, these words have a well-known meaning which is quite inapplicable to their use in these documents. On the other hand it is a strong thing to treat them, as the plaintiff desires us to treat them, as unmeaning and of no effect. The writer undoubtedly meant something by the phrase, and if what he meant could or ought to have been understood by the recipient, we must give effect to it. We know what the writer meant, because he said what he meant in the witness-box. The question was probably inadmissible, but it was put and answered without objection. He said that he 'meant without prejudice to the Company's rights under the agreement of 1906.' The question is, did the plaintiff know, or ought he to have known, what Mr. Simson meant? We think that the proper inference is, he ought, and did. He had in Exhibit Al a clear reference to the agreement of 1906, of whose terms he was cognizant before. And after all, this interpretation seems to us to be in accordance with the ordinary and natural meaning of the words. It is quite true that when a man makes an offer "without prejudice," the effect is to prohibit the reading of the letter if the offer is not accepted. But the actual meaning of the words in such a case is this: "I am making an offer which I do not admit I am bound to make; and I make it without prejudice to my existing legal rights." In other words, "you shall not use this letter as an admission that I owe what I offer." So here we think that "without prejudice" meant 'without prejudice to the Company's existing legal rights,' that is, to their rights under the agreement of 1906, to which express reference was made in Exhibit Al. There is in fact no offer, only a notice that they were aware of a certain assignment, and an assurance that the instructions would be given effect to without prejudice to their own rights and without binding themselves to any course in future. That is, in our view, the effect of the letter.

This disposes of the main point in the appeal; for Mr. Rangachariar concedes that, if the defendant Company's claim to deduct interest and disbursements is good, no enquiry is necessary to ascertain whether the proceeds of the 36 cases of mica will be exhausted thereby. But the further question was decided by the learned trial Judge, and is before us, as to whether, as after 1st January 1911, the defendant Company were entitled to exercise a lien on the goods for their advances which then became repayable, as well as for interest and disbursements. As we have held that the plaintiff took subject to the defendant Company's rights under the agreement of 1906, it follows that he took subject to any lien created by that agreement; and reliance is placed on clause 12 as creating such a lien. Mr. Rangachariar in effect argues that no lien at all was created by that instrument. He says that the lien created by that clause was in terms subject to clause 11 and clause 11 obliged the defendant Company to pay all current balance after satisfying certain claims to the owners, the Naidus. A Court will not readily adopt a construction that reduces one important clause of an agreement to a nullity; and where a man professes by his contract to give a lien to another, any reasonable construction will be adopted to give effect to it: *ut res magis valeat quam pereat*. A perfectly natural construction gives effect to both clauses; viz., that the operation of the lien is subject to the discharge of all payments guaranteed to be made except those to the Naidus themselves; and that their right to receive the balance depended on there being no further increase under clause 5 of the standing loan of Rs. 55,000. We are, therefore, of opinion that the lien created by the agreement of February 1906 was valid and could be exercised in respect of the capital sums falling due from the Naidus to the Company. The right to enforce it against the proceeds of any particular consignment, might conceivably depend upon the facts as to that consignment; and the only consignment in question in these proceedings is that of the 36

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cases of mica already referred to, with regard to which the question need not be considered on Mr. Rangachariar's admission. We understand that subsequent consignments with regard to which the question of the general lien will be important are the subject of another pending action. We, therefore, desire to guard ourselves against prejudging in any way the results of those proceedings.

One other contention requires to be noticed. Mr. Rangachariar contended that the lien which the Naidus purported to give the plaintiff by the concluding words of Exhibit E, was of such a nature that, as soon as they extracted any mica from the designated mines and put it in a deliverable condition, there was a specific appropriation of such mica to the purposes of the lien, passing a special property in it to the plaintiff. In support of this contention he cited *Maradugula Venkataratnam v. Kotala Ramanna* (7). It is more than doubtful whether in face of clause 12 of the agreement of February 1906 the lien purported to be given to the plaintiff was one which the Naidus could validly give. But be that as it may, it could obviously give no property in the mica as the arrangement never contemplated that the mica should ever be handled by the plaintiff at any stage after it left the mine in a merchantable condition; it was to be consigned for sale not to him, but to the defendant Company; and even if the lien is to be treated as an assignment, the assignment to him was not of the proceeds in his own hands but in the hands of the defendant Company. In these circumstances, it is impossible to hold that there was at any time any appropriation of the mica to him.

The appeal fails and is dismissed with costs, certified for two Counsel.

Appeal dismissed.

(7) 9 Ind. Cas. 255; 21 M. L. J. 413; 9 M. L. T. 276.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 502 OF 1911.

April 1, 1915.

Present:—Justice Sir Donald Johnstone, Kt.,
and Mr. Justice Shah Din

KURA AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

MADHO AND ANOTHER—PLAINTIFFS,

AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 13, Expl. II—Res judicata—First suit as purchasers—Second suit as reversioners—Purchase of ancestral property by reversioners, effect of—Waiver—Acquiescence.

After a land was sold to the defendants, it was sold again to the plaintiffs-reversioners, and when the latter sued their vendor for possession of the land as purchasers, the former, having been added as parties, set up their prior purchase as a defence and the plaintiffs' claim was dismissed. Upon this, the plaintiffs sued as reversioners for a declaration on the ground that the land was ancestral and the sale, being in favour of defendants, was without consideration and necessity.

Held, that the plaintiffs' suit was not barred by the rule of *res judicata*. [p. 160, col. 1.]

A reversioner by purchasing an ancestral property does not admit the alienor's unrestricted powers, nor does he thereby renounce his position and rights as reversioner. [p. 160, col. 1.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 19th January 1911.

Lala Balwant Rai, for the Appellants.

Mr. Sundar Das, for the Respondents.

JUDGMENT—This further appeal under the old law was "admitted on grounds 3 and 4." Appellants-defendants, however, claimed that, according to law and practice the appeal having been admitted, they are entitled to argue each and every ground stated in the memorandum of appeal. Evidently the learned admitting Judge thought that ground 2 was untenable, and on examination we find that this is so. We also think no case has been made out on grounds 3 and 4. Grounds 1 and 5 are general.

The first clause of ground 2 proceeds on the law of *res judicata*. The important facts are, that on 1st June 1903 the alienor Daya Ram sold the property in suit to defendants, and on 1st July 1903 he sold the same property to plaintiffs. On 6th June 1904 plaintiffs sued for the land and were met by the sale-deed of 1st June 1903; the claim was dismissed finally by

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the Chief Court on 15th March 1907. On 22nd October 1907, the present suit was brought for a declaration that the sale of 1st June 1903 was invalid as against plaintiffs-reversioners, as being a sale of ancestral land without consent of reversioners, and not for consideration and "necessity." The first Court applied Explanation II to section 13 of the old Civil Procedure Code, and held that in their earlier suit plaintiffs should have asked for a declaration that the sale of 1st June 1903 was ineffective against them; but the lower Appellate Court ruled that the two suits were based on entirely different causes of action. It is not clear that this amounts to a sufficient refutation of the first Court's views; but nevertheless it seems to us that the matter is not *res judicata*. It is admitted before us that, before the questions now in issue could have been agitated in the earlier suit, amendment of the plaint would have been necessary. Plaintiffs there sued only their vendor, and the present defendants were added upon his pleas. It seems to us clear that the question, whether the earlier deed should be held invalid as against plaintiffs in the capacity of reversioners was outside the scope of the suit as laid, and the importation of it into the case would have made the suit one of a different nature and probably also multifarious. The explanation, therefore, does not apply, and we overrule ground 2 (a).

Ground 2 (b) is concerned with waiver or acquiescence. Again, the first Court found for defendants, the reasons given being that plaintiffs, by themselves purchasing on 1st July 1903, admitted alienor's unrestricted powers; and *Labh Singh v. Gopi* (1) is quoted in support. There the waiver was presumed from the fact that plaintiff's grandfather had already sued for *pre-emption* on the occurrence of the obnoxious alienation. Here plaintiffs-reversioners by purchasing merely accelerated the coming of the property to themselves, being willing by paying a sum down to avoid the necessity of waiting till succession should open out. We are unable to see how a reversioner by purchasing renounces his position and

rights as reversioner. Ground 2 (b) is overruled.

Ground 3 does not impress us. No doubt defendants did plead that plaintiffs were not reversioners and that the land was not ancestral. The first Court dismissed the suit upon the doctrines of *res judicata* and waiver and did not go into other points. The lower Appellate Court set aside the findings on those two points, and remanded for re-trial, an order that was altered by this Court into one under Order XXI, rule 25, for enquiry and report. The "report" dealt only with the questions of consideration and "necessity." Plaintiffs put in certain objections to it, but defendants never objected that the questions of reversionership of plaintiffs or of ancestral nature of the property should have been gone into; and in the lower Appellate Court, at the final hearing, apparently not a word was said about those questions. These facts, coupled with the implicit admission in defendants' *res judicata* and waiver pleas that plaintiffs had a *locus standi*, make it clear to us that issues 1 and 2 were tacitly dropped; and we cannot agree with the learned Advocate for the appellants that the case must go against plaintiffs because they cited no evidence to prove relationship or the descent of the property from the common ancestor.

Ground 4 is untenable. The lower Appellate Court has shown unmistakably that consideration and "necessity" have not been made out. The marriage of Daya Ram, the alleged "necessary" event, has not even yet come off, Rs. 286 of the Rs. 500 purchase-money has not been paid even yet, and Rs. 104 "received at home" is almost certainly a fiction.

For the reasons we dismiss this appeal with costs.

Appeal dismissed.

In re PARAMESWARA NAMUDURI.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 18 OF 1915.

CRIMINAL REVISION PETITION NO. 14
OF 1915.

August 26, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Tyabji.

In re K. PARAMESWARA NAMUDURI—
ACCUSED NO. 2—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 195
(1) (b)—*False endorsement on promissory note with*
intent to use it as evidence—Suit on promissory note
—Penal Code (Act XLV of 1860), s. 193, complaint
under—Sanction for prosecution, if necessary.

Section 195 (1) (b) of the Code of Criminal Procedure aims at providing that where, prior to the institution of a criminal prosecution, a properly constituted judicial tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the Criminal Court should decline cognizance unless that tribunal has, in effect, certified that in its opinion, the complaint is one worthy of investigation. That safeguard should not be limited to cases where the offence is committed *pendente lite* but should extend also to fabrication of false evidence in advance. [p. 162, col. 1.]

Noor Mahomed v. Kaikhosru, 4 Bom. L. R. 268; *Lalla Prasad v. Emperor*, 17 Ind. Cas. 794; 13 Cr. L. J. 863; 10 A. L. J. 294; 34 A. 654; *Giridhari Maricari v. Emperor*, 12 C. W. N. 822; 8 C. L. J. 73; 8 Cr. L. J. 51; *Teni Shah v. Bolahi Shah*, 5 Ind. Cas. 879; 14 C. W. N. 479; 11 Cr. L. J. 250, followed.

When an offence is of such a nature that at the time of committing it, the accused must have legal proceedings in mind and prior to his being charged with the commission of the offence, legal proceedings of the same nature have already commenced in any Court, it is most in consonance with the intention of the Legislature to require that the sanction of the Court should be obtained. [p. 164, col. 1.]

Where, therefore, the complaint set out that the accused wrote an endorsement on a promissory note executed in favour of the complainant, purporting to record a payment of Rs. 1,500 while no such payment was ever made and that the accused intended to use the endorsement as evidence in case the complainant brought a civil suit to recover the amount due:

Held, that the uncertainty at the time of writing the endorsement as to whether any suit could ever be brought, did not affect the completeness of the offence and that the Court could not take cognizance of the offence without the sanction of the Civil Court. [p. 161, col. 2; p. 162, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Malapuram, in Calendar Case No. 25 of 1914 (since re-numbered as Calendar Case No. 106 of 1914).

Mr. A. Sivarama Menon, for the Petitioner.

The Public Prosecutor, for the Government.

ORDER.

AYLING, J. — The complaint in this case sets out that sometime in the month of Chingam 1087 (Malabar) corresponding to August 1912, the accused persons, the present petitioners, wrote an endorsement on a promissory note, which had been executed in favour of the complainant (present counter-petitioner), purporting to record a payment of Rs. 1,500 towards that promissory note. No such payment, according to complainant, was ever made; and his case is that the endorsement was written with the intention that it might appear in evidence in case he (complainant) brought a civil suit to recover the amount due on the promissory note.

Now assuming that complainant is in a position to make out (1) that accused wrote the endorsement, (2) that the payment which it purports to record was never made, (3) that the intention of accused was that the endorsement should appear in evidence in a judicial proceeding, then the offence of fabricating false evidence defined in section 192, Indian Penal Code, and made punishable by section 193, Indian Penal Code, would seem to be established. The intention above referred to, must almost necessarily be a matter of inference, but if it were shown that the accused could have had no other object than the appearance of the endorsement in evidence, *in case* a suit should be brought on the promissory note, then I do not think the uncertainty, at the time of writing the endorsement as to whether any suit would ever actually be brought, affects the completeness of the offence.

The question is whether in this case the Joint Magistrate before whom the complaint was presented on 20th February 1914 was precluded from taking cognizance of the offence by reason of section 195 (1) (b), Code of Criminal Procedure. I agree with my learned brother that the earlier presentation of the complaint before a Magistrate who had no jurisdiction to entertain it, may be disregarded.

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It is admitted that before 20th February 1914, complainant had actually filed a suit on the promissory note (Original Suit No. 275 of 1912 on the file of the Court of the District Munsif of Walawanad) and got a decree which was at that time under appeal. The question is whether this circumstance renders the sanction of the Civil Court necessary under section 195 (1) (b), Code of Criminal Procedure.

It has been argued before us that it does not; inasmuch as the suit had not admittedly been instituted at the time when the endorsement was written and the offence committed. I cannot accept this view. The object of this clause of the section seems to be to save the time of Criminal Courts being wasted, and accused persons being needlessly harassed, by erecting a safeguard against rash, baseless, or vexatious prosecutions for the offences specified. It aims at doing so by providing that where, prior to the institution of the criminal prosecution, a properly constituted judicial Tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the Criminal Court should decline cognizance unless that Tribunal has, in effect, certified that, in its opinion, the complaint is one worthy of investigation. I see no reason why this safeguard should be limited to cases where the offence is committed *pendente lite*; and should not extend to cases of fabrication of false evidence in advance. Its desirability is just as great in the one case as in the other.

It is, of course, necessary that the "proceeding in any Court" referred to in the clause should be actually instituted before the Criminal Court is asked to take cognizance of the offence. If it is not, there is nothing in section 195 to prevent the Court from taking cognizance of the case. And once the Court has lawfully taken cognizance of the case, its jurisdiction is not affected by the subsequent coming into existence of a circumstance which would have barred its jurisdiction, if it had existed at the time of institution.

In my opinion this was a case in which the sanction of the Civil Court was necessary, and the complaint should have been dismissed by the Joint Magistrate.

TYABJI, J.—In this case we are asked to revise an order of the Sub-Divisional Magistrate of Malapuram, dated 23rd April 1915, in which he held that he could take cognizance of the complaint before him notwithstanding that no sanction had been obtained under section 195 of the Criminal Procedure Code.

The facts alleged in the complaint are that an endorsement had been falsely made in the handwriting and signature of the 2nd accused to the effect that Rs. 1,500 had been paid in respect of a certain promissory note; and it is admitted before us that if the complainant's story is true, then false evidence was fabricated on or about the 30th of August 1912. The complainant's case is that it was fabricated for the purpose of being used in some stage of a judicial proceeding and that, therefore, an offence under section 193, Indian Penal Code, was committed.

The complaint was filed in the first instance before a 2nd Class Magistrate on 19th November 1912, but as he had no jurisdiction to take cognizance of it, it was transferred on the 20th February 1914 to a Magistrate of the 1st Class.

Between the date of the complaint before the 2nd Class Magistrate and the transfer to the 1st Class Magistrate's Court, civil proceedings were instituted (*viz.*, Original Suit No. 275 of 1912 in the Court of the District Munsif of Malawanad, resulting in Appeal No. 40 of 1913 which was disposed of on 13th October 1913). The promissory note is alleged to have been filed as an Exhibit in these civil proceedings.

It seems to me to be clear that the complaint before the 2nd Class Magistrate cannot be considered for fixing the date of the criminal proceedings, as that Magistrate had no jurisdiction to try the offence.

If this is correct, then the offence is alleged to have been committed on or about 30th August 1912, civil proceedings were commenced some time after, and then on 20th February 1914 the complaint was filed before the first Class Magistrate.

It is admitted that the sanction of the Civil Court has not been obtained and the question arises whether the omission to do so, is fatal to the proceedings in the 1st Class Magistrate's Court.

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Section 195 (1) (b) of the Criminal Procedure Code, as it has to be read in the present connection, provides that no Court shall take cognizance of any offence punishable under section 193 of the Indian Penal Code, of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding when such offence is committed in or in relation to any proceeding in any Court, except with the previous sanction of the Court. The real point arising in this case is, whether it can be predicated of the offence in question, that it is committed in or in relation to any proceeding in any Court," notwithstanding that the offence was complete before any proceeding had been taken in the Civil Courts.

In *Noor Mahomed v. Kaikhasru* (1), the acting Chief Presidency Magistrate, in his reference to the High Court, pointed out that if the clause in question is interpreted very widely, it may retrospectively render nugatory many complaints which are valid when filed; and the Court accepting the Magistrate's view, was of opinion that when the offence in question is one under section 471 of the Indian Penal Code (use of a forged document) and the document is alleged to have been used outside the Court, no sanction is necessary. According to this case, if the document has already been used outside the Court and the charge refers to that offence, no sanction is necessary, though subsequently to such use legal proceedings are instituted and the document is produced or given in evidence in Court, and apparently though such production in Court may have been prior to the complaint. A similar view is expressed by Knox, J., in *Lalla Prosad v. Emperor* (2).

No authority has been cited to us having reference to section 195 (1) (b). The cases brought to our notice were all under section 195 (1) (c).

Clauses (b) and (c) agree in some respects, but differ in this that the offence is identified in clause (b) by reference to the fact that it has a direct connection with some proceeding in Court, viz., having been (i) committed in, or (ii) in relation to the proceeding;

whereas in clause (c) the offence has to be connected not with the proceeding, but (i) with a document produced or given in evidence in the proceeding and (ii) by the fact that the document has been produced or given in evidence by a party to the proceeding.

In the one case, it suffices if the offence has reference to the proceeding, in the other, it must have reference to a party to the proceeding, and to a document produced or given in evidence by the party. The corresponding portions of the particular expression on which the present decision turns are also not the same; clause (b) runs "when the offence is committed," clause (c) "when the offence has been committed."

In *Giridhari Marwari v. Emperor* (3), the Counsel for the prosecution conceded that subsequent legal proceedings altered the circumstances in regard to a charge for forgery (section 463) so that the prosecution could not proceed, though the offence was complete and the complaint had been made before any legal proceedings had been instituted. But the concession was opposed to the decision in *Noor Mahomed v. Kaikhasru* (1), to which I have just referred and the Court did not in *Giridhari Marwari v. Emperor* (3) itself express any opinion on the question.

In *Teni Shah v. Bolahi Shah* (4), it is merely stated at page 480: "this forgery is alleged to have been committed in respect of a document produced at a proceeding in this Court; it comes, therefore, within the express words of section 195 and before the petitioner could be prosecuted for forgery sanction is required." The case does not take us any further.

These decisions, as I have already said, are on clause (c). The offences referred to in clause (b) fall under two classes:—

I. Some of them (e.g., those under the Indian Penal Code sections 205 *et seq.*) are such as can be committed only in or in relation to, legal proceedings.

II. There are others (including the offence under section 193, Indian Penal Code) which may be committed irrespective of legal proceedings.

(1) 4 Bom. L. R. 268.

(2) 17 Ind. Cas. 799; 13 Cr. L. J. 863; 10 A. L. J. 294; 34 A. 654.

(3) 12 C. W. N. 822; 8 C. L. J. 73; 8 Cr. L. J. 51.

(4) 5 Ind. Cas. 879; 14 C. W. N. 479; 11 Cr. L. J. 280.

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It is only in regard to an offence falling under the latter head that the qualification "when such offence is committed in or in relation to any proceeding" can have any force.

Again, some of the offences falling under the second head are such that the accused must have legal proceedings in contemplation; and the offence now in question (fabrication of evidence for the purpose of being used in any stage of a judicial proceeding) is obviously one of this nature.

In regard to offences of the last mentioned kind, it seems to me that the operation of the clause must be attracted to cases where, before any charge is brought against the accused, such legal proceedings have already commenced as the prosecution alleges to have been in the contemplation of the accused at the time of the commission of the offence. I can quite see that by interpreting the section in a very strict way when the offence is complete prior to there being any legal proceedings, there may appear no necessity for sanction. For it may be said that no act can be done, and no offence committed, in or in relation to any non-existent proceeding. But as my learned brother points out, the object of the section is to prevent rash, baseless or vexatious prosecutions in regard to offences for which a safeguard is available. Hence when the offence is of such a nature that at the time of committing it, the accused must have legal proceedings in mind, and prior to his being charged with the commission of the offence legal proceedings of the same nature have already commenced in any Court, it seems to me that it is most in consonance with the intention of the Legislature to require that the sanction of the Court should be obtained.

This decision is not opposed to that given in *Noor Mahomed v. Kaikhosru* (1). For there the offence was under section 471—the use of a forged document—not an offence in which the accused has necessarily any legal proceedings in mind at the time of committing the offence, and the actual offence charged had no reference to any legal proceedings.

In my opinion, therefore, the Court cannot in this case take cognizance of the offence.

Petition allowed.

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE NO. 22 OF 1915.
CRIMINAL APPEAL NO. 262 OF 1915.
May 17, 1915.

Present:—Mr. Justice Chitty and
Mr. Justice Beachcroft.
EMPEROR—PROSECUTOR

versus

DWIJENDRA CHANDRA MUKERJEE—
ACCUSED APPELLANT

Penal Code (Act XLV of 1860), s. 80—Accident, defence of—Burden of proof—Evidence as to deed done convincing—Motive, if necessary—Criminal Procedure Code (Act V of 1898), s. 342—Written statement by accused, practice of filing, illegality of.

If the accused puts forward a substantive defence of accident within the purview of section 80 of the Indian Penal Code, it is incumbent upon him to prove it. [p. 167, col. 2.]

If the evidence as to the deed done is sufficiently convincing, it is immaterial to consider with what motive it was done. [p. 171, col. 1.]

Per *Beachcroft, J.*—When a theory of accident is set up, the Court is entitled to a full and, so far as possible, detailed account of what happened. [p. 172, col. 2.]

The practice of refusing to answer questions in the Sessions Court and of putting in a written statement is a very pernicious practice. There is no provision in the Code for the making of a written statement by an accused and the obvious object of the practice in many cases is to defeat the provisions of section 342, Criminal Procedure Code, probably based on some idea of the Legal Advisers of the accused that he may give himself away. That section if used intelligently by Judicial Officers, is of great use to accused persons for whose benefit the section was enacted. A written statement drafted by an accused's Legal Adviser can never have the same value as answers coming directly from the accused's mouth. The refusal to answer questions may be attended with great risk to the accused, for the Court is bound to question him and a refusal to answer may involve an adverse inference against him. [p. 173, col. 1.]

Messrs. J. N. Roy, S. K. Sen and A. Sen, Counsel, and Babus Monmotho Nath Mukerjee and Probodh Chandra Chatterjee, for the Accused.

Mr. Sultan Ahmad (Deputy Legal Remembrancer, Bihar and Orissa) and Babu Kunja Behari Mukerjee, for the Crown.

JUDGMENT.

CHITTY, J.—In this case the appellant, Dwijendra Chandra Mukerjee, was found guilty of murder by the majority of the Jury (4 to 1) and sentenced to death by the Sessions Judge of Khulna. He has appealed, and the matter comes before us also on a reference under section 374, Criminal Procedure Code. The petition of appeal contains no less than 27 grounds

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based on the alleged errors of law and instances of misdirection on the part of the learned Sessions Judge. None of these, however, have been touched upon in the argument before us and it was conceded for the appellant that there had been no want of fairness in the trial. The main facts of the case are not in dispute. The deceased girl, Aparna Debi, was the second daughter of Purna Chandra Bhattacharya of Senhati. Senhati is about five miles from Khulna on the other side of the river. Purna Chandra died some time ago. Aparna was married to Charu Chandra Mukerjee of Pabla near Daulatpur. He is the Head Master of the Siddipasa High English School. At the date of her death, 12 November 1914, Aparna was about 14 years of age. She had attained puberty in the preceding *Chaitra* and had resided with her husband at Pabla, but at the time of her death was living in her father's house. The other inmates of the house were Satish Chandra Bhattacharji, her cousin and the present head of the family, her mother, Bidhu Mukhi, her elder sister, Charubala, her aunt, Birajmohini, Saradindu, a boy of about 12, a cousin, and the infant daughter of Satish aged seven or eight. Another aunt, Monmohini, also lived in the compound but in a separate hut. She was old and infirm and does not appear to have had any knowledge of the occurrence.

Dwijendra, the appellant, is the son of Saroda Charan Mukerjee, who resides at Senhati and is President of the local *punchayet*. The appellant himself was a Head Constable in the Police force at Khulna. He had a gun, a single-barrelled 12 bore breech-loading hammer gun, for which he held a license. It is in evidence that he was fond of shooting and had shot a leopard. He also shot pigs and birds. A number of cartridges were found in his house, some loaded with shot others with bullets, both lethal and spherical. Some he appears to have loaded himself, using black powder. It is also in evidence that he often carried the gun, especially at night, for his own protection. He had been employed in the Criminal Investigation Department and may have been in some danger from political suspects. He was well acquainted with all the family of Purna Chandra Bhattacharji. Purna

Chandra had been the *guru* of his father, Saroda, and Bidhumukhi was the preceptor of Saroda's wife. Dwijendra was a frequent visitor at Purna Chandra's house, and it is said that he always treated Charubala and Aparna with the respect due to daughters of his *guru*. There is no evidence of anything approaching impropriety in the relations between Dwijendra and Aparna. There is evidence that there was some dispute between the family of Aparna and that of her husband about money matters, but it does not appear how far Dwijendra was aware of this. On 10th September 1914, Satish, as head of the family, had written a petition to the Khulna Police complaining of Charu Chandra's ill treatment of his wife (Exhibit 1). This was given by him to Dwijendra to deliver, but later on he asked him not to deliver it as the matter had been settled. The petition, however, remained with Dwijendra and was found with him after the occurrence. It is also in evidence (though Satish now denies it) that Dwijendra accompanied Satish when he brought Aparna back from her husband's house. The precise date of that is in doubt but it was either at the end of *Bhadra* or beginning of *Assin*, i.e., in the week 12th to 19th September 1914. Charu Chandra was absent from Pabla when his wife left, and it appears that his absence was secured by a bogus telegram. There is nothing, however, to connect Dwijendra with that telegram. All that can be said to be proved is that Dwijendra knew of the trouble between Aparna and her husband, and of her return to her father's house and the reasons for it.

On the evening of the occurrence, 12th November 1914, about 7 or 7.30 P.M. Dwijendra was met on the road leading from Sarada's to Purna Chandra's house by the two Kabirajs, Bejoy Kumar Sen Gupta and Hementa Sen Gupta. All were going to the north and Dwijendra overtook them. Some remarks passed between him and Bejoy as to some medicine. He was carrying a gun under his arm. He had a *chadar* tied round his head, *galpatta* fashion, and wore a long black coat and slippers. Hementa said to him "you are going out at night armed with a gun. Some accident might happen." To this Dwijendra gave no reply

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but passed on. The witnesses went to the house of Ambika Charan Sen, their co-sharer.

It should be stated that the plan annexed to the proceedings, shows correctly the buildings, etc., in Purna Chandra's *bari* and also the roads in the locality. There is no question as to its correctness and, therefore, no necessity to describe it in detail.

About or shortly before 8 p. m., the state of things in Purna Chandra's *bari* was as follows: Birajmohini was in the western kitchen. In that kitchen was a tin lamp by the light of which the boy Saradindu was eating his evening meal. There was also a hurricane lamp on the verandah. Satish was in the eastern kitchen cooking for himself, Bidhumukhi, Charubala and Aparna, who messed together. Charubala, who was far advanced in pregnancy, could not cook, and Aparna would not. She had cooked the midday meal, but was offended with her mother, who had slapped her for some trifling offence. Bidhumukhi was giving Satish's daughter her food in the eastern kitchen. Charubala and Aparna had gone to the hut of their other aunt, Monmohini. About that time Satish asked Birajmohini to call them to come and eat their supper. She did so and they returned. Charubala went to, and remained for a short time at, the western kitchen speaking to Saradindu. Aparna went on, passed the eastern kitchen and went into the *dalan* and into the middle room in the northern building from the east. About the same time Dwijendra came into the *bari* from the south. Birajmohini saw him pass her, that is, pass the western kitchen. Bidhumukhi also saw him pass along the *rowak* to the east and enter the northern building by the eastern door. Satish's little daughter cried out "Oh grandmother, Dwijen is entering the house with his gun uplifted." Charubala then came to the eastern kitchen and her mother told her to call Buri (the pet name of Aparna) to come there. Charubala then entered the house by the eastern door, which would take her into the eastern room. Almost immediately afterwards came the report of the gun, which was heard not only by the inmates of the *bari* but by others in the village. There is no doubt that Aparna was then and there shot dead by Dwijendra, whether intentionally or by accident, in the

middle room of the northern building. The bullet, which was fired at a very short distance, struck her on the left temple about an inch from the eye, passed through her head and emerged behind the right ear, just above the mastoid process. It struck the eastern wall of the room 22 inches from the ground, i.e., just above the *takhtaposh* and fell to the ground behind the *takhtaposh*, where it was discovered on the 14th by Mr. Cornish, District Superintendent of Police. Charubala cried out "Mother, Buri has gone," and then "Dwijen has shot Buri dead and has gone away." It is undisputed that Dwijendra did run away. He left the northern building by the southern door, and in his haste fell over a heap of firewood which was lying in front of the southern steps. He left his slippers behind in the courtyard and just outside the *bari* he dropped the fore-end of his gun. He was seen running away, within the *bari*, by both Bidhumukhi and Birajmohini, and on the road outside going south by Bejoy and Hemanta. Bejoy was for catching hold of him but Hemanta held him back, saying he might get shot. Dwijen had the gun still in his hand. Both the ladies and Satish went at once to the room where Aparna had been killed. They found her lying on the *takhtaposh* against two pillows. Her head was to the north and her face to the west. Her legs from the knees downwards were over the south end of the *takhtaposh*. The mosquito-curtain, which was hanging by three of its corners from the north and east walls, was alight in two places and Bidhumukhi put out the flame by slapping it with the palms of her hands. Satish appears to have been so overcome with the shock that he swooned. He was revived by pouring water on his head. When he came to senses, he went or was taken to the *baitakkhana*. By this time, a number of the villagers had assembled, including Nepal Chandra Chakravarti, Saroda Charan Mukerjee, Akhoy Dutt, Dr. Amrita Lal Sen, Bhola Nath Chakravarti, Nibaran Chandra Sen, Kanai Lal Sen and three *choukidars*. Some of these persons depose to hearing the ladies of the house crying "Oh Dwijen, what a calamity (*sarbanash*) have you wrought on us!"

In the *baitakkhana* in the presence of a number of the villagers Satish wrote out a

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letter to be sent to the Police at Khulna. The first draft (Exhibit 3) was not completed. The wording was slightly altered and the letter re-written and signed by Satish (Exhibit 2). As it is of importance, I set it out in full:—

"To

The High in Dignity, the Officer in charge of the Thana,

A cat used to infest our house, and I asked my disciple, Head Constable Dwijen Mukherji, to kill that cat. Dwijen came after evening; and chasing the cat he entered into our northern *dardalan* and fired on the cat. But he missed his aim; and my sister Aparna Debi, who was lying on a cot in the *ghar* came to be shot on the head, and died in consequence thereof. I have no enmity with Dwijen. Finis. Dated Senhati, Thursday, the 26th Kartick, 1321.

Sd/. Satish Chandra Bhattacharjee,
Senhati."

This was despatched at once by a messenger, but as he could not get a boat to cross the river, it was not recorded at the Police Station until 7 A.M. on the 13th. Meanwhile the body of the girl was left lying as it was found, the room was locked and a *chowkilar* put on guard.

Jai Kumar Chakravarty, Sub-Inspector of Police, who was at Hajigram, heard of the occurrence about 2 A.M., and at once proceeded to Senhati, arriving about 6 A.M. He held an inquest. He has described how he found the body, which was in the same position as it had been left overnight. He also found an ear-ring on the floor. This evidently came from the girl's left ear, as that in the right ear was in place, and had been forcibly removed, as the hasp was straightened out. Dwijendra's slippers the Sub-Inspector found lying some 3 or 4 cubits apart by the southern *rowak*. He sent for Dwijendra, who came at 10 or 10-30 A.M. and explained how he had come to shoot the girl, where he was standing and so forth. Dwijendra's house was searched that afternoon. Nothing much turns upon what was found there.

On the 14th November Mr. Cornish came to Senhati. He too examined the premises and as above stated, found the bullet by the wall beneath the *takhtaposh*. He too questioned Dwijendra and heard his version of

how the girl had met with her death.

Thus far the facts are not seriously disputed. There are two alternatives for consideration in this case: (1) Has the prosecution made out a case of deliberate killing? (2) Was the death of Aparna Debi the result, as the accused maintains, of an unfortunate accident? It might, of course, happen that, while disbelieving the theory of accident, the Court might consider that the prosecution had not made out their case, but that is not the case here. If the accused puts forward a substantive defence of accident within the purview of section 80 of the Indian Penal Code, it is incumbent upon him to prove it. Here the accused has called no evidence. He relies for proof of any fact upon the oral or documentary evidence put before the Court on behalf of the Crown. As the acceptance of either alternative means the rejection of the other, they may be conveniently considered together. Now, apart from the facts detailed above, there is a considerable body of evidence which, if believed, leaves no doubt that Dwijendra murdered Aparna, and entirely negatives the theory of accident. In the first place, how did he come upon the scene? On behalf of the accused an attempt was made to show that he spoke to Saradindu in passing the western kitchen and also greeted Satish in the eastern kitchen with the words "Thakur Mahashai". It was argued that a man who had gone there with the deliberate intention of murdering the girl, would not thus make his presence known to the inmates of the *bari*. Now there is nothing upon the record to show, nor do I understand it to have been the case for the Crown, that the murder was so deliberate and premeditated as that. Whatever may have been his motive for visiting Aparna that evening, there is nothing to show that he had already resolved to kill her. At the same time it is not proved that Dwijendra spoke either to Saradindu or to Satish on his arrival as alleged. Saradindu in the Sessions Court in examination-in-chief said he saw Dwijen pass the kitchen, but made no mention of his calling out. In cross-examination he said he did not remember if he did so, or if he had given evidence before the Committing Magistrate to that effect. In the Magistrate's Court, he had said that some one called out "Indu"

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and that the voice seemed to be that of Dwijen Mukerjee. It was suggested by the defence that this witness had been tampered with. There is no foundation for this suggestion, and if there was any tampering it was from the other side. Of this, there is the evidence of the Sub-Inspector, who saw Akhoy Dutt tutoring Saradindu in the verandah of the Court. The witness is a child of 10 years old and it would be unsafe to rely upon his statements, the more so as pressure was brought to bear upon him with regard to them. It is true that Bidhumukhi says she heard Indu call out who goes there and Dwijendra answered that it was he. On the other hand Birajmohini, who was in the western kitchen with Saradindu, flatly denies that Dwijendra called to him, and we may accept her statement. Then Satish, no doubt, says that while he was cooking some one called out "Thakur Mahashai" to him from the courtyard. Before the Committing Magistrate he had said that some one had called out to him, but that he could not make out whose voice it was. Bidhumukhi says that though Dwijendra often called out "Thakur Mahashai", on this occasion he said nothing. We may take it that Dwijendra came through the courtyard and passed into the house without attempting in any way to conceal his arrival, but without speaking to any one.

The next evidence in chronological order is that of Charubala. Now she claims to have been an eye-witness of the deed, and if her evidence be accepted, the case for the Crown is proved. She had stopped at the western kitchen, while Aparna had gone on into the house. Charubala followed after a short time entering the northern building from the east. She says:—"I then went to call her (Aparna) from the middle room. I got as far as the door between the middle room and the eastern room. I saw Dwijen standing in the centre part of the middle room. Seeing me he took something out of his pocket and turned to the west. I told my sister to come and eat her rice as it was ready. As soon as I said this, Dwijen turned round to the east and levelled his gun. I said, 'Dwijen, what are you doing?' He fired his gun and said 'I am giving her something to eat.' The shot killed my sister. When I went to the place, my sister was lying down with her

face resting on her right hand. She was not lying flat down, but was reclining against the pillows." Before the Committing Magistrate, Charubala did not claim to have actually seen the shot fired. There she said that she heard the report as she was entering the eastern room by the eastern door, and that she ran into the middle room in time to see Dwijen escaping by the south door with his gun in his hand. She has explained why she did not tell the whole truth on that occasion. Though her reasons on paper may not appear very cogent, I think that what she now says is substantially true. It may fairly be asked why, if it were really and truly an accident, should Charubala and the other members of Aparna's family combine to perjure themselves and make what was only an accident appear as a crime. It was suggested that they had done so at the instance of Dr. Amrita Lal Sen, who, it was said, was on bad terms with Dwijendra and owed him a grudge. There is no foundation on the record for such a suggestion. It is true that Dr. Amrita Lal Sen from the first declined to believe in the theory of accident, and did not hesitate to let the Police know his opinion. He also recommended and insisted upon a Police investigation. But this any impartially minded man would have done under the circumstances, which, to say the least, were highly suspicious. In my opinion advantage has been taken by the defence of the untimely death of Dr. Amrita Lal Sen to foist upon him much in this case for which he was not in the slightest degree responsible, and in particular the responsibility for the case being pressed against Dwijendra. Dr. Amrita Lal Sen was seized with smallpox about the time of the trial in the Sessions Court and died before the trial was concluded. His evidence before the Committing Magistrate was rightly put in and read at the trial. He had not, however, been cross-examined, though the accused had the opportunity to do so, and the suggestions now made were, of course, not put to him. They are mere suggestions and I see no reason to suppose that the testimony of Satish and the other members of his family or indeed that of any of the witnesses for the prosecution was at all more unfavourable to the accused by reason of

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any action or influence of Amrita Lal Sen. I can see no other possible reason why the members of Aparna's family should depose falsely against the accused. An important question is what amount of light there was in the middle room at the time when the gun was fired. As to this, the evidence is not absolutely clear, but there appear to have been two lamps in the eastern kitchen which lighted the verandah and the courtyard to the east of the house. There was also an earthenware lamp inside the house. Bidhumukhi says that she had placed it in the eastern room of the *dalan* near the door leading from the eastern to the middle room and that it was so placed in order to light both rooms. Charubala now says that this lamp was in the south window of the middle room. Before the Magistrate she had said that she came into the middle room carrying a lamp, but this she now admits was not the case. She does, however, say that there was a hurricane lamp burning at the south west corner of the bed. Bidhumukhi also says that Charubala immediately after the occurrence had told her of this hurricane lantern, and Bidhumukhi further says that Dwijendra was carrying a lantern, when he came. There seems to be some doubt about this lantern, but the evidence is clear that there were two lamps in the eastern kitchen, which would light up the space between that and the house, and there was a lamp just outside the door between the two rooms which would give light to both. The middle room was certainly not in complete darkness, as was suggested on behalf of the accused. The next question of importance is the position of Aparna when she was shot. The statement of the accused, to which he consistently adhered, was that he was entering the middle room from the closed verandah on the south in pursnit of a cat, which had run into that room, that when he was just on the threshold of the south door towards the west he brought down the gun from his shoulder to point it at the cat, that the gun went off, and the bullet hit and killed Aparna. Now this would be impossible if Aparna was lying, reclining or sitting on the *takhtaposh*. The evidence shows that the muzzle of the gun when

fired was within three feet of and probably not more than two feet from her head. This is shown by the fact that her face was scorched, her left eye-brow and hair singed and her clothing burnt in one or two places. Seeing this difficulty, it was suggested that Aparna was not shot on the *takhtaposh*, but while squatting on the floor near its south-west corner; since it was also supposed that there must have been a considerable flow of blood from the wound (as indeed there was) the further wild suggestion was made that there had been a pool of blood on the floor and that Amrita Lal Sen had washed it up. The fact that he was seen washing his hands with ashes shortly before he left the house about 2 A. M. that night was the only foundation for that suggestion. Then it was said that Aparna must have been lifted from the floor on to the *takhtaposh* and this was put to one or two of the witnesses and denied. For this suggestion too there is no foundation in fact. If she was shot while sitting on the floor by a man standing up, it appears impossible that the bullet should have struck the wall where it did, i. e., four inches above the *takhtaposh* and 22 inches from the ground. The evidence proves conclusively that Aparna was shot as she sat or reclined upon the cot. The pillows were soaked with blood, and there was a pool of blood beneath the *takhtaposh* at the spot where her head lay. The fact that brains and blood were found by the wall shows that her head was somewhere near the wall, while the fact that the bullet struck the wall at right angles indicates that Dwijendra was somewhere in the middle of the room, and not at the south door as he alleges. From his statement to Mr. Cornish, it appears that the cat could not have been much more than two feet from the muzzle of the gun when it went off. This is absolutely inconsistent with the undoubted fact that Aparna's head was about the same distance from the muzzle of the gun at the same moment. In conclusion on this point it is proved beyond all reasonable doubt that the accused entered the house by the eastern door and not from the south verandah. His statement, therefore, about his pursnit of the cat from that direction

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cannot possibly be true.

It may be well at this point to deal generally with the accused's defence of "accident". It appears to me to have only two circumstances to recommend it, one that there had been some talk in Purna Chandra's house a few days before about driving away or killing a cat, and the other that it was undoubtedly raised at an early stage of the proceedings. There seems to have been some talk about a strange cat which was coming to the compound and causing some annoyance. But the result of the conversation was certainly not such as would justify Dwijendra in coming to the *bari* as he did and without further permission firing at the cat inside a small room 14 feet 6 inches by 9 feet. The ladies had expressed a reluctance to have the cat killed at all. It would have been abhorrent to them to have it killed in a room where they used to sit. But in my opinion it is wildly improbable that had he come with the intention of shooting a cat, Dwijendra, who had a good knowledge of fire arms, should have acted as he did. He would certainly have spoken to Satish or someone about it first, and obtained definite permission. There is nothing but Dwijendra's statement to prove that the cat was there at all that evening. If it was and he did follow it as he says, it is incredible that he should think of shooting it with a 12 bore bullet within a small room in complete darkness. As to the gun going off by accident, that too is highly improbable. The gun was produced in Court. It has a very stiff pull and would be most unlikely to discharge by accident. Then if it was an accident, why did he run away? If this fact stood alone it might not have much weight. But here we have the case of a man who, as he says, by an unfortunate accident has taken the life of a girl friend in a house where all the family were his friends. Is it not more likely that he would remain and express contrition, and do what he could to make amends? Instead of that he bolts away in the darkness like a criminal. In his haste, he drops his slippers, he falls over the heap of firewood, and then allows the fore-end of his gun to drop off. This last implies haste and some violence, as the fore-end is by no means easy to remove. An attempt was

made by the defence to prove that when running away Dwijendra cried out "*ki karte ki karilam*", an expression which might indicate a feeling of horror at what had happened. The child Saradindu was the only one who speaks to this. As I have said above, his evidence cannot be trusted. It cannot, therefore, be taken as proved that Dwijendra made use of any such expression. Then we have the letter written by Satish to the Police. Satish says that it was dictated to him and that he was made to write it. Of this, there can be no doubt. His state of mind was such that he could hardly have written it of his own motion; but there is an even more cogent reason than that, which is that it was impossible for Satish to have personal knowledge of the facts narrated. The suggestion that it was dictated by Amrita Lal Sen is absurd. Moreover he did not appear on the scene until the writing was nearly complete. It was clearly inspired by some one who wished to screen Dwijendra. There is evidence that it was Dwijendra's father, Saroda, who dictated the letter, and this I believe to have been the case. Dwijendra, presumably ran away to his house, so that he would have seen his father before he came to Purna Chandra's house. They may very well have agreed upon what should be said. Saroda then taking advantage of Satish's weakness got him to write the letter. This reduces the significance of the 'cat' theory being advanced at an early stage, to nothing at all. The last piece of evidence against the accused is the letter, dated 22nd December 1914 (Exhibit 7), written by him from Jail to his father. This was intercepted by Amrita Lal Sen and by him made over to the Police through his brother, Mohendra. As to the genuineness of the letter there is no question. The request to his father to have the old fore-end of his gun fitted with a new steel piece and stamped with the number and the maker's name, may be susceptible of an explanation compatible with innocence. But in that letter he also asks his father to use all his endeavours to persuade Chota Thakurani (*i.e.*, Bidhumukhi) and Charubala to depose in his favour. Again he says: "Please tell Satish Thakur Mahashai that if my life be spared it will do him

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no harm" and again: "After consulting the Counsel please win over (or get into your hands) the witnesses of the Thakurbari, otherwise there will be danger." This does not read as the letter of an innocent, falsely accused man. It is true that in this case there is no evidence, which indicates the motive for the murder. If, however, the evidence as to the deed is sufficiently convincing (and in my opinion it is), it is immaterial to consider with what motive it was done. If, as I find, Dwijendra fired at Aparna at a distance of two or three feet, there can be no doubt that he intended to kill her. It is idle to speculate why he did so. What passed between them in that room is now known only to Dwijendra. There is no need to suppose that the act was premeditated, or that he had gone to the house with a fixed intention to murder the girl. It may have been done on the spur of the moment, the act being facilitated by the fact that he had the gun and cartridges with him. It is nonetheless murder. After giving the case the fullest and most anxious consideration, there is only one conclusion to which I can come, *viz.*, that the accused intentionally killed the girl and that the story of accident cannot possibly be accepted. It is against all the evidence in the case and in its details utterly improbable. It does not appear why the Jurors who brought in the verdict of guilty recommended that the extreme penalty should not be inflicted. I agree with the learned Sessions Judge in my inability to see any extenuating circumstances.

I would dismiss the appeal and confirm the sentence of death.

BRACECROFT, J.—This case presents a feature very unusual in cases in this country, *viz.*, an admission of the act which caused death, coupled with a plea of accident. And because it is such an unusual plea, the facts must, I think, be examined with particular care, for it would be lamentable if a candid story were rejected too lightly or from expecting too high a standard of conduct from the accused immediately after the accident, if accident it was.

We have only one person, the accused, who can tell us exactly what happened in that room, for in my opinion we cannot accept the story of Charubala, as told in the Sessions Court, that she actually saw the occurrences.

It is possible that she may have seen what she says she saw, but the explanation for not telling the story in the Magistrate's Court, is not to my mind entirely satisfactory; at any rate it would be extremely unsafe to act on evidence so far in advance of the evidence given in the Magistrate's Court.

The accused has this in his favour, that his acts do not suggest a premeditated murder. The slippers which he wore are heavy and without heels and caused a shuffling sound as he walked. They are not the sort of footwear one would expect a man to use who wanted to conceal his presence. The position in which they were found, indicates that they were discarded or fell off as the accused ran away, rather than deliberately taken off before the accused entered the building. If the accused called out to Satish, as Satish says, though Bidhumukhi denies the fact, that does not suggest an intention to conceal his presence. This act is, of course, open to the suggestion that he wished to see if the coast was clear. Apparently Satish did not answer, and there is, therefore, nothing to show that accused knew that anyone of the household was about. Neglect to conceal his presence could, of course, be reconciled with the theory of premeditated murder on the supposition that accused intended to plead accident, but if he had a story of accident ready, his flight from the spot is inexplicable, except on the theory that thinking his presence to have been unobserved, he suddenly abandoned that idea. But I do not understand the Crown to have committed itself to the theory of premeditated murder.

Saradindu's evidence that when accused ran out of the building he cried out "*ki karte ki karilam*" is strongly pressed in accused's favour. If true, the ejaculation is capable of explanation as one of remorse for an act done intentionally on failure to achieve some object, as well as of an act done unintentionally. Unfortunately Saradindu mentioned this ejaculation of the accused for the first time at the trial and there is good reason to think that attempts were made on the part of the accused to influence the witnesses, though in regard to the Sub-Inspector's evidence that he saw Akhoy Dutt tutoring Saradindu in the Court premises, I feel sceptical. The explanation which he gives for not informing

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the Public Prosecutor or the Court Inspector, is to my mind insufficient.

The statement of Satish Kandu, that accused said "Buri has been killed by a bullet from my gun," is a statement of the same class, suggesting accident. The witness's evidence in the Sessions Court is an improvement on that given in the Magistrate's Court, where the accused, when asked by the witness who he was, is reported to have said only "I" and nothing more. In this case, however, a statement to the same effect as that made in the Sessions Court had been made by the witness to the Police during the investigation. If true, the accused could not then have been attempting to conceal his identity: it is possible that accused had then realised that Birajmohini had seen him and possibly also that Charubala and Saradindu had, and concealment being useless thought that his safest course was to allege accident.

The strongest point in accused's favour is the apparent absence of motive. The learned Deputy Legal Remembrancer suggests that the motive, though known, was concealed to avoid a scandal. On the evidence there is nothing to support the suggestion, and the absence of motive would be enough to turn the scale in the accused's favour in the absence of any account but his own, if that account were a reasonable and possible one, and not shown to be untrue. I am prepared to accept the story that a strange cat had been a nuisance to the household, that Satish had expressed a wish that it should be made away with and that the accused was prepared to shoot it. On the theory that Satish believed that accused was chasing the cat, learned Counsel for the accused based his explanation of the letter that was sent to the Police giving information of the occurrence. He argued that Satish put two and two together and so sent the letter, which is true in its main detail but not in all the facts, and that Amrita Lal Sen Gupta, whom he made responsible for all accused's troubles, attempted to suppress the letter; but throughout his argument, till reply, repudiated the idea that accused's father, Saroda, had anything to do with it. He then conceded that possibly Saroda brought information to the household that it was an accident.

I am not prepared to accept the theory that the information was guess work on the part of Satish, a guess that happened to be correct in its main detail. If it had been merely a matter of inference, it is highly improbable that he would have stated it as a definite fact. It is not suggested that any one in the house saw the cat that evening. Saroda was early on the scene and it seems to me not only in the highest degree probable in any event that he brought the story of firing at a cat which Satish was willing to accept, but if the defence set up by the accused is true, it seems to me that that is the most natural thing to have happened, for if accused was afraid to face the household, it was very natural for his father to go and explain matters. But that line has not been taken: it would have made Saroda's appearance in the witness-box an absolute necessity on behalf of the defence, and the defence must for some reason or other have been unwilling to risk that.

I am not prepared to accept the suggestion, made on no sound basis, against Amrita Lal that he got up the case against the accused. If Amrita Lal was responsible for the members of the household giving false evidence or suppressing the truth, he would not have openly stated in his evidence that he told the *chowkidar* to inform the Police that he did not believe in the theory of cat-killing and have requested the presence of the Superintendent of Police. That he did send this message is supported by the formal information drawn up by the Sub-Inspector on the morning of the 13th.

I have said that we must not too lightly reject a candid story of accident. Equally, we must not too lightly accept a story to which by reason of its apparent candour we naturally incline. When a theory of accident is set up, we are entitled to a full and, so far as possible, detailed account of what happened. In this case we do not get it. The accused was ill advised enough to give equivocal answers to the Committing Magistrate and some of his statements were untrue. This does not matter much as to the fact of his alleging accident, for he had alleged that long before, but it was the first opportunity he had, in the course of the enquiry, of disclosing the facts to a Judicial Officer.

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Then in the Sessions Court he put in a written statement, which alleges that he could not see whether there was any one in the room when he began to aim at the cat, because there was no lamp in the room, but omits to explain what is extremely important, how he came to know, after the gun had gone off, that he had killed Aparna.

This practice of refusing to answer questions in the Sessions Court and of putting in a written statement, which it may be said has now become almost universal in the Province, but which is largely a growth of recent years, is a very pernicious practice and in my opinion the sooner it is put an end to the better. There is no provision in the Code for the making of a written statement by an accused and the obvious object of the practice in many cases is to defeat the provisions of section 342, Criminal Procedure Code, probably based on some idea of the Legal Advisers of the accused that he may give himself away. That section if used intelligently by Judicial Officers, is of great use to accused persons for whose benefit the section was enacted. A written statement drafted by an accused's Legal Adviser can never have the same value as answers coming directly from the accused's mouth, and it cannot anticipate the points on which the presiding officer considers explanation desirable. It frequently happens that verbal explanation is refused and the promised written statement never filed. The refusal to answer questions may be attended with great risk to the accused, for the Court is bound to question him and a refusal to answer may involve an adverse inference against him.

In this case, the putting in of a written statement instead of answering questions is particularly to be deplored, for it is clear that on a story of accident many questions naturally arise. Four obvious questions are, how did accused know that he had killed Aparna, why did he use ball cartridge to shoot a cat, how did a gun with so stiff a pull go off accidentally, and why did he run away. The first of these is particularly important, as I shall show later: I am willing to assume that a possible explanation could be found for the other three facts, which are *prima facie* suspicious.

One extremely important point against the

accused is the statement of Bidhumukhi that she saw accused enter the building by the east door. If believed, that statement at once stamps accused's story as untrue. As is natural there are some statements in her evidence in the Sessions Court, which are not to be found in her evidence before the Magistrate. Any difference that there may be between the two depositions is not of great importance, but this particular statement was made in the Magistrate's Court and in spite of its importance, there was no cross-examination on it. No doubt the accused had already indicated his defence which was inconsistent with that statement, but the witness ought to have been pressed on that, which is perhaps the most important statement in her evidence. If failure to cross-examine on it was an accidental omission, which is improbable in Counsel of Mr. Roy's experience, it was a most unfortunate one.

The accused pointed out to the various Police Officers engaged in the investigation, the spot at which, he said, he was when the gun went off. His statements do not appear to be consistent. Mr. Cornish says the distance was about four yards from where the woman was. This is rather an inaccurate method of description. If it means four yards from her feet there is a great difference between the spot shown to Mr. Cornish and that shown to Sub-Inspector Jai Kumar Chakravarti, to whom the spot shown was 8 or 8½ cubits from deceased's head. If Mr. Cornish referred to the deceased's head, and the language will hardly bear that construction, the two places are the same. The difference involved in Mr. Cornish's looseness of description is practically the whole length of the girl's body. The spot pointed out to the Deputy Superintendent is stated by him to be 3½ cubits to the south-west of the door. He did not measure the distance till six weeks later. In the circumstances the accuracy of his memory as to the exact spot, may be questioned, though evidently it was not quite the same spot as that pointed out to Jai Kumar.

It might possibly be suggested that the difference in the spots pointed out to the different Police Officers, could be explained on the supposition that the accused's attention was more centred on

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the pointing out of the direction of his fire than the exact spot at which he stood. This supposition would hardly explain the varying positions given by him to the cat. But let that pass; there might be some confusion as to the exact position of an animal of rapid movement such as a cat, and let us assume for the purpose of argument the position most favourable to the accused, the one pointed out by him to Jai Kumar. That would be just by the south-east corner of the westernmost of the two door pillars. That point is 12 feet from the point where the bullet hole in the wall was found and 6 feet 3 inches from the edge of the *takhtaposh*.

From that spot, the girl could not have been shot in the position in which she was found lying in the bed. Nor could she possibly have been shot, if, as suggested, squatting on the floor at the foot of the bed. The position of the hole in the wall, if nothing else, makes that impossible.

Now comes the importance of having a statement from the accused how he knew the girl had been killed when he had not seen her before. Death must have been instantaneous, she could not have cried out and hardly have moved. He must, therefore, have seen her. Accused's suggestion practically commits him to the case that the girl was sitting on the floor or fell on the floor, and that must be untrue, for I have no doubt that she was found on the bed by the first person who entered the room after the gun was fired.

Now, it is a rather curious thing that a shot fired from the place shown by the accused at 5 feet from the ground—I take 5 feet as about the probable height of accused's shoulder as it is argued he was a tall man—directly at the hole in the wall would pass the edge of the *takhtaposh* 2 feet 6 inches about it, which would be about the height, the girl's head might be expected to be if she were sitting at or near the edge of the *takhtaposh*. Exactitude is impossible for we don't know the height of the girl; she is said to have been about the same height as Charubala and was apparently tall for her years as the Civil Surgeon seems to have over-estimated her age—he puts her down as aged about 16 whereas in fact she was about 14. If she had been shot when sitting on the *takhtaposh* near the edge, it is possible that she would have

fallen in the position in which she was found. This was not a theory advanced on behalf of the accused, but one which I thought ought to be considered in view of accused's allegation that he did not see the girl before his gun went off.

There are two difficulties to accepting such a position. In the *first* place, assuming accused's contention to be correct that there was no lamp in the room, there would have been a background of light, for the light from the lamp in the eastern room must have fallen across the *takhtaposh* though the south-west corner would have been outside its rays, and the accused could hardly have failed to see the girl with the background of light. In the *second*, there is the more serious difficulty that if there had been any scorching at all, it would not have been to the extent observed in this case. The distance from the accused's shoulder to the girl's head would have been not less than 6 feet 9 inches and from the muzzle of the gun to her head not less than 2 feet 11 inches. In the experiments made by Mr. Cornish, there appeared to him to be no scorching at 3 feet, while in the present case there was a great deal of scorching on the face and head.

Added to this, is the fact that the shape of the hole in the wall made by the bullet led Mr. Cornish to the opinion that the bullet had been fired at right angles.

The physical appearances then contradict the accused's story; and it is disproved at the start by the evidence that accused entered the building by the east door.

I have most anxiously considered the case, giving the accused the advantage of every possible theory for the points left unexplained in his story even when that story ought to have been explicit, and I can come to no other conclusion but that the girl's death was not due to any such accident as described by him.

I, therefore, agree in thinking that we ought to dismiss the appeal and confirm the sentence of death.

Appeal dismissed.

In re RAPU NAIDU.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 259 OF 1915.
CRIMINAL REVISION PETITION No. 210 OF 1915.
September 24, 1915.

Present:—Justice Sir William Ayling, Kt.

In re BAPU NAIDU AND OTHERS—ACCUSED

—PETITIONERS.

*Criminal Procedure Code (Act V of 1898), s. 424—
Rioting—Omission to consider case of each accused
separately, effect of.*

In a case of rioting where the Magistrate has failed to consider the question whether the evidence regarding each individual accused is sufficient to show that he participated in the rioting, the conviction is bad and liable to be set aside.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Tindivanam in Criminal Appeal No. 21 of 1915, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tindivanam in Calendar Case No. 105 of 1915.

FACTS.—A number of persons were charged before the Stationary Sub-Magistrate of Tindivanam with the offence of rioting punishable under section 147, Indian Penal Code. The Sub-Magistrate convicted eleven persons. Against these convictions, all the eleven persons appealed to the Joint Magistrate of Tindivanam. The latter officer upheld the convictions. In the judgment which he wrote, he fairly discussed the prosecution story as a whole and assigned reasons for accepting the same. He, however, omitted to consider the case of each accused separately and declined to discuss the evidence regarding *alibi*, on the ground that one witness only spoke to *alibi* on behalf of each accused and the same was not corroborated. The accused, thereupon, preferred this revision petition to the High Court.

Mr. T. V. Muthukrishna Iyer, for the Petitioners:—The conviction is unsustainable, inasmuch as the appellate Magistrate has failed to deal with the case of individual accused separately. The case being one of rioting, it is very essential that this should have been done, as the question of participation was important. Then again the Joint Magistrate has gone wrong in declining to discuss the evidence regarding *alibi*. The reason assigned for such a course

is that the *alibi* evidence is spoken to only by one witness for each accused and is not otherwise corroborated. This again is clearly wrong. The *alibi* of second accused is supported by D. W.s Nos. 2 and 5, that of 5th and 6th accused by D. W.s Nos. 4 and 5, and that of the 11th accused by D. W.s Nos. 1, 5, 6 and P. W. No. 9. The whole case is the outcome of enmity as will be apparent from the cross-examination of P. W. No. 1.

The *Public Prosecutor*, for the Government, argued *contra* in support of the conviction.

ORDER.—The judgment of the Joint Magistrate, while fairly discussing the prosecution story as a whole and giving satisfactory reasons for accepting it, has omitted to consider the case against the individual accused separately. This is very necessary in a rioting case in which 11 accused are implicated, and in which the occurrence is obviously the outcome of previously existing ill-feeling. The Magistrate has, in fact, declined to discuss the *alibi* evidence on the simple ground that each *alibi* is spoken to only by a single witness. This is not so. The *alibi* of 2nd accused is supported by the 2nd and 5th defence witnesses; that of 5th and 6th accused by the 4th and 5th defence witnesses; and that of 11th accused by the 1st, 5th and 6th defence witnesses, as well as 9th prosecution witness. The case of this latter accused calls for special consideration also, as he is admittedly a particular enemy of the 1st prosecution witness, and cross-examination of the latter has been directed to show that he has been impleaded falsely on that score alone. I think it must be said that the Magistrate has failed to consider the question, whether the evidence regarding each individual accused is sufficient to show that he participated in the rioting.

I, therefore, set aside the order of the Joint Magistrate and direct him to restore the appeal to file and dispose of it according to law, giving the parties an opportunity of addressing fresh arguments if they desire as regards the individual complicity of accused.

Petition allowed; Case sent back.

RAMALINGAM PILLAI V. RAJA OF RAMNAD.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 270 OF 1915.
CRIMINAL REVISION PETITION No. 221 OF 1915.

October 7, 1915.

Present:—Justice Sir William Ayling, Kt.
RAMALINGAM PILLAI, AGENT OF TWO
MINORS OF LATE CHITOORSAMI THEVAR
—PARTY NOS. 2 & 3, COUNTER-PETITIONERS
—PETITIONERS

versus

RAJA OF RAMNAD—PARTY No. 1—

RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 145—
Possession, how to be determined—Delivery of symbolical
possession by a Civil Court, bearing of, on Magistrate's
enquiry*

In proceedings under section 145, Criminal Procedure Code, the Magistrate will enquire into the fact of actual possession of the subject of dispute regardless of delivery of its symbolical possession to a party by a Civil Court under the provisions of rule 96, Order XXI, Civil Procedure Code.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional first Class Magistrate of Ramnad Division, in Miscellaneous Case No. 28 of 1915.

Mr. G. S. Ramachandra Aiyar, for the Petitioners.

Messrs. L. S. Veeraraghava Aiyar and S. Krishnamachariar, for the Respondent.

The Public Prosecutor, for the Government.

ORDER.—The order of the Subordinate Judge, Exhibit A, is passed under Order XXI, rule 96, of the Civil Procedure Code, which applies only to cases in which the property is in actual possession of a third party—in this case, the present petitioners; and the Subordinate Judge is very careful to state that it does not prejudice their right to the interest claimed by them (petitioners) or their right to resist Periasami Thevar (under whom respondent claims) when he seeks physical possession. Exhibit B, the delivery *attakshi*, is to the same effect.

These proceedings have no bearing whatever on the actual possession of the lands in dispute, which is the only subject of enquiry under section 145 of the Criminal Procedure Code.

CHEMIKKALA CHINNA REDDI V. EMPEROR.

The Joint Magistrate relying on Exhibits A and B, has declined to exercise the jurisdiction vested in him of enquiring into the actual possession of the lands and passing an order in favour of the party in whom such actual possession is found to reside.

His order is set aside as illegal, he will restore the case to file and dispose of it according to law.

Petition allowed; Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 369 OF 1915.

CASE REFERRED No. 43 OF 1915.

July 30, 1915.

Present:—Mr. Justice Seshagiri Aiyar.
CHEMIKKALA CHINNA BALI AND
ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

*Criminal law—Procedure—Notice to Police Inspector
in charge of case, before disposing of it, necessity of.*

A Magistrate is bound to give notice to the Police Inspector in charge of a case before disposing of it.

Case referred for the orders of the High Court, under section 435 of the Criminal Procedure Code, by the Sessions Judge of Cuddapah in his letter, dated the 24th June 1915, No. 509 Criminal.

Mr. P. R. Grant, on behalf of the Government.

ORDER.—The conviction is clearly wrong. As pointed out by this Court on a previous occasion, the Magistrate was bound to give notice to the Police Inspector in charge of the case before disposing of it.

The conviction is set aside. I direct the Magistrate to re-hear the appeal after giving notice to the Inspector.

Conviction set aside.

SAFER ALI MANDAL v. GOLAM MANDAL.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1036 OF 1914.

July 21, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

SAFER ALI MANDAL—PLAINTIFF

AND OTHERS—DEFENDANTS

—PETITIONERS

versus

GOLAM MANDAL AND ANOTHER—

DEFENDANTS—OPPOSITE PARTY.

*Provincial Small Cause Courts Act (IX of 1887),
Sch. II, cl. (8)—Special authorization personal—Rent
for homestead land—Construction of statute.*The special authorization contemplated by clause
(8) of the second Schedule to the Provincial Small
Cause Courts Act is entirely personal to the
presiding Judge. [p. 178, col. 1.]*Semble:—By enacting clause 8 of Schedule II to the
Provincial Small Cause Courts Act the Legislature
intended that suits for the recovery of rent should
be tried under the Small Cause Court pro-
cedure only by such Judges as have been expressly
authorized to exercise jurisdiction in that behalf: it
was not intended that jurisdiction should be conferred
by a general order on a particular Small Cause Court,
irrespective of the qualifications of the individual
officer who may preside therein. [p. 178, col. 2.]*Civil Rule against the following decision
of the Court, dated the 4th June 1914, in Civil
Rule No. 251 of 1914:—"This is a Rule to set aside the
judgment and decree of a Small Cause
Court Judge, on the ground that he had no
jurisdiction to try the suit, which is for re-
covery of rent of homestead land. Objection
was taken in the Court below that under
Article 8 of the second Schedule to the Small
Cause Courts Act, such a suit was excluded
from the cognizance of a Small Cause Court.
This objection was overruled on the ground
that a similar suit in respect of this very land
had been tried as a Small Cause Court suit
in 1906. In our opinion, the view taken by
the Small Cause Court Judge is erroneous."It is plain from clause (8) that a suit for
recovery of rent other than a house-rent is
not triable as a Small Cause Court suit [*Uma
Churn Mandal v. Bijari Bewah*(1)], unless the
Judge of the Small Cause Court has been ex-
pressly invested by the Local Government with
authority to exercise jurisdiction with respect
thereto. It is possible that Babu Beharilal
Chatterjee who in 1906 tried the previous
suit for rent, had been invested by the LocalGovernment with authority to exercise juris-
diction in respect of suits for recovery of rent.
But it has not been shown that the present
Small Cause Court Judge, Babu Tincowri
Chowdhury, has been so authorised. A
special authorisation under clause (8) is en-
tirely personal to the presiding Judge; it is
not as if the Court were specially invested with
jurisdiction to try a particular class of cases.
Consequently, the mere fact that a similar
suit was in 1906 tried as a Small Cause Court
suit does not show that the present suit could
have been similarly tried."The result is that this Rule is made
absolute, the decree of the Small Cause Court
Judge set aside and the case returned to him
in order that it may be tried as a regular suit.
The petitioner is entitled to his costs both
here and in the Court below. We assess the
hearing fee in this Court at one gold
mohur."

Maulvi Wahed Hossein, for the Petitioners.

Babu Purnendu Sundar Banerjee, for the
Opposite Party.JUDGMENT.—We are invited in this
Rule to review our judgment in the case
of *Golam Mandal v. Safer Ali Mandal*. That
Rule was obtained by the defendants, in a
suit for recovery of rent of homestead land,
to set aside the decree of the Small Cause
Court Judge on the ground that he had no
jurisdiction to try the suit. The Rule was
heard *ex parte* on the 4th June 1914 and was
made absolute. On the 3rd September 1914
the plaintiff and two of the defendants appli-
ed to us to review our decision on two grounds,
namely, *first*, that the notice of the Rule had
not been served upon the petitioners, and,
secondly, that materials essential for a correct
decision of the question in controversy were
not placed before the Court. We accordingly
granted the present Rule. The allegation
that the notice of the Rule had not been duly
served, has not been contradicted by the
opposite party. We have consequently allow-
ed the matter to be re-argued, and this course
was clearly desirable in view of the fact
that the question raised is one of jurisdiction,
which may affect the decision not merely of
the case before us, but also of other similar
cases tried by the Small Cause Court
Judge.The plaintiff sued the defendant for re-
covery of arrears of rent of homestead land.

(1) 15 C. 174.

SAYER ALI MANDAL C. GOLAM MANDAL.

An objection taken by the defendants that the suit was excluded from the cognizance of the Small Cause Court by Article 8 of the second Schedule to the Small Cause Courts Act was overruled by the Judge in the Court below on the ground that a similar suit in respect of this very land had been tried as a Small Cause Court suit in 1906. We set aside the decree made by the Small Cause Court Judge in favour of the plaintiff, on the ground that there was nothing to show that the Judge had been expressly invested by the Local Government with authority to exercise jurisdiction with respect to suits of this class. We are now invited to review our decision on the ground that the Judge had, as a matter of fact, been duly authorised by the Local Government. In support of this contention reliance has been placed upon the following notification of the Government of Bengal dated the 21st June 1904:—

"Let here⁽²⁾ notified that the Munsifs of Alipore and Seallah in the District of 24-Parganas are vested under clause (8) of the second Schedule of the Provincial Small Cause Courts Act (IX of 1887) with power to try, under the Small Cause Court procedure, suits for the recovery of rent of homestead lands within their respective jurisdictions, when the value does not exceed Rupees fifty." It has been argued on behalf of the opposite party that this notification is of no avail, and that what is requisite is that the particular Judge who tries the case should have been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto; in other words, that the special authorization contemplated by clause (8) is entirely personal to the presiding Judge. In our opinion, this contention is well founded.

Clause (8) of the second Schedule to the Provincial Small Cause Courts Act excepts a suit for the recovery of rent other than house-rent from the cognizance of a Court of Small Causes, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. Clause (8) of the Schedule must be read along with sub-section 1 of section 15, and when they are so read, it becomes obvious that a distinction is drawn by the Legislature between "a Court of Small Causes" and "the Judge of the Court of

Small Causes." Clause (8) requires that the Judge should have been expressly invested with authority to exercise jurisdiction, and not that jurisdiction should have been conferred upon the Court. The distinction between the Court as an institution in which the Judge exercises judicial functions and the particular individual who presides in that Court is fundamental and well recognised. (See for instance section 6 of the Small Cause Courts Act). As an illustration reference may be made to the decision of the Full Bench in *Bahadur v. Eradatullah* (2), where it was pointed out that the word "Court" implies a sense of continuity notwithstanding a change of officers. On the other hand, when we turn to section 153 of the Bengal Tenancy Act, we find an instance where a Judicial Officer may be specially empowered to exercise a particular jurisdiction. It is clear, upon a plain reading of clause (8) and assigning to the term "Judge" its natural meaning, that the Legislature intended that suits for the recovery of rent should be tried under the Small Cause Court procedure only by such Judges as had been expressly authorised to exercise jurisdiction in that behalf; it was not intended that jurisdiction should be conferred by a general order on a particular Small Cause Court, irrespective of the qualifications of the individual officer who may preside therein. It is not disputed that Babu Tincowri Chaudhuri, who tried this suit, had never been expressly invested by the Local Government with authority to exercise jurisdiction with respect to suits for the recovery of rent. The notification of the 21st June 1904 is, as we have said, of no avail; what was needed was a notification authorising the particular officer to try suits for the recovery of homestead lands after jurisdiction had been conferred upon him under section 25 of Act XII of 1887. The order under section 25 of Act XII of 1887 constituted this officer a Judge of a Court of Small Causes within the meaning of clause (8) of Act IX of 1887, as explained in the case of *Akshay Kumar Shaha v. Hira Ram Dosad* (3). But as he was

(2) 6 Ind. Cas. 801; 37 C. 642; 12 C. L. J. 45; 14 G. W. N. 799; 11 Cr. L. J. 407.

(3) 35 C. 677; 7 C. L. J. 407.

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not expressly invested with authority to try suits for the recovery of homestead land, he has exercised a jurisdiction not vested in him by law; *Sahodora Mudali v. Sarabosabhi Dasi* (4). It is desirable that matters should be set right by the Local Government on an early date by the issue of notifications from time to time expressly investing particular officers (whether they be Judges of Small Cause Courts under sections 6 and 8 of Act IX of 1887 or section 25 of Act XII of 1887) with authority to exercise jurisdiction in suits for the recovery of rent of specified classes of land and of specified amounts. But in so far as the present suit is concerned, there is no escape from the position that the decree was made without jurisdiction. We accordingly affirm our previous decision and discharge this Rule; but, in view of the special circumstances of the case, we make no order as to costs.

We direct that a copy of our judgment be forwarded to the Local Government for information and for such action as may be deemed necessary.

Rule discharged; Case remanded.

(4) 27 Ind. Cas. 255; 20 C. L. J. 494; 42 C. 635; 19 C. W. N. 1030.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 884 OF 1914

August 5, 1915.

Present:—Mr. Justice Srinivasa Aiyangar.

SAMU PATHAN PLAINTIFF—PETITIONER
versusCHIDAMBARA ODAYAN—DEPENDANT—
RESPONDENT.

Mortgage—Mortgage-debt, transfer of—Covenant, implied, for title—Breach of covenant for title—Suit for damages, maintainability of—Cause of action, when arises—Transfer of Property Act (IV of 1882), s. 55.

There is no implied covenant for title on a transfer of a mortgage-debt, as it can hardly be regarded as a transfer of ownership of immoveable property. [p. 179, col. 2.]

Therefore, in such a case a suit to recover damages for an alleged breach of covenant for title is not maintainable. The cause of action for a suit for damages for breach of covenant for title arises on the execution of the conveyance. [p. 180, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Mayavaram, in Small Cause Suit No. 1805 of 1913.

Mr. A. V. Visvanatha Sastri for Mr. G. S. Ramachandra Iyer, for the Petitioner.

Mr. K. S. Jayarama Iyer, for the Respondent.

JUDGMENT.—The plaintiff obtained an assignment of a mortgage-debt from the defendant and sued the mortgagor for the mortgage amount. That suit was dismissed on the ground that the mortgagor had no title to the mortgaged properties. Why the plaintiff did not obtain a personal decree against the mortgagor is not explained. The plaintiff brought the present action in the Small Cause side of the Sub-Court, Mayavaram, to recover damages for an alleged breach of a covenant for title. The 1st Court dismissed the suit and this application is to revise the decree of the first Court. Plaintiff contends that the mortgage is an interest in immoveable property, that the transfer was a sale of immoveable property and by virtue of section 55 of the Transfer of Property Act, the defendant should be deemed to have contracted that the interest which he professed to transfer subsisted.

A charge on land is undoubtedly an interest in immoveable property, and I will assume, though there is a difference of opinion on this point, that for the transfer of such a charge, the formalities required for the sale of immoveable property should be complied with. See *Ramasami Pattar v. Chinnan Asari* (1), *Subramaniam v. Perumal Reddi* (2), and section 8, Transfer of Property Act. Ghose on Mortgage, page 72 (note). But I am not prepared to hold that there is an implied covenant for title on a transfer of a mortgage-debt. A transfer of a mortgage can hardly be regarded as a transfer of ownership of immoveable property. What is sold is primarily not the charge but the debt [*Subramaniam v. Perumal Reddi* (2)]; and the rights of such a transferee are practically the same as those of a transferee of an actionable claim, though a mortgage-debt is not an actionable claim as defined in the Transfer of Property Act. In a transfer by way of mortgage there is implied a covenant for title and the transferee of a mortgage gets the benefit of this

(1) 24 M. 449; 11 M. L. J. 132.

(2) 18 M. 454; 5 M. L. J. 92.

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covenant. [See section 65, clause (a), of the Transfer of Property Act]. My attention has not been drawn to any case, Indian or English, in which such a covenant was implied; on the other hand the case of *Marnham v. Weaver* (3) seems to assume that there is no such covenant. I agree with the lower Court that the plaintiff has no cause of action against the defendant. Further, the suit appears to be barred by limitation, as the cause of action for a suit for damages for breach of a covenant for title arises on the execution of the conveyance. As, however, the question was not argued before me, I do not desire to express any final opinion on the question.

I dismiss the petition with costs.

Petition dismissed.

(3) 80 L. T. 412.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 193 OF 1914.

June 21, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

VIRCHAND VAJEKARAN SHET—

PLAINTIFF—APPELLANT

versus

KONDU KASAM ATAR AND OTHERS

—DEPENDANTS RESPONDENTS.

Limitation Act (IX of 1908), s. 22—Mortgage, suit on, filed within time—Added defendants, limitation against—Estate of mortgagor liability of.

A mortgage, effected on the 23rd of June 1899, became due on demand on the 1st January 1900. The suit to enforce payment of money was brought after the death of the mortgagor, a Muhammadan, against his only son, a minor, on the 23rd of June 1911. The defendant's guardian urged that the mortgagor left other heirs, a widow and two daughters. The plaintiff applied, on the 29th of January 1912, to have them added as parties and they were so added on the 12th of February 1912. The added defendants contended that the suit was barred as against them under section 22 of the Limitation Act:

Held, that the addition of parties after the expiry of the time for the institution of a suit does not necessarily involve its dismissal under section 22 of the Limitation Act.

Held, further, that this suit was not barred against the added defendants inasmuch as the money was specifically charged on the whole property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage.

Second appeal from the decision of the District Judge of Thana, in Appeal No. 5 of 1913, confirming the decree passed by the Subordinate Judge at Kalyan, in Civil Suit No. 114 of 1911.

Mr. P. B. Shingne, for the Appellant.

Mr. W. B. Pradhan, for the Respondent.

JUDGMENT.—This suit was brought by a mortgagee under a simple mortgage to recover the amount of his claim by sale of the mortgaged property.

The mortgage was effected on the 23rd of June 1899, the mortgage-debt becoming due on demand, which was made on the 1st January 1900. The suit was instituted after the death of the mortgagor, a Muhammadan, against his only son, a minor, on the 23rd of June 1911. It was, therefore, within time if properly constituted.

The plaintiff alleged that the mortgagor was dead, that his only heir was the defendant and that the property of the deceased was in that defendant's possession.

The defendant's guardian having alleged that the deceased left other heirs, a widow and two daughters, the plaintiff applied, on the 29th of January 1912, to have them added as parties and they were so added on the 12th of February 1912.

It was then contended by the added defendants that the suit was barred as against them under section 22 of the Indian Limitation Act. This plea found favour with the lower Courts and the suit for sale was dismissed so far as the shares of the added defendants were concerned.

In our opinion the judgments of the lower Courts cannot be supported.

The suit was properly brought by the plaintiff to enforce payment of money charged upon immoveable property within twelve years of the date when the money sued for became due. The money was specifically charged on the whole property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage.

A decree for sale obtained after contest in the suit as originally constituted would have been binding on the other heirs even though they had not been added: *Assamatham Nessa Bibee v. Roy Lutchmeeput Singh* (1) and (1) 4 C. 142 (F. B.); 2 C. L. R. 223; 1 Shome L. R. 219.

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Davalava v. Bhimaji Dhondo (2). The suit, therefore, was, as originally filed, one in which the plaintiff could have obtained the relief sought. It was not improperly constituted in the sense of being instituted only against one of several parties to a contract. Nor was it instituted to enforce claims against shares in the hands of heirs: it was to enforce a mortgage lien binding on the whole property in the hands of any heir of the mortgagor. As pointed out in *Gurneayya v. Dattatraya* (3), the addition of parties after the expiry of the time for institution of the suit does not necessarily involve its dismissal under section 22. We set aside the decree of the lower Court and decree the plaintiff's claim for sale against all the defendants with all costs to be added to the mortgage-debt.

Decree set aside.

(2) 20 B. 338.

(3) 28 B. 11; 5 Bom. L. R. 618.

CALCUTTA HIGH COURT.

FIRST APPEAL No. 211 OF 1912.

June 9, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.

MATI LAL PODDAR—PLAINTIFF—

APPELLANT

versus

JUDHISTIR DAS TEOR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI—Pleading—Plaintiff bound to state nature of deeds supporting his title—Parties to be restricted to their pleadings—Inconsistent pleadings.

It is absolutely essential that a plaintiff, not to be embarrassing to the defendants, should state those facts which will put the defendant on his guard and tell him what he will have to meet when the case comes on for trial. It is not necessary to set out the evidence whereby the plaintiff proposes to prove the facts which give him the title [p. 182, col. 1.]

A plaintiff is bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims and show the devolution of the estate to himself. [p. 182, col. 1.]

Parties should be held strictly to their pleadings and should not be allowed to prove at the trial any fact which is not stated in their pleadings. [p. 182, col. 1.]

A plaintiff may in certain circumstances rely upon several different rights alternatively though they may be inconsistent. But he cannot be permitted to allege two absolutely inconsistent statements of facts each of which is destructive of the other. [p. 183, col. 1.]

Appeal against the decree of the Subordinate Judge of Dacca, dated the 6th May 1912.

Babu Gopal Chunder Das, for the Appellant.

Babus Joges Chunder Roy and Upendra Lal Roy, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against the preliminary decree in a suit for partition of joint property. The decree has been assailed on two grounds, namely, *first*, that the lower Court has erroneously determined the share of the plaintiff; and, *secondly*, that the lower Court has made an incorrect order for costs in favour of the defendants.

As regards the *first* ground, it appears that the disputed property was, on the 10th September 1898, purchased at an execution sale for Rs. 6,130 by a person whom we shall call X. X had a brother Y who had four sons A, B, C and D. On the 7th November 1900, X conveyed a six-annas share of the property to his three nephews A, B and C. On the 14th June 1910, A transferred a two-annas share to the defendants on the assumption that he was competent to deal with that share as one of the three brothers in whose favour the conveyance had been executed by X. On the 6th October 1910, X, B, C and D conveyed fourteen-and-a-half-annas share to the plaintiff, namely, a ten-annas share held by X, and four-and-a-half-annas share claimed by B, C and D, on the hypothesis that the conveyance by X, though nominally in favour of A, B and C, had really benefited A, B, C and D. On the 23rd January 1911, the plaintiff commenced this action for partition on the allegation that he was entitled to fourteen-and-a-half-annas share of the property while the defendants were entitled to the remaining one-and-a-half-annas share. The defendants answered that they had acquired a good title to a two-annas share by their purchase from A, and that the plaintiff was entitled to only fourteen-annas share.

The plaintiff, it may be observed at the outset, is singularly meagre; it does not narrate the history of the title of the plaintiff, nor does it mention the deeds whereby

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the title had devolved on him. The defendants accordingly urged in their written statement that the plaintiff was not entitled to relief on a plaint so framed and was bound to disclose the details of his title. This contention was well founded, as the plaintiff was bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims and to show the devolution of the estate to himself: *Philipps v. Philipps* (1), *Darbyshire v. Leigh* (2), *Davis v. James* (3); for as Cotton, L. J., said in *Philipps v. Philipps* (1), it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they will have to meet when the case comes on for trial. This much the plaintiff is bound to do, though he need not set out the evidence whereby he proposes to prove the facts which give him the title: *Williams v. Wilcox* (4), *Gautret v. Egerton* (5). The Court, however, took no notice of the objection, and raised a comprehensive issue in these terms: "What is the share of the plaintiff in the property in suit." The plaintiff was thus left free to nullify the salutary rule enunciated by Brett, L. J., in *Philipps v. Philipps* (1) that the parties should be held strictly to their pleadings and should not be allowed to prove at the trial any fact which is not stated in the pleadings. What the consequence has been, we realise when we come to examine the case on the merits. We find that the title alleged by the plaintiff is contrary to the tenor of the admitted deeds. On the face of the sale-certificate, X became the sole owner by purchase of the property in dispute. Under the conveyance executed by X in favour of A, B and C, they became jointly interested in a six-annas share. After this transaction, a ten-annas

share was left to X. Consequently, A was *prima facie* entitled to a two-annas share which he transferred to the defendant. B and C were entitled to a four-annas, while their uncle X had a ten-annas share: this they conveyed to the plaintiff, who thereby obtained a fourteen annas share. D was apparently not entitled to any share at all. The claim of the plaintiff to a fourteen-and-half-annas share cannot consequently be sustained, unless it is established that these deeds do not represent the true state of facts. The plaintiff in his plaint has furnished no indication of the source of his title, nor does he afford a clue to the grounds, if any, upon which he challenges the admitted deeds. When we turn to the evidence, however, we find that he has attempted to develop two inconsistent cases. He called one of his vendors, namely, X to prove that X and Y, who were separate in food and estate, became joint owners of the property by purchase at the execution sale and that the consideration was furnished by them in the proportion of ten to six, though the purchase was made in the name of X alone. The witness added that thereafter Y took a conveyance from him in respect of a six-annas share in the name of his three major sons. X in substance repudiated the allegations he had solemnly made in the conveyance in favour of his nephews. On this basis, the plaintiff can succeed only if he proves that what purports to be a conveyance to A, B and C, is in reality a deed of relinquishment in favour of their father Y, and that upon the death of the latter, his four sons A, B, C and D have taken equal shares by right of inheritance. The plaintiff then called another set of witnesses, namely, his vendors B, C and D to contradict the allegations of X, on the hypothesis that the property was acquired by X alone and was transferred by him for consideration under the conveyance in the names of A, B and C either to Y or to A, B, C and D. The defendants found themselves in a position of embarrassment, when these contradictory allegations were sprung upon them, without any indication afforded in the plaint; but fortunately, the testimony of one set of witnesses neutralised that of the other, and the Subordi-

(1) (1878) 4 Q. B. D. 127; 48 L. J. Q. B. 135; 39 L. T. 556; 27 W. R. 436.

(2) (1896) 1 Q. B. 554; 65 L. J. Q. B. 360; 74 L. T. 241; 44 W. R. 452.

(3) (1884) 26 Ch. D. 778; 53 L. J. Ch. 523; 50 L. T. 115; 32 W. R. 406.

(4) (1858) 8 A. & E. 314 at p. 331; 3 N. & P. 606; 1 W. W. & H. 477; 7 L. J. Q. B. 229; 112 E. R. 857; 47 R. R. 595.

(5) (1867) 2 C. P. 371; 36 L. J. C. P. 191; 16 L. T. 17; 15 W. R. 638.

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nate Judge held that the plaintiff had failed to prove his title to any share in excess of fourteen annas. In our opinion, the plaintiff should not have been allowed to proceed on the plaint as framed; he should have been called upon to specify in his statement of claim, the nature of the deeds and transactions from which he deduced his title. The plaintiff, deliberately and for obvious reasons, departed from the well-recognised rule applicable to the matter; when the plaint was filed, he could not make up his mind which alternative to choose, and consequently left his case to be developed by his witnesses. Now, it may be conceded that a plaintiff may in certain circumstances rely upon several different rights alternatively, though they may be inconsistent. This was recognised by the Full Bench in *Narendra Nath Barari v. Abhoy Charan Chattopadhyaya* (6) and is in conformity with the rule recognised in *Philipps v. Philipps* (1); *Berdan v. Greenwood* (7); *Hawkesley v. Bradshaw* (8) and *In re Morgan, Owen v. Morgan* (9). But as pointed out by the Judicial Committee in *Mahomed Buksh v. Hosseini Bibi* (10), the plaintiff cannot be permitted to allege two absolutely inconsistent statements of facts each of which is destructive of the other. In the case before us, the plaintiff, it is true, did not make a definite case in the plaint but sought at the trial to develop two inconsistent cases on the testimony of two different sets of witnesses. The Subordinate Judge rightly held that the evidence was not reliable enough to establish either the one case or the other. He has pointed out that the evidence to show that the execution purchase, though made in the name of X, was for the benefit of both X and Y, is utterly untrustworthy. The two brothers at the time were separate. There is no independent evidence to corroborate the assertion of X that a proportionate part of the consideration was furnished by Y.

(6) 34 C. 51; 4 C. L. J. 437; 11 W. N. 20 (F. B.); 1 M. L. T. 384.

(7) (1874) 3 Ex. D. 251; 47 L. J. Ex. 528; 39 L. T. 223; 26 W. R. 902.

(8) (1880) 5 Q. B. D. 302; 49 L. J. Q. B. 333; 42 L. T. 285; 28 W. R. 557.

(9) (1887) 35 Ch. D. 492; 56 L. J. Ch. 603; 56 L. T. 503; 35 W. R. 707.

(10) 15 C. 684; 15 I. A. 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175.

Nor is there any trustworthy evidence to show that, after this purchase, Y obtained joint possession of the property along with X. There is, on the other hand, no tangible evidence to prove that the conveyance executed by X in favour of A, B and C was really a conveyance in favour of Y, or of A, B, C and D. It was suggested at one stage of the argument in the Court below, and that suggestion has been repeated in this Court, that the conveyance might possibly be treated as a deed of relinquishment. This theory is extremely improbable. If the parties really intended the document to operate as a deed of release, there is no conceivable reason why it should not have been described as such; it is inexplicable why recitals untrue in fact should have been deliberately inserted in the deed, and why a large amount should have been paid as stamp duty on the conveyance, while a smaller amount would have sufficed for a deed of release. We are clearly of opinion that the plaintiff has failed to prove that the deed of conveyance by X in favour of A, B and C was in reality other than what it purported to be. But the appellant has argued that as the parties in a suit for partition occupy the position of counter-claimants, it was incumbent upon the defendants to set up and establish their special case. There is plainly no force in this contention. The defendants had no occasion to meet any case alleged in the plaint, while the two alternative cases developed in the evidence were destructive of each other. The first ground consequently fails.

As regards the *second* ground, it has not been seriously disputed by the respondents that the order for costs is erroneous. The Subordinate Judge has allowed the defendants the full amount of Pleader's fees on the value of the suit. This order could not properly be made at the stage of the preliminary decree, when the matter in controversy related only to a half-anna share in the property valued at Rs. 320. We hold accordingly that the Pleader's fee in Court below should have been assessed at one gold mohur only and that the total costs allowed to the defendants should have been fixed at Rs. 42-1-9 instead of Rs. 376-1-9. Subject to this variation,

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the decree of the Subordinate Judge will be affirmed. The respondents are entitled to their costs in this Court. We assess the hearing fee at two gold mohurs.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 990 OF 1914.

September 22, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Phillips.

KOLANGORATH RAMAN NAYAR AND
OTHERS—PLAINTIFFS—APPELLANTS

versus

KANNOTH *alias* KANDOTH VELLA-
RIKKA KUNHI KOLANDAN
MUSALIAR AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Malabar Law—Kanom mortgage with covenant for perpetual renewal—Intention—Clog on equity of redemption—Denial of jennu's title—Forfeiture—Statements of deceased persons not made in course of business, admissibility of—Evidence Act (I of 1872), s. 32 (2).

A *kanom* mortgage, with a covenant for perpetual renewal, is rather a perpetual *kanom* than an ordinary mortgage with a clog on the equity of redemption and is, therefore, not invalid. The *kanomdar* in such circumstances does not forfeit his *kanom* mortgage by denying the *jennu's* title. [p. 185, col. 2; p. 186, col. 1.]

Raman Nair v. Vasudevan Namboodripad, 27 M. 26, followed.

Venkatasubbayya v. Venkayya, 15 M. 230; 1 M. L. J. 677; *Neelakandhan v. Ananthakrishna Aiyar*, 30 M. 61; 16 M. L. J. 462; 1 M. L. T. 426; *Thambayarsamy Moodetty v. Hoosain Rowthen*, 1 M. L. J. 21, A. 241; 3 Sath. P. C. J. 198; 3 Sar. P. C. J. 531; *Gopalan Nair v. Kunhan Menon*, 30 M. 300 at p. 303; 17 M. L. J. 189; 2 M. L. T. 161; *Mayavanjari Raman Nair v. Kandapurn Nayar*, 1 M. H. C. R. 445; *Mayavanjari Chumaren v. Nimini Mayuran*, 2 M. H. C. R. 109, referred to.

Merely assertions of title as owner by a person having rights in lands of a very substantial kind should not necessarily be treated as denial of the title of a landlord whose rights are of an attenuated character. [p. 185, col. 2.]

Abbakka Shethi v. Seshamma, 25 Ind. Cas. 944; (1914) M. W. N. 915; 16 M. L. T. 442, followed.

Statements of deceased persons not made in the usual course of business are not admissible in evidence under section 32 (2) of the Evidence Act. [p. 185, col. 2.]

Second appeal against the decree and judgment of the Court of the Subordinate Judge of Tellicherry, in Appeal Suit No. 387 of 1911, preferred against that of the Court of the District Munsif of Tellicherry, in Original Suit No. 167 of 1910.

Mr. K. P. M. Menon, for the Appellants.
Mr. T. K. Govinda Aiyar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. They are the *jennies* of the plaintiff lands, but their predecessors-in-title had executed a perpetual *kanom* (see Marupat, Exhibit A), in December 1857 in favour of the 1st defendant's ancestor for the sum of Rs. 120 reserving a nominal rent of one *fanom* per year. Whether this one *fanom* is to be treated as the agreed excess annual profits which the usufructuary *kanom* mortgagee is to pay to the mortgagee, or whether a *kanom* mortgage being usually held to be (as a combination of a mortgage and a lease) an anomalous mortgage, the one *fanom* is to be treated as rent seems to be an arguable point. The plaintiffs treat the 1st defendant in the plaint as both mortgagee and lessee, and contend that the lease has been forfeited because the 1st defendant denied in a reply notice, Exhibit F (alleged to have been signed and sent by him), dated January 1908 that he was a tenant under the plaintiffs. (See paragraphs 4 and 5 of the plaint which does not refer to any other denial of title before the date of suit.) The plaintiffs did not treat the *kanom* of 1857 in the plaint as a perpetual *kanom*, but as an ordinary *kanom* for the customary period of 12 years and contended in their plaint, paragraph 6, that the cause of action arose on the 26th December 1869. They also gave another date for the cause of action, namely, the date of Exhibit F (18th January 1909).

The District Munsif found (a) that the *kanom* was not one for 12 years as alleged in the plaint, but an irredeemable *kanom* (see paragraph 10 of his judgment).

(b) That the 1st defendant did send reply, Exhibit F, though he denied having sent it.

(c) That the 1st defendant forfeited his irredeemable *kanom* tenure by reason of the plaintiffs' title in the letter Exhibit F.

On these findings he gave judgment for the plaintiffs for redemption of the *kanom*.

The learned Subordinate Judge on appeal agreed with the District Munsif that the reply notice, Exhibit F, was proved to have been sent by the 1st defendant, but held on the strength of *Raman Nair v. Vasudevan Namboodripad* (1) that a perpetual *kanom*

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is not forfeited by denial of the landlord's title. He, therefore, dismissed the plaintiffs' suit reversing the District Munsif's judgment.

The contentions before us in second appeal are—

(1) That the clause in the Marupat, Exhibit A, against surrender is a clog on redemption, invalid in law and as such inoperative. (See 2nd ground of second appeal memo.)

(2) That the perpetual right must be held to have been forfeited on the ground of the denial of the landlord's title, the case of *Raman Nair v. Vasudevan Namboodripal* (1) not being applicable to the facts of the present case. (See the 5th ground of second appeal memo.)

As regards the first contention, the mortgage now in question is dated in 1857. This Court in several cases [see for example *Venkatasubbayya v. Venkayya* (2) and *Nee akandhan v. Ananthakrishna Aiyar* (3)] has followed the ruling of their Lordships of the Privy Council in *Thumbusawmy Moodelly v. Hoosain Rowthen* (4), which held that the law of India was not the law of the English Courts of Chancery in respect of stipulations in documents of mortgage restricting the right of redemption, that the Indian Courts, when they applied the rules of the English Chancery Courts in such cases, "assumed the functions of the Legislature", and that, as regards mortgages made before 1858 when the erroneous course of decisions began in Madras, the intentions of the parties to the mortgage should be carried out without reference to the decisions of the English Courts of Equity.

As regards anomalous mortgages executed after the Transfer of Property Act came into force, also the provisions for perpetual renewal are valid according to the opinion of the present Chief Justice found in *Gopalan Nair v. Kunhan Menon* (5).

In the case of *Kottal Uppi v. Edavalath Thathan Nambudiri* (6), a perpetual *kanom* was recognised by this Court and relief was granted against the forfeiture of the perpetual term incurred by the breach of the stipulation in the *kanom*-deed that forfeiture

would be incurred by non-payment of rent regularly.

This contention, again, about the perpetual term being illegal, was not put forward in the plaint which relied only on the forfeiture by reason of the denial of title in the notice, Exhibit F. I would, therefore, reject this contention.

Coming to the second contention, the respondent's learned Vakil attacked the finding of the lower Courts, namely, that the 1st defendant signed and sent the reply, Exhibit F, as not supported by any legal evidence. Neither Court refers to any positive evidence that the 1st defendant signed and sent Exhibit F. The District Munsif presumes that the 1st defendant must have signed and sent it because in two previous documents, Exhibits K and M, he had set up *kudima jeum* title. The Subordinate Judge says without reference to any evidence whatever, "I find that the reply, Exhibit F, is proved to have been sent by the 1st defendant." The fact that Exhibits K and M are genuine is not legal proof that Exhibit F is genuine. The only evidence in the case on the plaintiff's side about Exhibit F is that the plaintiff's *kariyasthan* was told by the writer of Exhibit F that the writer wrote it at the request of the 1st defendant. That statement of the writer who is now dead, made to the plaintiff's *kariyasthan* is not alleged to have been made in the ordinary course of the writer's business. That statement, therefore, does not come under section 32, clause, 2 of the Evidence Act and cannot prove that the 1st defendant did ask that writer to write Exhibit F. That is the only denial of title relied upon in the plaint. Mr. K. P. M. Menon, the learned Counsel for the appellant, relied upon the denial of title in Exhibits K and M. But apart from the fact that these alleged denials are not relied upon by the plaintiffs in the plaint, I think that assertions of title as owner by a person having rights in lands of a very substantial kind should not necessarily be treated as denial of the title of a landlord whose rights are of a very attenuated character [see also *Abbakka Shetthi v. Seshamma* (7) decided by Napier, J., and myself as to the caution re-

(2) 15 M. 230; 1 M. L. J. 677.

(3) 30 M. 61; 6 M. L. J. 462; 1 M. L. T. 426.

(4) 1 M. 1; 2 L. A. 241; 3 Sutr. P. C. J. 198; 3 Sar. P. C. J. 531.

(5) 30 M. 300 at p. 303; 17 M. L. J. 189; 2 M. L. T. 161.

(6) 6 M. H. C. R. 254.

(7) 25 Ind. Cas. 944; 16 M. L. T. 442; (1914) M. W. N. 915.

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quired to be exercised by Indian Courts in applying the doctrine of forfeiture of denial of title.

Further, I am prepared to follow the decision of Boddam, J., and Bashayam Aiyangar, J., in *Raman Nair v. Vasudevan Namboodripad* (1) that such denial by a mortgagee within the period of his contractual mortgage term does not work a forfeiture of the term. It was argued that *Raman Nair v. Kandalam Nayar* (8) and *Mayarajaji Chumachen v. Nimalai Mayuran* (9), which the learned Counsel contends are in his favour, have not been considered in *Raman Nair v. Vasudevan Namboodripad* (1). I cannot accept this argument, as the Vakils who argued that case (Messrs. Sankaran Nair and Sundara Aiyar) were two of the most eminent Vakils of this Court. Sir Bhashyam Aiyangar (one of the learned Judges who decided that case) and those two learned gentlemen (who also became learned Judges of this Court afterwards) possessed quite exceptional knowledge of Malabar Law, including the case-law.

Further, the judgment in *Raman Nair v. Vasudevan Namboodripad* (1) does refer to decisions cited by the respondents' Vakil and states the effect of those decisions. I am quite satisfied, therefore, that these two cases must have been cited before the learned Judges who decided *Raman Nair v. Vasudevan Namboodripad* (1). That case clearly decided that while the customary period of 12 years for an ordinary *kanom* cannot be availed of by a mortgagee who denied his mortgagor's title within that period, such a denial of the mortgagor's title does not make the mortgagee liable to forfeit the term contracted for between the parties. As the term contracted for in this case is a perpetual term, it cannot be forfeited by denial. I am not inclined to question the correctness of the decision in *Raman Nair v. Vasudevan Namboodripad* (1) after this length of time, though the distinction made between the case of a customary term and a contractual term in that decision may be rather fine (see also the criticism of this decision in Moore's Malabar Law, pages 229 and 230).

In the result I would dismiss the second appeal with costs.

PHILLIPS, J.—I concur.

Appeal dismissed.

(8) 1 M. H. C. R. 445.

(9) 2 M. H. C. R. 109.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1274 OF 1913.

July 28, 1915.

Present:— Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

Musammal MAYA DEVI AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

RAM CHAND—PLAINTIFF—RESPONDENT.

Hindu Law—Marriage—Guardian appointed by Court—Infant girl given in marriage without guardian's consent or in disobedience of Court's order, effect of—Marriage performed in inauspicious times—Right to give girls in marriage—Duty of giving girls in marriage, rules as to, nature of—Guardians and Wards Act (VIII of 1890), s. 24.

A Hindu marriage performed at a time regarded inauspicious by the astrologers cannot be treated as ineffectual in law. [p. 187, col. 1.]

Under Hindu Law, in the event of the father and paternal male relations losing their right by death or waiver to give a girl in marriage, the right of selecting the husband for a female infant devolves on the mother. [p. 187, col. 1.]

The rules as to the duty of giving Hindu girls in marriage are directory and not mandatory. Therefore, in the absence of force or fraud, a Hindu marriage otherwise legally contracted and performed with the necessary ceremonies is not invalidated by the absence of consent of the guardian entitled to give such consent. [p. 187, cols. 1 & 2.]

Venkatacharyulu v. Rangacharyulu, 14 M. 316; 1 M. L. J. 85; *Ghazi v. Sukri*, 19 A. 515; A. W. N. (1897) 130; *Mulchand Kuber v. Bhudhia*, 22 B. 812, relied upon.

Dyal v. Narain Das, 64 P. R. 1884, distinguished.

The circumstance that the marriage of a Hindu girl was celebrated by her guardian in disobedience of the order of the Civil Court would not invalidate the marriage, if it was performed by the guardian in good faith and for the welfare of the minor and if in the absence of that guardian's appointment under the Guardians and Wards Act by the Court, the guardian would have been entitled to give the girl in marriage. [p. 187, col. 2.]

Second appeal from the decree of the Court of the Divisional Judge, Gujranwala Division, at Lahore, dated the 24th May 1913, affirming that of the District Judge, Gujranwala, dated the 23rd December 1912, decreeing the claim.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellants.

Mr. Kirkpatrick and Lala Tiroth Ram, for the Respondent.

JUDGMENT.—This second appeal arises out of an action brought by the respondent, Ram Chand, against his wife, Musammal Maya Devi, for the restitution of conjugal rights. The facts which are relevant to the point of law in issue in this appeal are simple and may be stated in a few words

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Musammât Maya Devi's father died in 1903, and in 1905 *Musammât* Radhi, her mother, was appointed her guardian by the District Court, with the direction that she should not perform the marriage of the minor without the sanction of the Court. It appears that the mother celebrated the marriage of her daughter with Ram Chand sometime in 1909 without obtaining the necessary permission of the Court, and the *factum* of this marriage is no longer in dispute. The cardinal point for consideration is whether the Court should refuse to recognise the validity of the marriage.

We may state at once that the fact that the marriage was solemnized in the *sangât* year does not render it invalid. A *sangât* year may be an inauspicious time, but there is no authority for holding that the marriage performed at a time regarded inauspicious by the astrologers should be treated as ineffectual in law. Nor do we consider that the disparity in the ages of the parties is such as would constitute a sufficient reason for setting aside the marriage, which has been duly solemnized.

There was some discussion before us as to whether the marriage was performed in accordance with the Hindu rites or whether it was, what is commonly known, an *anand* marriage. The Courts below have not recorded a clear finding on this point but the report of the Commissioner, who is a retired officer of judicial experience, is that the marriage was celebrated according to the ceremonies prescribed by the Hindu Law and we think his view is supported by the evidence on the record.

It is manifest in the event of the father and paternal male relations having lost their right to give the girl in marriage by death or waiver, the right of selecting the husband for a female infant devolves upon the mother and *Musammât* Radhi was, according to the rules of Hindu Law, fully competent to give her daughter in marriage. The rules as to the duty of giving (girls) in marriage are directory and not mandatory and it has been held over and over again that in the absence of force or fraud, a Hindu marriage otherwise legally contracted and performed with the

necessary ceremonies is not invalidated by the absence of consent of the guardian entitled to give such consent, vide *Venkatacharyulu v. Rangacharyulu* (1) *Ghazi v. Sakru* (2) and *Mulchand Kuber v. Bhudhia* (3). The judgment in *Dyal v. Narain Das* (4) does not lay down any rule to the contrary and it appears that the Court on the peculiar circumstances of that case annulled the marriage because it was celebrated by the mother in opposition to her husband's authority and because the marriage was found to be unnecessary and unsuitable. It is doubtful whether those circumstances would justify a Court in setting aside a Hindu marriage performed with the usual rites, but the ruling has clearly no applicability to the case before us.

It follows from the above discussion that if no proceedings had been taken under the Guardians and Wards Act and if the mother had not been appointed guardian by the Court, the validity of the marriage in question, which was performed by her in good faith and for the welfare of the minor, could not have been successfully contested in a Court of law. And we do not think that the absence of sanction has the effect of invalidating a marriage which is otherwise legally contracted. In fact the Bombay High Court in their judgment in *Bai Dhwali v. Moti Karson* (5) decided that the circumstance that the marriage was celebrated in disobedience of the order of a Civil Court, does not invalidate it. In this view we entirely concur.

It will be observed that no male paternal relation of the father has raised any objection to the marriage and that Beli Ram, who has been contesting the claim of the plaintiff, is the second husband of *Musammât* Radhi and is not in any way related to the minor. We are unable to say whether it is his solicitude for the welfare of the minor or some ulterior motive which has actuated him in fighting out this case.

(1) 14 M. 316; 1 M. L. J. 85.

(2) 19 A. 515; A. W. N. (1897) 139.

(3) 22 B. 81.

(4) 64 P. R. 1884.

(5) 22 B. 509.

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Upon a consideration of all the circumstances and the law bearing on the subject, we are satisfied that the marriage between Ram Chand and Mysammata Maya Devi is a valid transaction and that there is no cogent reason for disturbing the decree for restitution of conjugal rights granted by both the Courts below. We accordingly affirm the decree appealed from and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 363 OF 1914.

August 2, 1915.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Napier.

M. NARAYAN SINGH—DEFENDANT—

PETITIONER—APPELLANT

versus

AIYASAMI REDDI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63
—Suit to set aside attachment of immovable property,
valuation of—Jurisdiction—Suits Valuation Act (VII of
1887), s. 4.

In a suit instituted under Order XXI, rule 63 of the Code of Civil Procedure (both against the judgment-debtor and the decree-holder) to cancel the attachment and also to declare that the judgment-debtor has no interest in the property attached, the market value of the land and not the amount due under the decree in execution of which the land was attached, determines the Court which should entertain the suit. [p. 189, col. 1.]

Phul Kumari v. Ghanshyam Misra, 35 C. 202; 12 C. W. N. 169; 35 I. A. 22 (P. O.); 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1; *Fisher v. Arunachella Chettiar*, 2 Ind. Cas. 522; 9 M. L. J. 236; 5 M. L. T. 70, followed.

Krishnasami Naidu v. Somasundaram Chettiar, 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116 (F. B.), distinguished.

Appeal, under clause 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Kumaraswami Sastri, in Civil Revision Petition No. 907 of 1913, reported in 27 Ind. Cas. 265, preferred against that of the District Court of Chingleput, in Original Suit No. 31 of 1913.

Mr. S. Krishnamurthi Aiyar, for the Appellant.

Mr. A. Krishnaswami Aiyar, for the Respondents.

JUDGMENT.—We think the learned Judge is right. The 1st defendant obtained a decree against the 2nd defendant and

attached the suit property as his. The plaintiff put in a claim petition. He made the judgment-debtor and the decree-holder (2nd and 1st defendant) parties to that petition. His claim was disallowed and he has brought this present suit under Order XXI, rule 63. The value of the property in suit is Rs. 4,000, whereas the decree of the 1st defendant is for Rs. 300. The question for determination is, what is the value of the suit for purposes of jurisdiction. The Court-fee under Schedule II, Article 17, of the Court Fees Act, will be the same whatever be the value of the property. The District Judge held that the suit ought to be instituted in his Court, as the value of the land in dispute exceeded the pecuniary limits of the District Munsif's jurisdiction. The defendant asks this Court to revise the order on the ground that the value of the suit is the value of the decree obtained by the 1st defendant against the 2nd defendant.

Under section 4 of the Suits Valuation Act, the plaintiff is not entitled to put a higher value on the suit than what is covered by his interest in the litigation. The decision of the Judicial Committee in *Phul Kumari v. Ghanshyam Misra* (1) is to the same effect. Their Lordships say that the value of the action is its value to the plaintiff. If that criterion is applied, the suit ought to be valued with reference to the relief sought by the plaintiff. In *Fisher v. Arunachella Chettiar* (2), this Court came to the conclusion that for purposes of jurisdiction the right put forward by the plaintiff fixes the value of the suit.

On the other hand, the decision of the Full Bench in *Krishnasami Naidu v. Somasundaram Chettiar* (3) lays down that in determining jurisdiction the lowest value, whether it be that of the decree under execution or of the property under attachment, should be accepted as determining the forum for the trial of the suit. We find no reference in this judgment to the decision of the Judicial Committee in *Phul Kumari v. Ghanshyam Misra* (1). Moreover, in the present case both to the claim pro-

(1) 35 C. 202; 12 C. W. N. 169; 35 I. A. 22 (P. O.); 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1.

(2) 2 Ind. Cas. 522; 9 M. L. J. 236; 5 M. L. T. 70.

(3) 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116 (F. B.).

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ceedings and to the suit the judgment-debtor was a party. The prayer in the suit is not only to cancel the attachment but also for a declaration that the judgment-debtor has no interest in the property. The proper issue must relate to the conflicting title of the plaintiff and of the 2nd defendant, and the decision on it will be binding on both. Consequently, the value to the plaintiff of this suit is his full interest in the land whose attachment he seeks to raise. The learned Judges who decided *Krishnasami Naidu v. Somasundaram Chettiar* (3) based their decision on the ground that the judgment-debtor will not be affected by the decision in the suit. The present case is distinguishable from the Full Bench ruling, because the plaintiff here has distinctly asked for an adjudication against the 2nd defendant. It is doubtful whether the Full Bench decision is good law having regard to the decision in *Phul Kumari v. Ghanshyam Misra* (1). However that may be, we feel no difficulty in holding in this case that the learned Judge is right in his view that the value of the suit is the value of the entire property claimed by the plaintiff.

We dismiss the Letters Patent Appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2673 OF 1912.

July 7, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Ne bould.

ATRABANNESHA BIBI—PLAINTIFF—

APPELLANT

versus

SAFATULLAH MIA AND OTHERS—

DEPENDANTS—RESPONDENTS.

Benamidar—Suit for partition of immoveable property by benamidar, if maintainable—Suits for land and suits for money claims, distinction between—Nature of partition.

A benamidar cannot maintain a suit for partition of joint immoveable property. [p. 190, col. 2.]

Seemle:—A distinction has been recognised in the Calcutta High Court between suits for land and suits for money claims in the determination of the question of the competence of a benamidar to maintain a suit: in the former class of cases the right has been denied; in the latter class of cases the right has been sustained. [p. 190, col. 1.]

The essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property. [p. 190, col. 2.]

No analogy can be established between partition and the enforcement of a money claim, even when such claim is associated with land, as in the case of a *benami* mortgage or of a *benami* lease, though as regards leases and mortgages, there is apparently some divergence of judicial opinion. [p. 190, col. 2.]

Appeal against the decree of the District Judge of Mymensingh, dated the 5th March 1912, affirming that of the Subordinate Judge of Mymensingh, dated the 24th April 1911.

Babus Ram Chunder Mozumdar and Dharendra Lal Kastgir, for the Appellant.

Babu Dwarka Nath Chakrabarti and Moulvi Nuruddin Ahmed, for the Respondents.

JUDGMENT.—A question of law of first impression has been raised in this appeal, which has been preferred by the plaintiff in a suit for partition of joint immoveable property. On the 30th April 1906 the plaintiff took a conveyance in respect of a share of the disputed land from her brother. On the 28th September 1909 the plaintiff instituted this suit for partition and joined her vendor as *pro forma* defendant. The contesting defendants resisted the claim on the ground, amongst others, that the sale was a fictitious transaction and that the plaintiff as the nominal owner was not entitled to maintain the suit. The Courts below have concurrently found upon the facts in favour of the defendants and have dismissed the suit. The question thus arises whether a *benamidar* can maintain a suit for partition of joint immoveable property.

On behalf of the appellant reference has been made to the cases of *Basi Poddar v. Ram Krishna Poddar* (1) and *Baburam Mandar v. Ram Sahai Sahoo* (2), where the right of a *benamidar* to apply for reversal of an execution sale of land under section 310A of the Code of 1882 was sustained, as also to the decision in *Sreenath Nag v. Chundernath Ghose* (3), *Bhoobunessur Roy v. Juggessuree* (4), *Sachitanandu Mohapatra v. Baloram Gorain* (5)

(1) 1 C. W. N. 135.

(2) 8 C. L. J. 305.

(3) 17 W. R. 192.

(4) 22 W. R. 413.

(5) 24 C. 644.

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Hari Gobinda Saha v. Purna Chandra Saha (6), *Alikjan Bibi v. Rambaran Shah* (7) and *Kirtibasa Das v. Gopal Jea* (8), where the right of a nominal mortgagee to enforce the security was recognised. On behalf of the respondents, on the other hand, reliance has been placed upon the doctrine now well settled in this Court, that a *benamidar* is not competent to maintain a suit for possession of immoveable property: *Meheranissa Bibi v. Hur Churn Bose* (9), *Fuzzeela Beebe v. Jundak Beebe* (10), *Kulee Prasanna v. Dinanath* (11), *Tamamunissa v. Wajjulummon Hossee* (12), *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar* (13), *Issar Chandra Dutt v. Gopal Chandra Das* (14), *Barnala Sundari Ghose v. Dina Bantha Khan* (15), *Mohendra Nath v. Kali Prashad* (16). This doctrine is in accord with the pronouncement of the Madras High Court in *Kuthaperumal Rajali v. Secretary of State* (17), though possibly a discordant note is sounded in the still later case of *Venkatachala Asari v. Subramania Chetty* (18); while a contrary view has been adopted in Bombay: *Dagdu v. Balwant Ramchandra Natu* (19), *Ravji Appaji Kulkarni v. Mahadev Bapaji Kulkarni* (20) and in Allahabad: *Nand Kishore Lal v. Akmal Ata* (21), *Yad Ram v. Umrao Singh* (22). These cases indicate that a distinction has been recognised in this Court between suits for land and suits for money claims, in the determination of the question of the competence of a *benamidar* to maintain a suit: in the former class of cases the right has been denied; in the latter class of cases the right has been sustained. The

substantial question in controversy is, within which of these classes does a suit for partition of land fall. In our opinion a suit for partition of immoveable property should, for our present purpose, be included in the same category as a suit for possession of land. The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners; or, as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. Partition is thus the division made between several persons of joint lands, which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him; the essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property. No intelligible principle has been suggested whereby an analogy can be established between the process thus described and the enforcement of a money claim, even when such claim is associated with land, as in the case of a *benami* mortgage or of a *benami* lease, though it may be observed that even as regards leases, [*Donzelle v. Kedarnath Chuckerbutty* (23), *Kedarnath Chuckerbutty v. Donzelle* (24), *Inderbuttee v. Mubhoob Ali* (25), *Jainarayan Bose v. Kallumbini Dasi* (26), *Purnia v. Torab* (27), *Bogar v. Karam Singh* (28)] as also as regards mortgages, [*Alikjan Bibi v. Rambaran Shah* (7), *Munshi Basiruddin v. Mahomed Jalish* (29)], there is apparently some divergence of judicial opinion. We accordingly hold that the plaintiff as *benamidar* is not entitled to maintain a suit for partition of the joint property in dispute.

It has finally been argued on the authority of the decision in *Ram Bhurosee Singh v. Bissesser Narain Mahata* (30), that the defendants should not have been

(6) 1 Ind. Cas. 522; 11 C. L. J. 47.

(7) 7 Ind. Cas. 166; 12 C. L. J. 357.

(8) 9 Ind. Cas. 499; 19 C. L. J. 193.

(9) 10 W. R. 220.

(10) 11 B. L. R. 60 n; 10 W. R. 469.

(11) 11 B. L. R. 56 at p. 64; 19 W. R. 434.

(12) 20 W. R. 72.

(13) 16 C. 364.

(14) 25 C. 98; 3 C. W. N. 20.

(15) 25 C. 874; 3 C. W. N. 12.

(16) 30 C. 265; 7 C. W. N. 229.

(17) 30 M. 245; 17 M. L. J. 174.

(18) 8 Ind. Cas. 264; 8 M. L. T. 377; (1910) M. W. N. 633.

(19) 22 B. 820.

(20) 22 B. 672.

(21) 18 A. 69; A. W. N. (1895) 160.

(22) 21 A. 380; A. W. N. (1899) 130.

(23) 7 B. L. R. 720; 16 W. R. 186.

(24) 20 W. R. 352.

(25) 24 W. R. 44.

(26) 7 B. L. R. 723 n.

(27) (1865) Wyman 14.

(28) 13 P. W. R. 1.07; 141 P. R. 1906; 96 P. L. R. 1907.

(29) 12 C. W. N. 409.

(30) 18 W. R. 454.

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allowed to object that the plaintiff was not the real owner. There is no foundation for this contention. The defendants allege that the vendor of the plaintiff was a party to a prior partition suit instituted in 1907 and that the present suit had been instituted at his instance and on his behalf by his *benamidar* with a view to enable him to escape from the effects of the decree in the earlier litigation. This, if established, is a complete answer to the suit as framed, and the defendants were undoubtedly competent to urge this defence, as they have successfully done. This also meets another objection taken by the defendants, namely, that the proper procedure was not to dismiss the suit but to direct that the beneficial owner be made a joint plaintiff—a course commended in *Sita Nath Saha v. Nobin Chunder Roy* (31), *Gopi Nath Choley v. Bhugout Pershad* (32), *Kallee Prosonno v. Dinonath* (11), *Bhola Pershad v. Ram Lal* (33). In the present case the procedure now suggested cannot possibly be adopted. In the first place the vendor of the plaintiff cannot be joined as a co-plaintiff without his consent. In the second place if he was so joined, it would be of no avail as the relief claimed must be refused on the ground that the suit is barred by the decree in the prior partition suit.

As a last resort the plaintiff has relied upon her *jote* right, but we are of opinion that the District Judge has very properly left the matter open for adjudication in a separate suit appropriately framed in that behalf.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(31) 5 C. L. R. 102.

(32) 10 C. 697.

(33) 24 C. 34.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1979 OF 1912.

April 1, 1915.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

BHAMBA RAM AND ANOTHER—DEPENDANTS
—APPELLANTS

versus

ALLAH BAKHSH—PLAINTIFF AND OTHERS
—DEPENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 13—'Shop', meaning of—Residential place with an oven for making rotis, whether shop.

The question whether upon certain facts found, a building should or should not be held to be a 'shop' within the meaning of section 13 of the Punjab Pre-emption Act, 1905, is one of law and constitutes a good ground for second appeal. [p. 191, col. 2.]

Feroze-ud-Din v. Rahim Bakhsh, 8 Ind. Cas. 356; 192 P. L. R. 1910; 96 P. R. 1910, referred to.

The word 'shop' in its ordinary meaning denotes a building or an apartment which is primarily used for buying and selling goods. [p. 192, col. 1.]

Where a place was primarily used as a residential place:

Held, that it was not a shop although there was in it an oven for cooking *rotis* for any one who brought his own flour for the purpose and paid in cash or in kind for baking the *rotis*. [p. 192, col. 1.]

Second appeal from the decree of the Divisional Judge, Multan, dated the 10th October 1912.

Rai Bahadur Pandit Sh o Narain, for the Appellants.

Bakhshi Tek Chand and Mr. Badr-ud-Din, for the Respondents.

JUDGMENT.—The point which requires decision in this appeal is, whether the property in dispute is a shop and consequently exempt from pre-emption. We have to determine it upon the facts found by the lower Appellate Court, and it seems to us clear that the question, whether upon those facts, the building should or should not be held to be a shop within the meaning of section 13 of the Punjab Pre-emption Act, is one of law and constitutes a good ground for second appeal—*vide, inter alia, Feroze-ud-Din v. Rahim Bakhsh* (1). We have, therefore, no hesitation in overruling the preliminary objection that no second appeal lies from the decree of the Divisional Judge.

Upon the merits, the Advocate for the appellants has not been able to satisfy us

(1) 8 Ind. Cas. 356; 96 P. R. 1910; 192 P. L. R. 1910.

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that the concurrent finding of the lower Courts as to the nature of the property is erroneous and we have not, therefore, called upon the respondents' Pleader to reply. It is clear that the building consists of three rooms and a roofed verandah, which is a kind of *thara* or platform and it appears that in that platform there is an open sunk oven for cooking *rotis*. The lower Appellate Court has found that the vendors, Musammal Muradan and her son Allah Wasaya, lived in the rooms, and that she used the oven for cooking *rotis* for any one who brought his own flour for the purpose and paid her either in cash or in kind for her services in baking the *rotis*. It has further found that the woman did not actually sell *rotis* there.

On these facts we are unable to regard the property as a shop. The word 'shop' is not defined in the Act, and it is not easy to lay down a complete and exhaustive definition of the term. But in its ordinary meaning it denotes a building or an apartment which is primarily used for buying and selling goods. Judged by this test even the roofed verandah, apart from the rooms which are undoubtedly used for residential purposes, can hardly be called a shop. And, if we take the entire building as one tenement, we have no doubt that it cannot be regarded as a shop. The *ratio decidendi* in cases in which the property is used for more than one purpose, is to find out the primary or main purpose for which it has been used; and we are of opinion that the primary use in this case was certainly residential. We find that prior to 1906, the property had in all the deeds been described as a house and it is only in the deeds executed in that year and subsequently that the vendees and their predecessors-in-interest got it described as a shop. It is quite possible that the object of that description was to defeat the right of pre-emption. As regards the other properties in the locality, no definite information can be gathered from the evidence on the record. It, however, appears that some of them are houses while others are shops, pure and simple.

In view of all the circumstances of the case, and more especially the primary use to which the building has been put, we

agree with the lower Courts that it has not been proved to be a shop, and that the plaintiff has established his right to pre-empt it. We accordingly maintain the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT. REFERRED CASE NO. 3 OF 1914.

September 3, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

C. A. EASWARA AIYAR—PLAINTIFF—
APPELLANT

versus

K. GOVINDARAJULU NAIDU—
DEFENDANT—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 17—Judgment-debtor adjudicated an insolvent—Court, whether has jurisdiction to entertain execution proceedings—Leave of High Court, necessity of—Security bond for appearance of judgment-debtor—Presidency Small Cause Courts Act (XV of 1882), s. 9, rules under.

When once a person is adjudicated an insolvent, creditors seeking any remedy against him must apply to a High Court on its insolvency side to get leave for that purpose. [p. 196, col. 1.]

A Court of Small Causes has, therefore, no jurisdiction without the leave of the High Court to entertain an application in execution after the judgment-debtor has been adjudicated an insolvent. [p. 196, col. 1.]

Quere.—Whether section 30 of the Presidency Small Cause Courts Act, or Order XXI, rule 27, of the Civil Procedure Code empowers a Presidency Court of Small Causes to take a security bond for the appearance of the judgment-debtor arrested in execution of a decree? [p. 196, col. 1.]

Case stated, under section 69 of Act XV of 1882, by the Judges of the Presidency Court of Small Causes of Madras, in F. B. No. 58 of 1913 and Suit No. 6809 of 1913.

FACTS of the case appear from the following

REFERENCE.

One Easwara Iyer, the plaintiff in this case, had obtained a decree against one Jayaram Naidu in Small Cause Suit No. 1048 of 1912 on 31st January 1912 for Rs. 307-12-0 and costs. On 12th September 1912 the said Jayaram Naidu filed his

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petition and schedule in the Insolvency Court, Madras, and obtained from that Court a protection order under section 25 of the Insolvency Act, *vide* Exhibit II in this case. The said order gave protection to him in the first instance till 22nd of November. The plaintiff's decree-debt was not included in the debtor's schedule when first filed. On the 30th November, the plaintiff got Jayaram arrested under a warrant he obtained from this Court, in execution of his decree in the said Small Cause Suit No. 1048 of 1912. The amount of the warrant was Rs. 396-9-3. Jayaram was kept in intermediate custody for two days and produced before the 3rd Court on 2nd day of December to be committed to jail or otherwise dealt with as the Court directed. Jayaram then filed an application in Court supported by an affidavit asking for release from custody for a fortnight, on the ground that he had already filed his petition and schedule in insolvency and obtained protection but by oversight, he had omitted plaintiff's decree-debt in his schedule, that he had already applied to have the schedule amended and expected orders in a week. The Court granted an adjournment till the 12th December and directed Jayaram to be released from custody during that time on his giving security for his appearance to the satisfaction of the Registrar. The present defendant, Govindarajulu Naidu, agreed to be the surety and Jayaram and he executed the bond filed as Exhibit A in this suit to the Registrar and Jayaram was thereupon released. By the bond Jayaram and the present defendant agreed to pay to the Registrar and his assigns, etc., the sum of Rs. 396-9-3 on condition that the obligation was to be void "if the said Jayaram Naidu shall appear in the said Court on the 12th day of December 1912 (with the protection order) and on any subsequent day or days to which the hearing of the said application may be adjourned until it shall be disposed of, otherwise to remain in full force and virtue." The sum mentioned in it is the amount in the warrant under which Jayaram was arrested. On the adjourned date, Jayaram as well as the surety appeared, but did not produce the amended schedule or protection order and Jayaram

prayed for a further adjournment to produce these documents and the Court granted him a further adjournment to 19th December and he was again released on the same security. On the adjourned date, parties again appeared and produced the copy of the amended schedule including plaintiff's decree-debt therein, *vide* Exhibit I, but did not produce the copy of the protection order. From Exhibit I, it is clear that at some time on or before 13th December the debtor's schedule had been amended to include plaintiff's decree-debt, for it bears the date 13th December 1912. An oral application for further adjournment was again made and granted till the 8th of January 1913, Jayaram being released on the same security. On that date Jayaram did not appear in Court though the Vakil for the defendant and the surety was present. The Court thereupon rejected Jayaram's application. Immediately the surety put in an application to Court stating that he did not produce Jayaram in Court as the latter was seriously ill and unable to move from his bed and asked for three days' time undertaking to produce him by then. On that, the Court passed on 8th of January 1913 the order, "on the same security extended till Saturday", *i. e.*, the 11th of January. On the 11th the Court passed the order "debtor not produced, plaintiff might take such steps as he may be advised." On the 22nd January, on plaintiff's application for assignment of the bond to him the Court passed, without any notice to Jayaram or the surety, the order "sanctioned". On the 4th of February the assignment deed was executed in plaintiff's favour by the Registrar. On the 19th of February the surety, the present defendant, made an application to the Registrar to set aside the assignment of the security bond, stating in the affidavit in support of it that his inability to produce the debtor in January was on account of the latter's illness and that he was ready to produce him then, that this debt had been included in the schedule and a protection order obtained when he was asked to produce the defendant and that, therefore, the decree-holder had not been prejudiced by his default to produce him. That application after notice to plaintiff was adjourned from time to time. The

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plaintiff filed the present suit on 22nd of April. On 9th May, the surety's application was dismissed for default, the surety not appearing apparently because the question of his liability under the bond was already raised in the suit. All through these execution proceedings the copy of the protection order now produced in this suit, Exhibit II, was not produced in Court. Exhibit II now filed, shows that Jayaram Naidu was granted protection by the Insolvency Court on 12th September 1912 in the first instance till the 22nd of November; and protection was "extended" four times till 21st February 1913, 28th March 1913, 4th April 1913 and 3rd May 1913. These "extension" orders are not dated and do not state expressly the dates of commencement. We are not agreed as to the validity and the effect to be given to these orders.

Plaintiff's suit against the defendant surety for the amount of the bond is based on the ground that on 8th January 1913 Jayaram Naidu failed to appear (see paragraph 6 of the plaint). The defendant pleaded that the debtor was not produced on that date as he was too ill, that he was ready to produce him then, that the plaintiff had no cause of action as he could not have taken steps even if Jayaram had been produced as a protection order had been obtained then, that the sum mentioned was penal and that plaintiff was not entitled to it.

The learned trial Judge found against the defendant on all these pleas and decreed the suit as brought. The defendant applied to the Full Court under section 38 of the principal Act. In the Full Bench, we are not agreed on the question whether in the circumstances of the case, the bond should be enforced against the surety, the defendant; the Chief Judge and the second Judge holding that the decree of the first Court should be reversed and the suit dismissed; the third Judge holding that his first judgment was correct and that the decree should be confirmed. We have delivered separate judgments setting forth our reasons for our individual views; a reference to which judgments is respectfully requested. As we have differed in opinion we beg to make this reference to the High

Court under section 69 of the principal Act. The question we refer for the opinion of the High Court is as follows:—

"In the circumstances of the case as set out above, should the bond Exhibit A be enforced against the surety, the defendant, and is plaintiff entitled to a decree for the amount thereof."

Messrs. Venkatasubba Row and Radha Krishnayya, for the Appellant:—The Small Cause Court had jurisdiction to take this bond. By the term "other legal proceeding" it is not intended to include arrest of a judgment-debtor. That is clear from the provisions of the Provincial Insolvency Act, which specially make mention of the judgment-debtor's person.

It is also clear from section 49 of the repealed Insolvency Act.

In the absence of any provision, the decree-holder is entitled to take steps; further in this case, the decree-debt was not included in the schedule at all. It was only when application for execution was made that it was included and the protection sought.

Mr. W. V. Rangaswamy Aiyangar, for the Respondent:—The Small Cause Court had no jurisdiction to take this bond at all. It must come under section 30 of the Presidency Small Cause Courts Act which contains no provision as to taking of a bond. Such a provision is found only in the Code of Civil Procedure, section 54, and has not been repeated in the rules framed under section 9 of the Presidency Small Cause Courts Act.

JUDGMENT.

NAPIER, J.—This is a reference under section 69 of the Presidency Small Cause Courts Act—Act XV of 1882. It is much to be regretted that the Judges of that Court did not adhere more closely to the directions of the section in making their reference. They do not state clearly the points on which there is a difference of opinion. They practically refer the whole case to this Court saying that they are not agreed on the question, whether "under the circumstances of the case, the bond should be enforced against the surety, the defendant." In my opinion this is not a proper reference, and were it not that one of the Judges of that Court has now retired, I would, speaking for myself, return the reference for re-submission in strict accordance

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with law. As that course is now impossible, I will deal with it as if the reference was on three points:—(1) whether there was any jurisdiction in the Court to take the bond, (2) whether the protection order granted by the High Court in the exercise of its insolvency jurisdiction operated to make the bond void and (3) whether the sum mentioned in the bond was penal. These three points have been elaborately argued before us. On the second point, the principal questions to be considered are:—Whether the continuance order did in fact relate back to cover the date when the bond was taken and also whether the protection order, continued after he had entered this debt in his schedule, could be read as covering this debt when no specific reference was made to the fact in the continuance order. From what we learn from the Registrar, it is clear that these orders for continuance of protection are made in rather a routine manner after once the protection has been given and I am inclined to think that any continuation of protection would cover all debts contained in the schedule at the date of each of such continuation order unless the order is made exempting from protection with respect to any particular debt. The point, however, is not under the present procedure of much importance, for I am of opinion that the first question must be answered in the negative. I hold that the Small Cause Court had, after the 2nd of December, the date of his adjudication, no jurisdiction over the debtor to make any order against him without the sanction of the High Court. Section 17 of Act III of 1909 is far wider in its terms than the corresponding provisions in the old Insolvency Act of 1848 on which the present protection system is based. Section 17 covers the same ground as section 7 and section 49 of the old Act; but provides an entirely different procedure. Under section 49 a suit or action or execution proceeding pending in a Court at the time when the insolvent filed his schedule could be stayed, set aside or suspended by that Court; the Insolvency Court having power under another section to protect the insolvent from arrest on account of either all or any of the debts mentioned in the schedule. Section 17 of the present Act goes a great deal further. It provides that no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency

shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent, or commence any suit or other legal proceeding except with the leave of the Court, and on such terms as the Court may impose. It is argued before us that applying for a warrant in execution proceeding is not commencing other legal proceedings within the meaning of the section, and a case reported as *Empeor v. Mulshankar Harinand Bhat* (1) is relied on as an authority for that position, the words used by one of the learned Judges being, "by 'other legal proceeding' is meant broadly other proceeding of a Civil nature connected with the insolvent's estate." The question before the Court was, however, whether the proceedings in a Criminal Court were without jurisdiction under this section, and it is with reference to that contention that the observation is made. That case is, therefore, no authority for the position. Reliance is also placed on the difference in the language of the Provincial Insolvency Act which "have any remedy against the property or the person of the insolvent or commence any suit or other legal proceeding". I do not, however, think that the difference in wording detracts from the meaning to be given to the words "other legal proceeding". Execution proceedings were specifically mentioned in section 49 of the old Act and were clearly intended to cover applications for arrest, as the proviso to the section enacts that if a person was already in custody, he should not be discharged out of it otherwise than by a protection order which could be made under section 13. It is further argued that if section 13 of the Act is to be held to include proceedings by way of application for warrant of arrest in execution, there is no necessity for a protection order. The answer is that the words in section 17 will not avail to discharge an insolvent from arrest any more than the words of section 49 of the old Act and that the order of the High Court is still necessary in such circumstances and may be granted or refused by the Court as it thinks fit. I am, therefore, not prepared to cut down the broad principle on which the section is based, namely, that

(1) 7 Ind. Cas. 963; 35 B. 63; 12 Bom. L. R. 750; 11 Cr. L. J. 548.

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when once a person is adjudicated an insolvent, creditors seeking any remedy against him must come to the High Court on its insolvency side to get leave for that purpose. Applying this view of the law to the facts of the case, I am of opinion that after the 2nd of December, the date when the order of adjudication was made, the Court of Small Causes had no jurisdiction without the leave of the High Court to entertain any application in execution against the insolvent: and that leave admittedly not having been procured, taking of security in execution proceedings was *ultra vires* of the Court. The matter being one of jurisdiction, it is immaterial whether the insolvent claimed the benefit of the section or not, though as a matter of fact, it is clear that the Court was aware of the adjudication. In this view, it becomes unnecessary to consider any other question, and I would answer the reference by the learned Judges as indicated above. I would add that it is not at all clear to me under what provision of the Small Cause Courts Act, this bond was taken. Section 55 (4) of the Civil Procedure Code provides that where a judgment-debtor who has been arrested, expresses his intention to apply to be declared an insolvent, he can be released on furnishing security; but the High Court in making rules for the Presidency Small Cause Courts under section 9 of that Act has not embodied this provision in the rules and I have great doubt whether either section 30 of the latter Act or Order XXI, rule 27, empowers the Court to take a bond of this nature.

SADASIVA AIYAR, J.—I agree that the first question should be answered in the negative that decree-debt of the plaintiff against the insolvent was "provable" in the insolvency. Hence section 17 of Act III of 1909 took away the jurisdiction of the Small Cause Court to pass any orders in execution without the leave of the High Court after the judgment-debtor had been adjudicated an insolvent. The bond sued on was, therefore, obtained without jurisdiction and is void. I do not answer the other questions as the answer to the first question is sufficient for the decision of the suit.

Reference answered in the negative.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 687 OF 1912.

April 28, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice LeRossignol.

R. H. SKINNER—PLAINTIFF—APPELLANT

versus

BADRI KRISHEN—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, r. 15—Fraud—Decree based on award obtained by fraud—Suit to set aside such decree, whether competent—Decree, whether can be set aside on ground that it was obtained by perjured evidence—Review.

A decree cannot be set aside in a subsequent action on the mere proof that such a decree was obtained by perjured evidence, on the principle that a matter cannot be re-agitated on the same materials or on materials which might have been laid before a Court in the first instance. [p. 197, col. 2.]

If evidence not originally available comes to the knowledge of a litigant at a later date, his remedy lies in seeking a review of the judgment if applied for without unreasonable delay. [p. 197, col. 2.]

A decree based on an award was passed in 1905. In 1911, the plaintiff sued to set aside that decree on the ground that during the course of the arbitration, the defendant had filed a fraudulent account and supported its items by false evidence. The document upon which the plaintiff based his allegation of fraud was in his possession in 1902:

Held, that in this case the only remedy open to the plaintiff lay through a review, and not by a separate suit. [p. 198, col. 1.]

Quere:—Whether a decree based on an award could not be set aside by a separate suit under any circumstances whatsoever? [p. 98, col. 1.]

Obiter dictum.—Where one of the parties to arbitration proceedings has been personated or has received no notice of the proceedings, a suit to set aside the award on the ground of fraud might be maintainable. [p. 198, col. 1.]

First appeal from the decree of the District Judge, Delhi, dated the 25th January 1912, rejecting the plaint.

Chaudhri Rambhaji Datt, for the Appellant.

Lala Moti Sagar, for the Respondent.

JUDGMENT.—The parties to this case in the year 1905 were disputing concerning certain sums of money which the present plaintiff claimed as due to him on a lease. A suit was instituted, but the parties agreed to refer the whole case to an arbitrator and on the 25th October 1905 the arbitrator gave his award in accordance with which the judgment followed on the 20th November 1905. The present suit was instituted

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by the plaintiff on 12th April 1911, and the plaint shows that the Court is asked to set aside the decree which issued on the award of 1905 on the ground that during the course of the arbitration, the defendant filed a fraudulent account and supported its items by the false evidence of a dismissed servant of the plaintiff. The defendant contended that the fraud alleged was not of the kind required to give a cause of action for setting aside the decree and that in any case no action lay for setting aside a decree based on an award, even though fraud be established.

The learned Judge, relying upon *Mohomed Golab v. Mahomed Sulliman* (1) and *Kappu Naidu v. Subbaraya Reddi* (2), held that the fraud alleged, i.e., perjury and subornation of perjury did not render the suit maintainable. Also with regard to the second plea he held that *Mehta Kashi Ram v. Dadabhoy* (3) was good authority for the view that a decree based on an award can be attacked on the ground that it was obtained by fraud only by means of a review, and not by a separate suit. Before this Court plaintiff has come in first appeal and his case was argued at some length yesterday afternoon by Mr. Rambhaji Datt on his behalf, but when the Court met this morning Mr. Rambhaji Datt expressed his unwillingness to continue to represent plaintiff, on the ground that his client after the rising of the Court yesterday evening had taken away the brief from him and stated that he wished to engage a more senior Counsel. In the circumstances Mr. Rambhaji Datt had not been able to study the case as well as he might have done and in view of the affront which his client had offered, he asked the leave of the Court to withdraw. Considering that Mr. Rambhaji Datt had received a very serious affront and had not been treated by his client with courtesy, we made no objection to Mr. Rambhaji Datt's withdrawal from the case and the plaintiff has been heard at considerable length in support of his appeal. From his remarks, it has been made quite clear that the document upon which he bases his allegation that the award

was obtained by fraud, was in his possession in 1902; and that from 1902 to either February or March 1910 that document remained in his possession but in the envelope containing it, which he had never opened. He freely admits that for this great delay there was no other cause but his own negligence, but he contends that as the case is a clear one, this should not prevent the Courts from granting him relief to which he is equitably entitled. It is needless to say that in this appeal we are not concerned with the facts, except so far as an understanding of them is necessary for the decision of the legal questions before us.

A reference to the authorities cited before us shows that it is a generally accepted rule of law that a decree cannot be set aside in a subsequent action on mere proof that such a decree was obtained by perjured evidence. This rule is clearly based upon the very important principle that a matter cannot be re-agitated on the same materials or on materials which might have been laid before a Court in the first instance. If evidence not originally available comes to the knowledge of a litigant at a later date, his remedy lies in seeking a review of the judgment, but a review of judgment will be granted only if there has been no unreasonable delay in applying to the Court. Now in the case before us, the proof of perjury which plaintiff now wishes to adduce was in his possession three years before the award was delivered, and again this suit was not instituted until some 13 or 14 months after the perjury had come to the plaintiff's knowledge. There remains the further question whether under any circumstances a decree based upon an award can be set aside by a regular suit. There appears to be no authority directly in point with the exception of *Mehta Kashi Ram v. Dadabhoy* (3). With the views expressed in that judgment we find ourselves entirely in accord. An examination of the rules concerning arbitration proceedings contained in the second schedule of the Civil Procedure Code shows that the procedure in such proceedings has been hedged round by many precautions and safeguards. In rule 15 we find provision made to meet a case identical with that now propounded by the plaintiff. When an award is filed an opportunity is given to either side to show

(1) 21 C. 612.

(2) 10 Ind. Cas. 105; (1911) 1 M. W. N. 355; 9 M. L. T. 454.

(3) 124 P. R. 1880.

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that the award is bad by reason of the deceitful or fraudulent conduct of either party. The plaintiff in this case did not avail himself of that provision and we must take it that the Legislature intended arbitration proceedings to be final and not to be open to challenge in an indirect manner.

Consequently we hold that the only remedy open to plaintiff lay through a review and not by a separate suit.

It is not necessary for us to decide that in no circumstances imaginable a decree on award can be set aside by separate suit; in a case where one party had been personated and had received no notice of the proceedings, such a suit might be maintainable, but any decision of ours on this hypothetical question would be a mere *obiter dictum*.

All that we should decide is that in this case, no separate suit is competent.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 390 OF 1911.

November 18, 1913.

Present:—Mr. Justice Oldfield.

M. SUBRAMANIA AIYAR—PETITIONER

versus

VAITHINATHA AIYAR AND ANOTHER—

RESPONDENTS.

Practice—Legal representative of deceased defendant not impleaded—Decree passed after death of defendant, whether valid—Objection taken in execution, legality of.

A decree passed after the death of a defendant and before his legal representative is impleaded, is null and void.

Goda Coopuramier v. Sundarammal, 3 Ind. Cas. 739, 6 M. L. T. 271; 33 M. 167, distinguished.

Radha Prasad Singh v. Lal Sahib Rai, 17 I. A. 150; 13 A. 53; 5 Sar. P. C. J. 600; *Janardhan v. Ramchandra*, 26 B. 317; 4 Bom. L. R. 23; *Imdad Ali v. Jagan Lal*, 17 A. 478; A. W. N. (1895) 109, followed.

Objection can be taken to such a decree in execution and separate proceedings to avoid it are unnecessary.

Petition, under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the order of the Subordinate Judge of Mayavaram at Kumbakonam, in Miscellaneous Application No. 1662 of 1910, in Small Cause Suit No. 1219 of 1910.

Messrs. K. R. Krishnaswami Aiyangar and S. V. Padmanabha Aiyangar, for the Petitioner.

Mr. N. Rajagopala Achariar, for the Respondents.

JUDGMENT.—It is admitted that the decree under execution was passed after the death of the defendant and before his legal representatives were impleaded. It is argued, *firstly*, that this did not affect its validity, and *secondly*, that the decree passed is not void but must be set aside in separate proceedings for that purpose, before it can be treated as a nullity.

Goda Coopuramier v. Sundarammal (1) is relied on. But it deals with exceptional circumstances and the case of a plaintiff; and it is not clear that the decision would have been the same if a decree against a defendant had been in question. On the other hand, in *Janardhan v. Ramchandra* (2), *Radha Prasad Singh v. Lal Sahib Rai* (3) and *Imdad Ali v. Jagan Lal* (4), the two last mentioned cases relating to decrees against defendant, it was held that the decrees were nullities. Authority is, therefore, against the petitioner's contention on this point; and, the decree under execution being null and void, proceedings to avoid it are unnecessary.

It is argued, *next*, that the respondents could not take objection to the decree in execution proceedings. But their objection was to the jurisdiction of the Court to pass it. It was, therefore, rightly considered and allowed.

Lastly, it is argued that the present application to join the respondents as legal representatives of the deceased defendant and for execution should have been treated as one for the former relief and for setting aside the abatement and that the trial of the suit should have been resumed. It does not appear that this was suggested in the lower Court; and in fact the defendant's death is referred to incorrectly in the petition as subsequent to the passing of the decree. For this reason and on its merits the suggestion is unacceptable.

The civil revision petition is dismissed with costs.

Revision rejected.

(1) 3 Ind. Cas. 739; 33 M. 167; 6 M. L. T. 271.

(2) 26 B. 317; 4 Bom. L. R. 23.

(3) 13 A. 53; 17 I. A. 150; 5 Sar. P. C. J. 600.

(4) 17 A. 478; A. W. N. (1895) 109.

KARAM CHAND v. GHULAM HASSAN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 189 OF 1910.

April 7, 1915.

Present:—Mr. Justice Shah Din and
Mr. Justice Chevis.KARAM CHAND AND OTHERS—DEFENDANTS
—APPELLANTS

versus

GHULAM HASSAN AND OTHERS—PLAINTIFFS
—RESPONDENTS.*Punjab Pre-emption Act (II of 1905), s. 18—Notice issued by Naib-Tahsildar, whether valid—Waiver—Punjab Alienation of Land Act (XIII of 1900), s. 3 (3).*

Where a Naib-Tahsildar, under the orders of the Deputy Commissioner, issues a notice with a view to find out whether any member of an agricultural tribe is willing to purchase the land proposed to be sold at a certain price to a person who is not a member of an agricultural tribe, the notice is not one given through any 'Court' as required by section 16 of the Pre-emption Act (II of 1905) and a pre-emptor who asserts his right of pre-emption but protests against the reasonableness of the price at which such land is offered to be sold, does not lose his right of pre-emption. [p. 200, cols. 1 & 2.]

Second appeal from the decree of the Divisional Judge, Multan, dated the 1st December 1909.

Bhagat Gobind Das, for the Appellants.

Mr. Abdul Rashid, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit for pre-emption brought by the plaintiff-respondent, Fazal Khan, against the defendants-appellants, Karam Chand and others, in respect of certain land situate in Mauza Kot Daud which had been sold by Ahmad, respondent No. 2, to the appellants by a registered sale-deed, dated 4th January 1908, for Rs. 1,400. The District Judge dismissed the suit, holding that the plaintiff, whose right of pre-emption was undisputed, had waived that right; but on appeal the learned Divisional Judge held that the alleged waiver of his right of pre-emption on the part of the plaintiff had not been established and he decreed the plaintiff's claim conditional on payment of Rs. 1,400.

In further appeal the vendees' Pleader has contended (1) that before the sale in dispute, a notice had been issued through the Naib-Tahsildar to all pre-emptors in the village calling upon them to purchase the land in suit at the price at which it was subsequently sold to the

vendees; that that notice was served upon the plaintiff; and that, since he refused to purchase the land at the price named in the notice, his right of pre-emption must be held to have been extinguished; and (2) that if the notice in question is held to have been not a proper notice under section 16 of the Pre-emption Act of 1905, the act of the plaintiff in having refused to purchase the land for Rs. 1,400 before the sale in favour of the present vendees took place for the same sum, amounts to a waiver of his right and that his suit was rightly dismissed by the District Judge.

The material facts are these. On the 1st February 1907, Ahmad, respondent, applied to the Deputy Commissioner for permission to sell the land in suit to the present vendees, who are not members of an agricultural tribe, for Rs. 1,400. The application was one made under section 3 of the Alienation of Land Act. The Deputy Commissioner sent the application to the Tahsildar, and the latter sent it to the Naib-Tahsildar for necessary action and report. The Naib-Tahsildar issued a notice on the 8th March 1907 to all the landowners of the village informing them of the intended sale of the land in question and of the price, Rs. 1,400, at which the owner, Ahmad, was willing to sell it. This notice was served on the present plaintiff on the 23rd March 1907, and on the 25th March 1907, he made an application to the Deputy Commissioner stating that he had a right of pre-emption in respect of the land intended to be sold and was desirous of purchasing it, but that the price entered in the notice was far in excess of the market value and had not been fixed in good faith; and he prayed that permission may not be given to the owner to sell the land to non-agriculturists and that he be directed to sell it to the applicant at a fair price. The plaintiff's objection, however, did not prevail, and the sale to the present vendees was sanctioned by the Deputy Commissioner.

Upon these facts the vendees' Pleader urges, relying upon *Ule Ram v. Balhar Mal* (1) and *Sardar Ali Shah v. Jivan Singh* (2), that the notice given to the plaintiff by

(1) 90 P. R. 1897

(2) 22 P. R. 1904; 86 P. L. R. 1901.

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the Naib-Tahsildar was a proper notice within the purview of section 16 of the Pre-emption Act of 1905, and that since the plaintiff had refused to purchase the land for Rs. 1,400, which was the price named in the notice he has lost his right of pre-emption. The District Judge has overruled this contention, holding that the notice issued by the Naib-Tahsildar was not a notice through a "Court" as required by the said section 16, and we have no hesitation in agreeing in that view. In issuing the notice to the landowners in the village, the Naib-Tahsildar was acting under the orders of the Deputy Commissioner, to whom an application had been made by the owner of the land for permission to sell it to certain non-agriculturists under the provisions of the Alienation of Land Act; and the notice was issued because the Revenue Authorities wanted to find out if any member of an agricultural tribe in the village was willing to purchase the land at the price named, their intention being to sanction the sale to non-agriculturists only in the event of a member of an agricultural tribe not coming forward to make the purchase. The Naib-Tahsildar was acting in this matter as an Executive Officer and not as a Court; and it is clear that neither the application of the owner of the land to the Deputy Commissioner to obtain sanction to the sale thereof to certain non-agriculturists nor the notice issued by the Naib-Tahsildar under the orders of the Deputy Commissioner had any connection with section 16 of the Pre-emption Act of 1905. The question before us was not discussed in either of the two rulings relied upon by the vendees' Pleader; and we accordingly hold that no proper notice was given to the plaintiff under section 16 aforesaid and that he has not lost his right of pre-emption.

The second question for decision is, whether the plaintiff has waived his right of pre-emption. No doubt the land in suit had been offered to him by the owner for Rs. 1,400, but he protested that that was not its fair market value, that the price had not been fixed in good faith and that he was prepared to enforce his right of pre-emption in Court. He never, by any act or conduct, waived his right of pre-emption; on the contrary, he all along proclaimed his intention, as the learned Divisional Judge says,

"of suing to pre-empt the land on what he considered the right price." In these circumstances, we are quite clear that no waiver of his right of pre-emption on the part of the plaintiff can be said to have been established. The vendees' Pleader cited *Shambu Mal v. Jamna Das* (3), *Diwan Chand v. Ghulam Hussain* (4), *Fateh Chand v. Kirpa Singh* (5) and *Abdullah Shah v. Hussain Jahana Shah* (6) in support of his argument that the plaintiff had waived his right of pre-emption; but not one of these decisions is in point, and we think it unnecessary to discuss them in this place.

We maintain the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

(3) 38 P. R. 1875.

(4) 30 P. R. 1897.

(5) 13 Ind. Cas. 561; 48 P. R. 1912; 76 P. W. R. 1912; 145 P. L. R. 1912.

(6) 20 Ind. Cas. 504; 14 P. R. 1914; 250 P. L. R. 1913; 179 P. W. R. 1913.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1076 OF 1914.

September 28, 1915.

Present:—Mr. Justice Srinivasa Aiyangar.

MURUGESA MUDALI AND OTHERS—

RESPONDENTS NOS. 2, 3 AND 5—PETITIONERS

versus

RAMASAWMI CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 3, 8—Extension of time fixed for payment of mortgage-money, grant of—Mortgagor, if entitled to redeem as of right after time fixed—Order made without jurisdiction—Revision.

In cases where the mortgagee sues for foreclosure, extension of time for payment is not given as a matter of course and the mortgagor is not entitled to redeem as of right after the time fixed for payment although no order for foreclosure absolute has been passed. [p. 201, col. 1.]

Faulkner v. Bolton, 7 Sim. 319; 4 L. J. Ch. 81; 58 E. R. 860; 40 R. R. 155; *Nanny v. Edwards*, 4 Russ. 124; 6 L. J. (o. s.) Ch. 20; 28 R. R. 24; 38 E. R. 752; *In re Parbola, Ltd.*, *Blackburn v. Parbola Ltd.* (1909) 2 Ch. 47; 78 L. J. Ch. 782; 101 L. T. 382; 13 S. J. 697, referred to.

In suits by the mortgagor to redeem, the time for payment is not extended except in cases of accident or mistake. [p. 201, col. 1.]

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Novosielski v. Wakefield, 17 Ves. 417, 34 E. R. 161; *Collinson v. Jeffery*, (1808) 1 Ch. 644; 65 L. J. Ch. 375; 74 L. T. 78; 44 W. R. 311, followed.

Where a Court extends the time when it has no power to do so, a High Court has power to interfere with the order in revision as one passed without jurisdiction, but will not do so if it appears that the order was made in the interests of justice. [p 201, col. 2.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Dharmapuri, in Original Petition No. 563 of 1914, in Original Suit No. 28 of 1911.

Mr. T. R. Krishnaswami Aiyar for Mr. T. R. Ramachandra Aiyar, for the Petitioners.

Mr. B. Narasimha Row for Dr. Swaminadhan, for the Respondent.

JUDGMENT.—This is an application to revise the order of the District Munsif of Dharmapuri extending the time fixed for payment of the mortgage-money by a decree nisi in a suit for redemption by a puisne mortgagee. The Munsif thinks that the reasons given by the plaintiff in the suit for non-payment of the mortgage-money within the time fixed were insufficient and unsatisfactory, but all the same he gave the extension prayed for, on the ground that the plaintiff was entitled as a matter of right to redeem until there is a decree for foreclosure absolute, even though the time fixed by the decree nisi had passed.

The power to extend the time for payment of the mortgage-money is now regulated by Order XXXIV, rules 3 and 8, and under these rules the Court can only extend the time upon good cause shown. This is in accordance with the settled practice in England. Even in cases where the mortgagee sues for foreclosure extension of time for payment is not given as a matter of course, and the mortgagor is not entitled to redeem as of right after the time fixed for payment although no order for foreclosure absolute has been passed [see *Faulkner v. Bolton* (1), *Nanny v. Edwards* (2), *In re Parbola, Ltd.*, *Blackburn v. Parbola Ltd.* (3), *Seton on Judgments* page 1913 and *Fisher on Mortgages*, section 1958]; and in suits by a mortgagor to redeem, the time for payment is not ex-

tended except in cases of accident or mistake [See *Novosielski v. Wakefield* (4) and *Collinson v. Jeffery* (5).] Inasmuch as the lower Court extended the time for payment when it had no power to do so, this Court has power to interfere with the order in revision as one passed without jurisdiction; but I do not think that the justice of the case requires that I should interfere with the order. The suit was instituted by the puisne mortgagee against the first mortgagee who had also purchased the equity of redemption. The puisne mortgagee, it is now settled, would be entitled to institute a suit for the sale of the property subject to the first mortgage. [See *Mulla Veetil Seethi Kutti v. Korambath Paruthooli Achuthan Nair* (6).] But at the time when the suit was instituted, there was some doubt on the point and the puisne mortgagee seems to have instituted the suit for the redemption of the first mortgage and for sale of the whole of the mortgaged properties for the sums due on both the mortgages. At any rate that was the decree passed. The sum which the plaintiff had to deposit on account of the 1st mortgage was nearly Rs. 2,000, and he made the deposit within a month after the date fixed and he paid also interest on that sum at 12 per cent. The amount due to him was nearly Rs. 1,161; and it is reasonable to suppose that the mortgaged property was worth considerably more than the amount due on the 1st mortgage. The 1st mortgagee suffers no hardship; while on the other hand, if I interfere with the order, the puisne mortgagee would lose the whole of the amount due to him.

I, therefore, dismiss this petition, but under the circumstances without costs.

Petition dismissed.

(4) 7 Ves. 417; 34 E. R. 16.

(5) (1896) 1 Ch. 644; 65 L. J. Ch. 375; 74 L. T. 78; 44 W. R. 311.

(6) 9 Ind. Cas. 513; 21 M. L. J. 113; 9 M. L. T. 431; (1911) - M. W. N. 165.

(1) 7 Sim. 319; 4 L. J. Ch. 81; 58 E. R. 860; 40 R. R. 155.

(2) 4 Russ. 124; 6 L. J. (n. s.) 1 h. 20; 28 R. R. 24.

(3) (1909) 2 Ch. 497; 78 L. J. Ch. 782; 101 L. T. 822; 38 S. J. 697.

PRITHMI CHAND v. SAFA CHAND.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1899 OF 1912.

April 13, 1915.

Present:—Mr. Justice Shah Din and
Mr. Justice Chevis.PRITHMI CHAND—PLAINTIFF—
APPELLANT

versus

SAFA CHAND AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 2 (3), 22 (4) (a)—Construction of Statute—Retrospective effect—Punjab Pre-emption Act (II of 1905), s. 11. Proviso—Period of 20 years, computation of.

Section 2 (3) of the Punjab Pre-emption Act (I of 1913) was not intended to give and does not give retrospective effect to sub-section (4) (a) of section 22 and this sub-section can only apply to a case in which the money deposited by a plaintiff in a pre-emption suit is withdrawn by him after the new Act has come into force. In other words, section 22 (4) (a) when read with section 2 (3) of the Act does not enjoin the dismissal of an appeal preferred by the pre-emptor in a case where he had withdrawn the money deposited by him in Court before the new Act came into operation. [p. 203, cols. 1 & 2.]

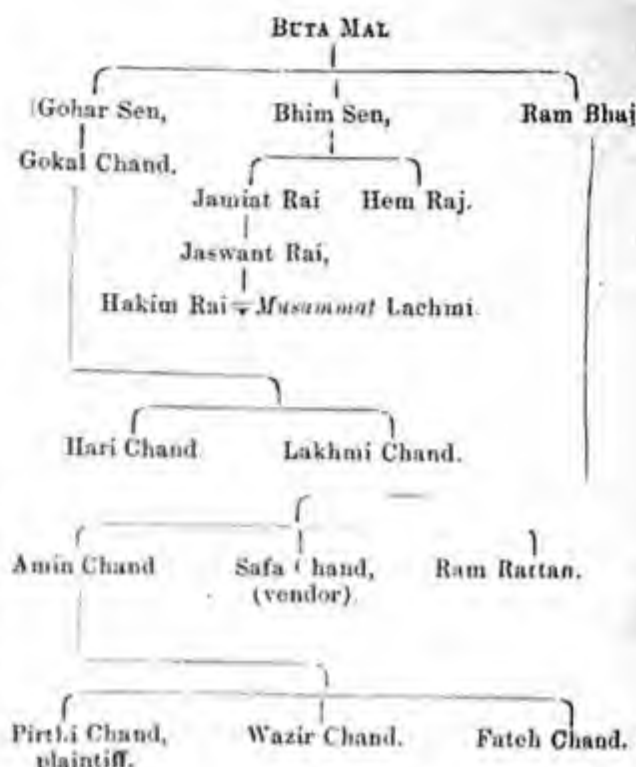
A pre-emptor who claims the benefit of the proviso to section 11 of the Punjab Pre-emption Act (II of 1905) should prove the existence of continuous record of ownership of land, on the strength of which he claims pre-emption, for a period of 20 years immediately preceding the date of sale, either in his own name or in that of an agnate of his. In other words, the period of 20 years, referred to in the proviso, over which the record of ownership should extend, should be computed back from the date of sale and if there occur any break, for however short a period, in the record of ownership in the name of the pre-emptor or any other agnate of his, he would forfeit the benefit of the proviso. [p. 204, col. 2.]

Second appeal from the decree of the Additional Judge, Jhelum Division, at Sialkot, dated the 10th June 1912.

Rai Bahadur Pandit Sheo Narain, for the Appellant.

Mr. B. Bevan Petman, for the Respondents.

JUDGMENT.—This appeal has arisen out of a pre-emption suit relating to certain land in Manza Diwankot, Tahsil and District Gujrat; and the principal question involved is one of interpretation of the proviso to section 11 of the old Punjab Pre-emption Act, 11 of 1905. The following pedigree is material:—



By a registered deed, dated the 11th April 1910, Safa Chand sold the land in suit to Mr. Shambu Nath Bari, Bar-at-Law, for Rs. 2,000. On the 1st August 1910, the vendor's nephew, Prithmi Chand, brought the present suit for pre-emption and he based his claim upon the proviso to section 11 of the Pre-emption Act of 1905. The vendee pleaded that the plaintiff had no right of pre-emption under the proviso to the said section 11, and that if he had any such right, he had waived it. The Subordinate Judge held that the plaintiff fulfilled the requirements of the proviso in question and had a right of pre-emption in respect of the land in suit, and that he had not waived it. The plaintiff's claim was, therefore, decreed by the Subordinate Judge conditional on a payment of Rs. 2,000. On appeal, the learned Divisional Judge set aside the decree of the Subordinate Judge, holding that the proviso to section 11 had not been correctly interpreted by him, and remanded the suit for re-decision under rule 23 of Order XLI, Civil Procedure Code, with reference to the three issues set out at page 8 of the printed paper-book. After the remand, the Subordinate Judge held that the plaintiff's case did not fall within the proviso to section 11 aforesaid and dismissed the suit, and his decree was upheld on appeal by the Divisional Judge.

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sional Judge who followed the recent decision of this Court reported as *Chajju Mal v. Telu Mal* (1).

The plaintiff has preferred a second appeal to this Court, and the question for decision is whether or not he fulfils the requirements of the proviso to section 11 of Act II of 1905 and has a right of pre-emption in respect of the land in suit. Before discussing this question we must notice a preliminary objection urged on behalf of the defendant-vendee by his learned Counsel. He has contended that the appeal must be dismissed under section 22 (4) (a) of the present Pre-emption Act, I of 1913, inasmuch as the money which had been deposited by the plaintiff in Court in compliance with an order passed by the Subordinate Judge on the 2nd August 1910 had been withdrawn by him on the 3rd July 1912. We think that this contention is unsound and that section 22 (4) (a) aforesaid does not apply to this case, so far as the withdrawal of the money deposited by the plaintiff is concerned. The learned Counsel has relied upon section 2, sub-section (3), of Act I of 1913, which runs as follows:—

"Notwithstanding anything to the contrary in section 4 of the Punjab General Clauses Act, 1898, the Courts shall in all suits, appeals and proceedings pending at the commencement of this Act give effect, so far as may be, to the procedure prescribed by this Act."

The argument is that the provisions of the said section 22 (4) (a) which relate to procedure and which require the Appellate Court to dismiss the appeal of a plaintiff in a pre-emption suit if he withdraws the money deposited by him in Court, have a retrospective effect by virtue of section 2, sub-section (3) of the Act, and that, although the present plaintiff withdrew the money which had been deposited by him in Court before the present Act came into force, the legal consequence of the withdrawal is that he forfeits his right to have his appeal adjudicated upon on the merits and that it must be dismissed *in limine*. In our opinion, section 2, sub-section (3), of the Act was not intended to give, and does not give, retrospective effect to sub-section (4) (a) of section 22,

and this sub-section can only apply to a case in which the money deposited by a plaintiff in a pre-emption suit is withdrawn by him after the new Act has come into force. The sub-section in question must be strictly construed; and when read with section 2, sub-section (3), of the Act, it does not enjoin the dismissal of an appeal preferred by the pre-emptor in a case where he had withdrawn the money deposited by him in Court before the new Act came into operation. We, therefore, overrule the preliminary objection.

Before considering whether the plaintiff is entitled to the benefit of the proviso to section 11 of Act II of 1905, it is necessary to state briefly the facts on the strength of which he claims that benefit. The village of Diwankot in which the land in suit is situated was owned by Jamiat Rai and Hem Raj, sons of Bhim Sen, in 1868. Jamiat Rai died before Hem Raj and was succeeded by his son, Jaswant Rai. Hem Raj died childless in December 1873, and in December 1874 his share was also mutated in the name of Jaswant Rai, who thus became owner of the whole village. On the death of Jaswant Rai in 1883, his son, Hakim Rai, succeeded to the whole village, and on Hakim Rai's death on the 24th May 1890 his widow, Musammal Lachhmi, came into possession of the village and mutation was effected in her name. She died on the 2nd September 1892, and thereupon half the village was entered in the names of Amin Chand, Safa Chand and Ram Rattan, sons of Ram Bhaj, while the other half was entered in the names of Hari Chand and Lakhmi Chand, sons of Gokal Chand. After 1894 there was a partition of the family property between the two branches represented by the sons of Gokal Chand and the sons of Ram Bhaj, and the entire village of Diwankot fell to the share of the latter. Amin Chand died in November 1909, and mutation of his one-third share in the village took place on the 21st March 1910 in the names of the plaintiff and his two brothers, Wazir Chand and Fateh Chand. On the 11th April 1908 Safa Chand sold, as has been stated above, his share in the village to Mr. Shambu Nath Bari; and it was in respect of this sale that

1) 13 Ind. Cas. 695; 53 P. R. 1912; 61 P. W. R. 1912; 108 P. L. R. 1912.

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the plaintiff, Prithmi Chand, brought his suit for pre-emption which has given rise to the present appeal. Admittedly, the parties are not members of an agricultural tribe; and the question for decision is whether the plaintiff, who is a nephew of the vendor, is entitled to a right of pre-emption in respect of the sale in dispute under the proviso to section 11 of Act II of 1905.

On behalf of the plaintiff it has been contended by his learned Advocate that he is entitled to the benefit of the said proviso, because at the date of the sale he was recorded as the owner of agricultural land in the village and had been so recorded for a period of twenty years before the sale in dispute took place through his agnates, the male descendants of Bhim Sen. Before *Musammal Lachhmi* succeeded on the 24th May 1890 to the estate left by her husband Hakim Rai, it had been continuously recorded for a period of more than twenty years in the names of Hakim Rai, Jaswant Rai, Jamiat Rai and Hem Raj, and the argument is that the period of twenty years referred to in the proviso to section 11, having been once completed before the sale in dispute took place, the fact that the land held by and recorded in the names of the agnates of the plaintiff was recorded between the 24th May 1890 and the 2nd September 1892 in the name of the widow, *Musammal Lachhmi*, was immaterial. The learned Advocate has contended that the completion of the period of twenty years before the widow came into possession, serves to distinguish this case from *Chajju Mal v. Tel. Mal* (1) on which the Divisional Judge has relied, for there the widow, *Musammal Shibbi*, had succeeded to and was recorded as owner of the land, on the strength of which pre-emption was claimed, before the land had been held by the plaintiff and his agnates for the requisite period of twenty years previous to the sale then in dispute. It is further pointed out that, in view of the facts of that case, the opinion expressed by the Division Bench in the 4th paragraph at page 195 of the report, to the effect that the plaintiff was bound to show that the land by virtue of which he claimed pre-emption had been continuously recorded in the Revenue papers for twenty years before the suit as his property or as the property of an agnate of his, was

mere *obiter dictum* and should not be followed in this case.

After giving the matter our best consideration, we think that the interpretation sought to be placed by the plaintiff's learned Advocate on the proviso to section 11 is not correct. In our opinion, having regard to the language of the proviso and more especially to the words "who is recorded as the owner . . . of agricultural land . . . and has been so recorded for twenty years previous to the date of sale," the intention of the Legislature was that the pre-emptor who claims the benefit of that proviso should be required to prove the existence of a continuous record of ownership of land, on the strength of which he claims pre-emption, for a period of twenty years immediately preceding the date of sale, either in his own name or in that of an agnate of his. In other words, the period of twenty years over which the record of ownership should extend, should be computed back from the date of sale, and if there occur any break, for however short a period, in the record of ownership in the name of the pre-emptor or any agnate of his, he would forfeit the benefit of the proviso. That is the only rational interpretation which, in our opinion, can be put upon the proviso; the construction contended for by the plaintiff's learned Advocate would lead to anomalous results and cannot, therefore, be accepted as sound.

For the foregoing reasons, we hold that the view of the lower Appellate Court that the plaintiff had no right of pre-emption under the proviso to section 11 of Act II of 1905 is correct; and we accordingly maintain its decree and dismiss the appeal with costs.

The vendee has filed cross-objections against so much of the decree of the Divisional Judge as relates to costs, but we are not prepared to say that in dismissing the plaintiff's appeal without costs the Divisional Judge materially erred in the exercise of his discretion, and we, therefore, dismiss the cross-objections.

Appeal dismissed.

GAMAN V. IMAM BAKHSH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2272 OF 1914.

April 17, 1915.

Present:—Mr. Justice Shadi Lal.

GAMAN—DEFENDANT—APPELLANT

versus

IMAM BAKHSH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Partition—Partition decree not executed—Second suit for partition, whether maintainable—Decree for possession conditional on payment of money—Decree not executed—Second suit, whether maintainable.

The rights of a joint owner of land who obtains a decree for possession by partition of the joint tenancy, are not extinguished by his neglect to execute the decree within limitation. The relationship of the parties *inter se* continues to be that of joint owners and a second suit by him to effect partition of the joint property of which he is undoubtedly a joint owner, is not affected by the previous non-executed decree. [p. 205, col. 2.]

Madan Mohan v. Baikanta Nath, 10 C. W. N. 839; *Bisheshar Das v. Ram Prasad*, 28 A. 627; 3 A. L. J. 379; A. W. N. (1906) 142, referred to.

Where a decree for possession of property is conditional on payment of a sum of money, the decree-holder is not by reason of non-execution of such decree debarred from instituting a fresh suit for possession [p. 206, col. 1.]

Ram Singh v. Nodh Singh, 93 P. R. 1879 (F. B.), followed.

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 5th May 1914.

Mr. Dina Nath Mehra, for the Appellant.

Mr. Herbert, for the Respondent.

JUDGMENT.—The facts, upon which the determination of the question of law involved in the second appeal depends, lie within the narrowest possible compass. Briefly, they are that the present plaintiff instituted in 1905 a suit for possession by partition of certain immoveable property against the present defendant. A compromise decree was passed on the 15th of May 1905 by which the plaintiff was to get two *kothas* and had to pay Rs. 10 to the defendant. This decree, it appears, was never executed and became barred by time. The plaintiff has now brought a fresh suit for partition, and the point for decision is whether the existence of the previous decree precludes him from maintaining the present suit. The learned Judge of the lower Appellate Court has decided in favour of the plaintiff, and after hearing arguments and referring to the law bearing on the

subject, I have come to the same conclusion.

It will be observed that the present suit is not to enforce the compromise decree passed in 1905. If that were the case, I should have no hesitation in holding that the suit to enforce a decree does not lie; *vide Soni v. Munshi* (1). But the suit, as observed, is one for partition of the property, and I do not think there is any valid ground for dismissing it *in limine*. The plaintiff was, no doubt, entitled to execute his previous decree within limitation, but his omission to do so, does not extinguish his rights in the property. He remained all along in possession of a portion thereof, and it seems to me clear that the relationship of the parties *inter se* continued to be that of joint owners. Now it is a well-established proposition of law that the right to enforce partition is a legal incident of a joint tenancy, and as long as such tenancy subsists any of the joint owners may apply to the Court for partition of the joint property. There is, therefore, no reason whatsoever for non-suiting the plaintiff. He is undoubtedly a joint owner and as such can always ask the Court to effect a partition.

A case very similar to the present one is reported as *Madan Mohan v. Baikanta Nath* (2). In that case a previous suit for partition brought by the plaintiffs having been compromised, an officer of the Court was appointed to effect a partition in terms of the compromise. Subsequently, the parties not appearing, execution proceedings were dismissed for default. It was held that a fresh suit for partition was not barred by section 13, or section 103, of the Civil Procedure Code. Further a Division Bench of the Allahabad High Court have held that the dismissal for default of a suit for partition does not bar a second suit for partition; *vide Bisheshar Das v. Ram Prasad* (3). These authorities, if authorities are needed at all, are sufficient to support the conclusion at which I have arrived.

Moreover, there is another aspect of the case which, though not referred to by the

(1) 3 Bom. L. R. 94.

(2) 10 C. W. N. 839.

(3) 28 A. 627; 3 A. L. J. 379; A. W. N. (1906) 142.

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learned Pleader for the plaintiff, constitutes in my opinion a sufficient ground for holding that the present suit is maintainable. It will be noticed that the previous decree was for possession of property conditional on the payment of a sum of money to the defendant, and a Full Bench of this Court have held that the plaintiff is not by reason of such decree debarred from maintaining a second suit for possession after the expiration of the period within which he might have obtained possession by execution of the decree; *vide Ram Singh v. Nodh Singh* (4).

For the reasons stated above I hold that the decision of the lower Appellate Court granting a decree to the plaintiff is correct, and I accordingly dismiss the appeal with costs.

Appeal dismissed.

(4) 93 P. R. 1879.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 115 OF 1914.

September 24, 1915.

Present:—Mr. Justice Srinivasa Aiyangar.

SUBRAYA ACHARYA—DEFENDANT

—PETITIONER

versus

KESAVA UPADHAYA—PLAINTIFF—

RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13—Suit to recover dues of hereditary office—Jurisdiction.

A suit by an *archaka* of a temple to recover the dues of his hereditary office from the trustee is within the exemption contained in clause 13) of Schedule II of the Provincial Small Cause Courts Act (IX of 1887), and is, therefore, not cognizable by a Court of Small Causes.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Puthur, in Small Cause Suit No. 280 of 1914.

Messrs. K. P. Madhava Row and K. P. Lakshmana Row, for the Petitioner.

Mr. B. Sitarama Row, for the Respondent.

JUDGMENT.—In this case the petitioner takes the objection that the Small Cause Court had no jurisdiction. The suit was one by a hereditary *archaka* of a temple to

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recover from the defendant, the trustee, an amount which was alleged to be due to the plaintiff as the dues of his office, which he says is a hereditary office. The defendant admitted that the plaintiff was entitled to the sum which he sued for, but claimed to make a reduction of Rs. 4 on account of a fine which he said he had imposed on the plaintiff. The lower Court found that this fine was not proved to have been properly imposed on the plaintiff. I am obliged to allow the objection taken here, that the suit was one which a Small Cause Court had no jurisdiction to try. Article 13 of the second Schedule to the Provincial Small Cause Courts Act includes a case of this kind. I, therefore, reverse the decree of the lower Court to the extent of Rs. 4; but inasmuch as this objection was not taken in the first Court, I give petitioner no costs either here or in the lower Court.

Petition allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2423 OF 1913.

September 7, 1915.

Present:—Mr. Justice Tyabji and

Mr. Justice Phillips.

VYTHINATHA AIYAR—DEFENDANT

No. 2—APPELLANT

versus

VAITHILINGA MUDALIAR AND OTHERS—

PLAINTIFF AND DEFENDANTS NOS. 3 AND 4—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, cols. 1, 15, 16 (2)—“Party interested,” meaning of—Reference to arbitration by contesting parties—Decree passed in accordance with award—Ex parte defendant, whether can appeal.

A suit was brought for recovery of certain properties purchased by the plaintiff and trespassed upon by defendants Nos. 1, 2 and 3. The 1st defendant contended that the properties had been sold to the 4th defendant, who was thereupon impleaded and adopted the defence. The 1st defendant died and defendants Nos. 2 and 3, his legal representatives, remained *ex parte* throughout. The plaintiff and the 4th defendant then agreed to refer the suit to arbitration and a decree was passed in accordance with the award. On this the second defendant appealed, on the ground that the decree was not binding on him as he was not a party to the arbitration:

Held, (1) that the appellant was not a “party interested” within the meaning of paragraph 1 of

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the Second Schedule of the Code of Civil Procedure and had no right to appeal; [p. 207, col. 1.]

(2) that he did not even have any equitable claim to set aside the decree, for by remaining *ex parte* he left the conduct of the suit in the hands of the Court and it was immaterial to him how the suit was decreed. [p. 108, col. 2.]

Per Phillips, J.—An appeal will not lie against a decree passed in accordance with an award, even where the award is not valid in law, except as provided in paragraph 16 (2) of the Second Schedule of the Code of Civil Procedure [p. 208, col. 1.]

Per Tyabji, J.—(dissenting)—An appeal does lie from a decree passed in accordance with an award, purporting to bind a person who never submitted to arbitration or where there has been no agreement to refer at all. [p. 107, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 896 of 1912, preferred against that of the Court of the District Munsif of Negapatam, in Original Suit No. 209 of 1910.

Mr. T. R. Venkatarama Sastri, for the Appellant.

Mr. T. V. Gopalaswami Mudaliar, for the Respondents.

JUDGMENT.

TYABJI, J.—In this case, the appellant did not appear in the Court of first instance. The other parties to the suit agreed to refer the matter to arbitration and an order to that effect was made by the Court. Judgment was pronounced in accordance with the award. A decree followed. The appellant now appeals and contends that the award purports to bind him though he was not a party to the reference. The scope of the Second Schedule, paragraphs 15 and 16, Code of Civil Procedure, was considered in Second Appeal No. 1192 of 1913 to which I was a party, and it seems to me that on the authorities as they stand, an appeal would lie from a decree purporting to bind a person who never submitted to arbitration or where there has been no agreement to refer at all. The 1st respondent in the present case concedes that the decree ought not to bind the appellant and is willing to have it made explicit that it cannot be enforced against the appellant. It seems to me, therefore, that the decree should contain a clause to that effect.

The appellant contends further that the award cannot stand to any extent as he was not 'a party interested' (within the terms of the Second Schedule, paragraph 1, Code

of Civil Procedure), and he not having concurred in the reference to arbitration, the reference is altogether vitiated. He was interested, he says, as the 4th defendant is a purchaser from his father, the deceased 1st defendant, and if the suit is decided against the 4th defendant he (the appellant) will be responsible to the 4th defendant. The appellant was, however, content to let the suit go on without appearing at the hearing and to trust to the 4th defendant to contest the suit as he pleased. The 4th defendant could have consented to a decree in the absence of the 2nd defendant. He could equally consent to the selection of the arbitrator as the Tribunal which was to adjudicate upon the matters in difference. It seems to me that the appellant cannot be said in the circumstances of this case to be interested in the arbitration between the other parties to the suit, or interfere with the arbitration so far as they were concerned.

The decree should, in my opinion therefore, be modified to the extent to which it is conceded that it ought to be modified. Otherwise the second appeal should be dismissed with costs.

PHILLIPS, J.—In this case a preliminary objection is raised that under paragraph 16 (2) of the Second Schedule of the Civil Procedure Code, no appeal lies as the decree appealed against is not in excess of, and is in accordance with, the award in the suit. The suit is for recovery of certain properties purchased by the plaintiff and trespassed upon by the defendants Nos. 1, 2 and 3. The 1st defendant raised various pleas, and said that the properties had been sold to the 4th defendant who was, thereupon, impleaded and adopted the first defendant's defence. The 1st defendant died. Defendants Nos. 2 and 3 are his legal representatives. Defendants Nos. 2 and 3 remained *ex parte* throughout. The plaintiff and the 4th defendant agreed to refer the suit to arbitration and the decree appealed against was passed on the subsequent award. The 2nd defendant alone now appeals on the ground that the decree is not binding upon him, as he was not a party to the arbitration and consequently there is no award valid in law, and the decree based upon it is also invalid. Prior to the Privy Council

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ruling in *Ghulam Khan v. Muhammad Hassan* (1), Courts had held that an appeal did lie in cases when there was no award valid in law [as for instance, in *Husananna v. Linganna* (2) and *Ibrahim Ali v. Mohsin Ali* (3)]. The facts of the case reported in *Ghulam Khan v. Muhammad Hassan* (1) are not the same as in the present case, and in discussing the question whether an appeal would lie, their Lordships remarked (page 182): "The Court makes an order of reference on the agreement (which must be the agreement of all parties to the suit) etc., etc.", and it is contended that the ruling applies only to cases in which all the parties to the suit agree in making the reference. The subsequent language of the judgment is, however, very clear (page 183): "Their Lordships would be doing violence to the plain language and the obvious intention of the Code, if they were to hold that an appeal lies from a decree pronounced under section 522 (paragraph 15 of the Second Schedule of the Code of Civil Procedure, 1908) except in so far as the decree may be in excess of or not in accordance with the award." The effect of this ruling has been considered by the Courts in India and it has now been held on its authority, that even when there is no award valid in law, an appeal will not lie except as provided in paragraph 16 (2) of the Second Schedule of the Code of Civil Procedure [*vide Chairman of the Purnea Municipality v. Siva Sankar Ram* (4), *Kanakku Nagalinga Naick v. Nagalinga Naick* (5), *Lal Mohan Pal v. Surya Kumar Das* (6), *Tallapragada Suryanarayana Row v. Tallapragada Sarabaya* (7), *Nidamurthi Krishnamurthi v. Gargiparthi Ganapathilingam* (8), *Lutawan v. Lachya* (9) and *Annada Prosad Dutt v. Jogesh Chandra Sen Gupta* (10)].

A different view was taken in *Haswa v. Mahbub* (11) and *Rangaswami Aiyar v. Swami Aiyar* (12); but in neither of these cases was the attention of the Court drawn to the Privy Council ruling in *Ghulam Khan v. Muhammad Hassan* (1). It is thus clear that under the law as it now stands, no appeal will lie in the present case. Further in the present case, the appellant has no equitable claim to set aside the decree, for, by remaining *ex parte*, he left the conduct of the suit in the hands of the Court, and it is really immaterial to him whether the suit was decreed upon examination of witnesses in Court or upon an award made by arbitrators. By not contesting the suit he submitted to whatever decree might be passed, provided that was not in excess of the relief claimed, and it is doubtful, therefore, whether he was a party interested within the meaning of paragraph 1 of the second Schedule, Code of Civil Procedure, for there was really no matter in difference between him and the plaintiff. If this view is correct, the Privy Council ruling in *Ghulam Khan v. Muhammad Hassan* (1) would be still more in point.

The exoneration of the appellant from the decree suggested by my learned brother does not in the circumstances appear to be necessary and the 1st respondent's consent to it appeared to me to be conditional.

I would, therefore, dismiss the second appeal with costs.

By THE COURT.—The result is that the second appeal is dismissed with costs under section 98 of the Civil Procedure Code.

Appeal dismissed.

(11) 10 Ind. Cas. 559; 8 A. L. J. 645.

(12) 17 M. L. J. 394.

(1) 29 C. 167; 29 L. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 25 P. R. 1902.

(2) 18 M. 423.

(3) 18 A. 422; A. W. N. (1896) 137.

(4) 33 C. 891.

(5) 4 Ind. Cas. 871; 32 M. 510; 6 M. L. T. 176; 19 M. L. J. 480.

(6) 11 C. W. N. 1152.

(7) 9 Ind. Cas. 173; 21 M. L. J. 263; 9 M. L. T. 251; (1911) 1 M. W. N. 151.

(8) 25 Ind. Cas. 583; (1914) M. W. N. 865.

(9) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

(10) 23 Ind. Cas. 862.

KARRI NARASAYYA V. THAVVALA NAGESWARA RAO.

RAM ADIN V. MUNSHI RAM.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 982 OF 1914.

October 1, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

KARRI NARASAYYA—DEFENDANT NO. 1
—PETITIONER

versus

THAVVALA NAGESWARA RAO AND
ANOTHER—PLAINTIFF AND DEFENDANT NO. 2—
RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 115—
Mistake of law as to jurisdiction—Jurisdiction dependent
upon finding of fact—Interference in revision,
when allowed—Misconstruction of documentary evidence,
whether good ground for interference.*

If an Appellate Court by an error of law finds jurisdiction in the Civil Courts, or denies jurisdiction to the Civil Courts, a High Court has power to interfere in revision under section 115 of the Civil Procedure Code.

Vuppuluri Atchayya v. Kanchumarti Seetaramachandra Rao, 18 Ind. Cas. 555; 13 M. L. T. 60; 24 M. L. J. 112, followed.

But where the jurisdiction depends on a finding of fact, unless that finding of fact rests on no evidence whatever, revision under section 115 is not legally permissible.

A High Court cannot interfere in revision where the lower Appellate Court has misconstrued a portion of the documentary evidence or ignored important evidence in the case.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the judgment and decree of the Court of the Subordinate Judge of Kistna at Ellore, in Appeal Suits Nos. 453 and 463 of 1911, preferred against the decree of the Court of the District Munsif of Ellore, in Original Suit No. 16 of 1910.

Mr. V. Ramadoss, for the Petitioner.

Mr. B. Somayya for Mr. P. Narayanamurthi,
for the Respondents.

JUDGMENT.—As regards the burden of proof the authority of the decision of Seshagiri Aiyar, J., in *Vegoti Chengiah v. Putta Ramudu* (1) relied on by the Subordinate Judge has been strengthened by the decisions of Division Bench in *Kidambi Jagannathacharyulu v. Pidipite Kutumbarayadu* (2) and *Ravulapati Papi Reddi v. Nandurn Peda Venkatacharyulu* (3). My opinion contra in earlier cases is not, therefore, the predominating or prevailing opinion in this Court.

If the burden of proving that the *inamdar* did not own the *kudivaram* at the

time of the *inam* grant lay on the defendants, the Subordinate Judge holds that they have not discharged that burden. He refers to various circumstances and pieces of documentary evidence in paragraphs 12 to 14 of his judgment to support his conclusion in favour of the *inamdar*. Even if he has misconstrued a portion of the documentary evidence or ignored important evidence in the case (as contended by Mr. Ramadoss), I do not think that it is a fit case for interference under section 115, Civil Procedure Code. No doubt, if the Appellate Court by an error of law finds jurisdiction in the Civil Courts, or denies jurisdiction to the Civil Courts, interference in revision under section 115 is permitted. [*Vuppuluri Atchayya v. Kanchumarti Venkata Seetarama Chandra Rao* (4).] But where the jurisdiction depends on a finding of fact, unless that finding of fact rests on no evidence whatever, revision under section 115, Civil Procedure Code, is not, in my opinion, legally permissible. Here, even if the burden of proof lay on the plaintiff there is evidence on record from which the Court was entitled to find the facts in the plaintiff's favour so as to give Civil Courts jurisdiction.

The petition is, therefore, dismissed with costs.

Petition dismissed.

(4) 18 Ind. Cas. 555; 13 M. L. T. 60; 24 M. L. J. 112.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 473 OF 1912.

April 14, 1915.

Present:—Justice Sir Donald Johnstone, Kt.,
and Mr. Justice Le Rossignol.

RAM ADIN—PLAINTIFF—APPELLANT

versus

MUNSHI RAM AND OTHERS—DEFENDANTS—
RESPONDENTS.*Partnership—Firm—Partners sued not as partners
but in their individual capacity—Pleadings—Plaintiff,
whether entitled to change position and seek relief
against firm—Acknowledgment of debt without promise
to pay, whether can be made basis of suit—Contract
Act (IX of 1872), s. 43.*

A plaintiff who sues some of the partners of a firm not as such partners or as representing the firm but in their individual and private capacity, can

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not, when he fails to prove his claim as preferred, be permitted to change his ground and continue the suit or ask for relief against the firm itself, nor does section 43 of the Contract Act apply to such a case. [p. 210, col. 2.]

A '*ruqqa*' which is merely an acknowledgment or admission of indebtedness and does not contain an express or implied agreement or promise to pay, cannot be made the basis of a suit. [p. 211, col. 1.]

Pala Mal v. Tulla Rao, 119 P. R. 1908; 206 P. W. R. 1908, followed.

First appeal from the decree of the District Judge of Ambala, dated the 20th February 1912, dismissing the plaintiff's suit.

Mr. Nanak Chand for Rai Bahadur Lala Sukh Dial, for the Appellant.

Mr. Gokal Chand Narang, for Respondents Nos. 1 to 6.

Mr. Sundar Das, for Respondents Nos. 7 and 8.

JUDGMENT.—Bindraban, one of the respondents, has died during the pendency of this appeal but Jadu Rai, his adopted son, is already a party to the suit and is on the record, so that no further action is necessary.

The plaintiff, Ram Adin, sues on his own behalf and as heir of the late Umrao Singh on the *ruqqa*, Exhibit P—1. That *ruqqa* is signed by Munshi Ram and Bindraban, and defendants Nos. 3 to 6 were joined as forming with Munshi Ram and Bindraban a joint Hindu family. Defendants Nos. 7 and 8 were subsequently added by the Court on the allegation of the other defendants that they too were partners in the firm of Dhani Ram-Bindraban. Defendants Nos. 7 and 8 have denied any interest in the aforesaid firm and the plaintiff has insisted on several occasions during the hearing of the case that he is suing not the firm of Dhani Ram-Bindraban but the executors of the *ruqqa*, P—1, and the members of their family only.

The District Judge has dismissed the whole suit on practically one point, namely, that the transactions on which the *ruqqa* is based were not between the plaintiff and defendants Nos. 1 and 2 in their individual capacity but between plaintiff and the firm of Dhani Ram-Bindraban. Proceeding from that point, the learned District Judge has held that it would be now impossible to permit plaintiff to alter his position and to continue the suit as a suit for an account against the firm of Dhani Ram-Bindraban. Before us it has been argued that the transactions which form the basis of this *ruqqa* were in fact trans-

actions operated by Munshi Ram and Bindraban in their private capacity. But taking into consideration that the only accounts which have been produced in support of this *ruqqa* have been extracted from the books of the firm of Dhani Ram-Bindraban, that plaintiff has produced no books of his own to show that he had an account with Munshi Ram and Bindraban in their individual capacity, and also bearing in mind that there is no allegation from either side that Munshi Ram and Bindraban had private books of account independent of the books maintained by the firm, we are far from being convinced that the finding of the learned District Judge on this point is incorrect. Having fixed this point we have now to consider whether the plaintiff can be permitted to change his ground and ask for relief against the firm of Dhani Ram-Bindraban, and after a due consideration we do not think that this course is allowable. It would involve on the plaintiff's part a total reversal of the pleas on which he came into Court. It would necessitate the decision of pleas raised between the two sets of defendants and would result in a re-trial of the whole case from the beginning. We note also that at the outset of the case, it was brought to the notice of the plaintiff by the District Judge that his failure to establish the allegation that the *ruqqa* was based on a private debt of Munshi Ram and Bindraban would result in a dismissal of the suit.

For the appellant it is contended that section 43 of the Contract Act would justify a continuation of the case as against the firm. Many authorities have been cited to us in support of the view that section 43 applies to a case in which some partners are selected to defend a case which might have been maintained against the whole partnership body. But it is obvious that that section does not cover the case now before us, for the plaintiff's contention from the outset has been that his claim was not against the partnership but against two individuals. The position then is this, that the plaintiff comes into Court protesting that he has no claim against the firm but sues some of its partners in their individual capacity, but failing to prove their liability to pay his claim except in their capacity as members of the firm

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he now desires to prove his claim by an examination of the accounts of that firm. This change of front cannot be permitted.

In addition to the grounds on which the plaintiff has been unsuccessful in the lower Court, it appears to us that another ground exists for non-suiting the plaintiff. He bases his claim upon a *ruqqa* which is merely an acknowledgment of indebtedness, though the appellant contends that the said *ruqqa* imports a promise to pay. *Pala Mal v. Tulla Ram* (1) concludes the matter. In the *ruqqa* now before us there is nothing but an admission of indebtedness. It contains no agreement, either express or implied, to pay interest and even the admission of indebtedness is of a qualified nature, for in the *ruqqa*, it is specified that certain other accounts still require adjustment and that charges on account of interest have not been settled.

For these reasons the appeal fails and is dismissed with costs. We are in this connection asked to allow one set of costs to defendants Nos. 1 to 6 and another to defendants Nos. 7 and 8. As the plaintiff has failed entirely in his contentions and as on his own theory defendants Nos. 7 and 8 were not interested in this case, he might well have refrained from impleading them in this appeal. Consequently we allow separate costs to each set of defendants.

Appeal dismissed.

(1) 119 P. R. 1908; 206 P. W. R. 1908.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 94 of 1913.

September 6, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

P. S. SIVARAMA AIYAR—DEFENDANT
No. 2—APPELLANT

versus

MUTHU K. R. ALAGAPPA CHETTY, BY
HIS AGENT VEDACHELLA AIYAR

—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 111 (g)
—"Some act showing an intention to determine the lease", meaning of—Lawyer's notice to quit, whether sufficient—Person in illegal occupation—Mesne profits, liability for.

The expression "some act showing his" (lessor's) "intention to determine the lease," occurring in section 11, clause (g) of the Transfer of Property Act, must not be confined to an attempt at re-entry or to the filing of a suit in ejectment. A Lawyer's notice by the lessor showing unequivocally his intention to determine the lease is quite sufficient. [p. 212, col. 1.]

A person who is in illegal occupation of land without the owner's permission or consent is liable for mesne profits. [p. 212, col. 1.]

Appeal from the judgment of the Hon'ble Mr. Justice Wallis, in Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 58 of 1912.

FACTS.—Plaintiff, a Nattukottai Chetty mortgagee with possession of certain buildings known as Triumph Buildings opposite the Madras High Court, leased the same to one Mr. Patel for seven years at a monthly rental of Rs. 470, on condition that if the lessee committed default in payment of rent for two consecutive months, the lessor would be at liberty to re-enter. Mr. Patel sub-let a portion of the building to the defendant at Rs. 200 a month. Mr. Patel committed default in payment of rent, and the plaintiff gave notice to Mr. Patel and his sub-lessees to vacate the same. The defendant contended that he had paid Rs. 1,000 to Mr. Patel as advance, that he was entitled to remain in possession until that amount was paid and that he would not vacate. The plaintiff then sued to recover rent for the period the defendant was in occupation. Mr. Justice Wallis before whom the case came on for hearing on the original side of the High Court gave a decree for the plaintiff. The present appeal is against that decree.

Mr. A. Duraisami Aiyar, for the Appellant:—Section 111 (g) of the Transfer of Property Act provides that a tenancy is forfeited only when the lessor does some act showing his intention to determine the tenancy; that act must be either a suit in ejectment or re-entry by taking possession. In this case what was done was only a Lawyer's notice to quit; it is not an act done within the meaning of section 111 (g) of the Transfer of Property Act.

There is no privity of contract between the plaintiff and the defendant and he cannot, therefore, sue for rent.

Mr C. V. Ananthakrishna Aiyar, for the Respondent, was not called upon.

JOWALA SINGH & TULSA RAM.

JUDGMENT.—The first contention of the appellant's learned Vakil is that the expression "some act showing his" (lessor's) "intention to determine the lease", occurring in section 111, clause (g), of the Transfer of Property Act must be confined to an attempt at re-entry, or to the filing of a suit in ejectment, where the forfeiture is incurred by the breach of a condition of the lease-deed providing for re-entry on such breach. We must decline to put such a restricted construction on the very general phrase "some act" occurring in the Statute. The Lawyer's notices by the plaintiff in this case showing unequivocally his intention to determine the lease are, therefore, sufficient.

The next contention is that the appellant (2nd defendant) is not liable for rent, or to pay compensation for use and occupation, because he was neither the plaintiff's tenant, nor did he continue in possession with the plaintiff's permission. The short answer to this contention is that he has been made liable for mesne profits as a person in illegal occupation and not as a tenant, permissive or otherwise.

Lastly, the learned Judge was right in making the 2nd defendant liable for mesne profits at Rs. 200 a month on his own admissions (see his evidence and his written statement in this case) that he has continued in possession of the same premises for which he had agreed to pay Rs. 200 rent to the 1st defendant.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 306 OF 1912.

April 20, 1915.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge, and Mr. Justice LeRossignol.
JOWALA SINGH AND OTHERS—DEFENDANTS
—APPELLANTS

versus

TULSA RAM—PLAINTIFF—RESPONDENT.

Regulation (XVII of 1806)—Mortgage by conditional sale—Foreclosure proceedings—Notice, service of, on de facto guardian of minor mortgagor, whether sufficient—Consideration, receipt of, denial of—Burden of proof.

In foreclosure proceedings taken in a mortgage by conditional sale, a notice under Regulation XVII of 1806 delivered to the *de facto* guardian of a minor mortgagor is sufficient, whether that person is described as *de facto* guardian in the notice or not. [p. 213, col. 1.]

If the executant of a mortgage-deed, who admitted receipt of consideration at the time of registration, denies the receipt of consideration, the burden of proving its non-receipt is on him. [p. 213, col. 2.]

Second appeal from the decree of the Divisional Judge, Gujranwala, at Lahore, dated the 1st May 1911.

Bawa Sewa Ram Singh, for the Appellant.

Lala Mehr Chand, for the Respondent.

JUDGMENT.—This was a suit for possession of land on the basis of a mortgage-deed with a conditional sale clause. The first Court framed a very large number of issues and ultimately dismissed the suit with costs, principally on the finding that service of notice under the Regulation was not valid. The lower Appellate Court, on the other hand, found service of the notice valid, and in all respects found that the plaintiff's suit must succeed and, therefore, substantially gave plaintiff a decree prayed for by him, though it became necessary to extract from the decree two small plots of land which had been sold to two persons called Bula Singh and Phula Singh. The defendants have filed a further appeal to this Court and we have heard arguments. A preliminary objection, that the appeal is time-barred, we have overruled, applying section 5 of the Act in view of the peculiar circumstances which led to the delay in filing the full Court-fee required. The grounds of appeal are four in number, but Mr. Sewa Ram Singh, who appears for the appellants, has intimated that he cannot support the contention that the suit is barred by the law of *res judicata*, or the contention that the suit is time-barred. There remain, therefore, the question of the regularity of the foreclosure proceedings and the question of consideration and necessity for the mortgage.

On page 5 of the paper-book in the last paragraph the story of the service of notice is told at length. It appears that on the 20th November 1897 notices were issued to the three brothers Jowala Singh, Hazura Singh and Phula Singh, the last of whom is now dead.

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Those notices were handed by the process-server on 9th December 1897 to Jowala Singh for himself and for his brothers. But apparently the District Judge did not think this sufficient and ordered notices to be issued again to the two brothers of Jowala Singh, and these notices were served on them personally on the 29th December 1897. Now, it appears that Phula Singh, the third brother, was a minor. We think that this point, although the lower Appellate Court seems to have doubt about it, is quite clear; but we agree with the lower Appellate Court that the earlier service of 9th December 1897 on Jowala Singh for Phula Singh was sufficient. Although the notice did not expressly state that Jowala Singh was the guardian of Phula Singh, as a matter of fact he was the guardian, and in our opinion it is quite sufficient, where the mortgagor is a minor, that notice under the Regulation should be delivered to his *de facto* guardian whether that person is described as *de facto* guardian in the notice or not. Much stress is laid by Mr. Sewa Ram Singh on the fact that Lal Singh, *lambardar*, whose seal is on the notice, now denies that Jowala Singh was present at all. On the other hand, we have Ganda Singh's statement as to the writing of a report on the back of the notice and we have the actual notice itself with the report endorsed. In our opinion Lal Singh, *lambardar*, is either intentionally lying or is at least drawing on his imagination about an incident of which he could hardly have a recollection. On the other hand Ganda Singh, who seems to be a quite independent person, would very naturally remember the incident as he was actually called to write an endorsement; and both the lower Courts appear to be quite satisfied that the service was effected. In these circumstances it is impossible for us to upset the concurrent finding of the Courts below on this point.

Mr. Sewa Ram Singh quotes *Des Raj v. Khan Bahadur* (1), by way of showing that the endorsement on the notice raises no presumption that notice was served. It is obvious that this argument has no force whatever in a case like the

present where there is independent oral evidence of a trustworthy kind to corroborate the endorsement. There are two other highly technical points which are taken by Mr. Sewa Ram Singh, both of them being based to some extent on a ruling, *Chaudhri Hazara Singh v. Mohammad Khan* (2); viz., first, that there is no proof that a copy of the application was given to the mortgagor, secondly, that demand is not proved to have been made before service of notice. These contentions are based upon ignorance of what the record contains, for Ganda Singh says quite plainly that copy of application was given, and there is also the evidence of one Chart Lal that demand was made. This demand was made apparently after the dismissal of the earlier suit which failed on the score of irregularity of the notice, and we find no difficulty whatever in believing that on this occasion at least demand was also made.

We have also heard arguments regarding consideration and "necessity." Mr. Sewa Ram Singh attempts to argue at one and the same time that there was no consideration and that the consideration existed but was met by the execution of decree proceedings of 1887, under which one-third of the land was sold for Rs. 900. We have some doubts whether inconsistent contentions of this sort are admissible; but, however this may be, we cannot find that his clients have proved either contention. As pointed out by the lower Appellate Court, the deed was registered and executant admitted receipt of consideration, and in all the circumstances the *onus* of proving want of consideration lay on appellants, and this *onus* has not been discharged. Then as regards satisfaction at the time of the execution proceedings Mr. Sewa Ram Singh is only able to point to vague generalities and conjectures, whereas we find frequent indications that the mortgage for Rs. 200 was considered as still subsisting, though mutation on it never was had. Thus the Commissioner's proposal to the Financial Commissioner for sale of one-third of the land distinctly mentions the mortgage as still in existence, and again the Subordinate Judge, in applying to the Collector for action under

(1) P. L. R. 1900, p. 332.

(2) 134 P. L. R. 1901.

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section 326, (old) Civil Procedure Code, recites the mortgage and talks of a proposal to combine it and the decree-money in a single big mortgage and so satisfy the decree, a scheme, however, that fell through owing to judgment-debtors' objecting.

For these reasons, we think there is no force in this appeal and we dismiss it with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 494 OF 1912.

July 26, 1915.

Present:—Mr. Justice Spence and

Mr. Justice Crompton-Potter.

Raja DAMARA KUMARATH MMA-

YINIM BAHADUR VARU,

RAJAH OF KALAHASTI—PLAINTIFF—

APPELLANT

versus

SWARNAM KAMAKSHAMMA AND OTHERS

—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expt. II—Appeal, right of—Substantive law—Act, retrospective effect of—Res judicata—Grant of agra-haram—Payment of meras and ruzsums, when can be enforced.

A right to appeal to a superior Tribunal is a substantive right which belongs to a suitor and an Act which takes away a substantive right is not retrospective in effect except by express enactment or by necessary intendment. [p. 214, col. 2.]

Where, therefore, in a suit instituted before the passing of the new Civil Procedure Code, a decision on a previous suit of 1902 in which no second appeal lay, was pleaded as a bar:

Held, that Explanation II to section 11 of the Civil Procedure Code, 1908, did not have a retrospective effect and the earlier decision could not operate as a bar to the suit. [p. 214, col. 2.]

Colonial Sugar Refining Company v. Irving, (1905) A. C. 389, 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513, followed.

As between a zemindar and his tenants a fee payable for a particular purpose cannot be enforced when that purpose fails. [p. 215, col. 1.]

Where, therefore, it appears that a grant of an agra-haram was made conditional on the payment of certain meras and ruzsums which, however, were to continue only so long as the purpose for which they were made continued:

Held, that the payment could not be enforced when that purpose failed. [p. 215, col. 1.]

Devanai v. Raghunatha Row, 18 Ind. Cas. 298; (1913) M. W. N. 886; 13 M. L. T. 351, followed.

Second appeal against the decree of the Court of the Subordinate Judge, North Arcot,

in Appeal Suit No. 37 of 1911 (Appeal No. 336 of 1907, on the file of the District Court of North Arcot), preferred against that of the Court of the District Munsif of Tirupati, in Original Suit No. 393 of 1905.

Mr. L. A. Gopinathaya Aiyar, for the Appellant.

Mr. A. Krishnaswami Aiyar, for the Respondents.

JUDGMENT.—This appeal arises out of the assertion on the part of the zemindar of Kalahasti of a claim to levy certain meras and ruzsums which the respondent agra-haramdars have denied their liability to pay, as being in their view unauthorized exactions.

The first argument is that the matter is *res judicata* between the parties by reason of the decision in a previous suit of 1902.

But it is clear that in 1905 when this suit was instituted that decision, according to the then prevailing law, which was settled by the Full Bench decision in *Avanasi Gounden v. Nachammal* (1), being one in which no second appeal lay, could not operate as a bar to a fresh decision on the same point in a subsequent suit between the parties.

After the decision in that suit the law was altered by the introduction of the Civil Procedure Code of 1908, in which the Explanation II to section 11 of that Code provided for the first time that the competence of a Court should be determined without reference to the existence of a right of appeal from its decisions.

It was held by the Privy Council in *Colonial Sugar Refining Company v. Irving* (2) that a right to appeal to a superior Tribunal is a substantive right which belongs to a suitor, and the well-known principle was further affirmed that an Act which takes away a substantive right is not retrospective in effect, except by express enactment or by necessary intendment.

The second objection is that the payment of the meras and ruzsums referred to in Exhibit I was part of the consideration for the grant of that part of the landlord's *melvaram* which went to make up the agra-haram. The Subordinate Judge found, as we understand his judgment, that the grant was subject to those

(1) 13 M. L. T. 351; 13 M. W. N. 886; 13 Ind. Cas. 298.
(2) (1905) A. C. 389; 74 L. J. P. C. 77; 92 L. T. 733; 21 T. L. R. 513.

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payments, but he also held that it was a condition of the grant that they were to continue only so long as the purposes for which they were made continued.

The case is thus on a similar footing to that decided in *Devanai v. Raghunatha Row* (3), where it was held that as between a *zemindar* and his tenants a fee payable for a particular purpose could no longer be enforced when that purpose failed. An attempt has been made to distinguish that case on the ground that these *agrarahamdar*s have not shown that they possess occupancy rights and that their position is thus inferior to that of the tenants in the above decision. But there is no presumption or proof that the *agrarahamdar*s are liable to be ejected from their holdings, and *prima facie* they appear to be in a stronger position than ordinary *ryots*, considering the nature and length of their tenure. Under Regulation XXV of 1802 the *zemindar*, in the absence of a contract to the contrary, is not entitled to collect more than the fixed quit-rent or *jodi* in case of pre-Settlement *inams*. The parties have not raised the question that this grant was subsequent to the Settlement and the earliest document between them is one of the year 1803, which by its terms purports to be subsequent to the original grant.

The questions as to which of the charges relate to purposes which have ceased to exist, are questions of fact into which we cannot enter.

This second appeal is dismissed with costs.

Appeal dismissed.

(3) 18 Ind. Cas. 298; 13 M. L. T. 351; (1913) M. W. N. 886.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 2935 OF 1914.

April 27, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Shadi Lal.

ALLIANCE BANK OF SIMLA, LTD.,—

APPELLANT

versus

AMRITSAR BANK IN LIQUIDATION,
THROUGH OFFICIAL LIQUIDATORS

—RESPONDENT.

Contract Act—(IX of 1872), s. 201—Bills sent with direction to collect and remit—Trust—Fiduciary relationship—Agency—Debtor and creditor.

When a person employs another to collect money

and remit it to him, the latter stands in a fiduciary relation towards the former and may in respect of the money so collected be regarded as a trustee. [p. 216, col. 1.]

In re Hallett's Estate, Knatchbull v. Hallett, (1879) 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732; *Ex parte Platt, In re Bawa*, (1889) 60 L. T. 397; 37 W. R. 463; G. Morrell, 81; *Official Assignee of Madras v. Rajam Aiyar*, 8 Ind. Cas. 138; 33 M. 299, referred to.

The money is held by him for a specific purpose and does not at his bankruptcy pass to the trustee in bankruptcy as the bankrupt's property. [p. 216, col. 1.]

Where the debtor is to collect and remit, there is confidence and trust. Where the debtor is to use and repay on demand there is no trust. The fact that the money so received has been mixed with other money of the agent is immaterial so long as there is a fund on which the *creditor qua creditor* can lay his hands. [p. 216, col. 1.]

In re West of England and South Wales District Bank, Ex parte Dale & Co., (1879) 11 Ch. D. 772; 48 L. J. Ch. 600; 40 L. T. 712; 27 W. R. 815, referred to.

In re Hallett's Estate, Knatchbull v. Hallett, 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732, relied upon.

The Alliance Bank of Simla, Delhi Branch, sent two bills for collection to the Gwalior Branch of the Amritsar Bank and distinctly asked the latter to send drafts on Delhi after realization. The Amritsar Bank realized the money and after deducting the usual charges remitted the balance by two drafts on the Delhi Branch of the People's Bank Limited. But before the drafts could be cashed, both the People's Bank and the Amritsar Bank went into liquidation. On these facts, the Alliance Bank claimed payment in full of the amount due on the drafts contending that the Amritsar Bank was the trustee and not a debtor *qua* that money.

Held, that all the requirements which were essential to the creation of a fiduciary relationship were satisfied, but that as soon as the drafts on Delhi were despatched and in accordance with the instructions of the Alliance Bank of Simla, the special business, for which the agency had been created, was completed, the agency then terminated *ipso facto* (*vide* section 201, Indian Contract Act), the fiduciary relationship came to an end, and thenceforward, the Alliance Bank of Simla was simply a creditor of the Amritsar Bank and if the drafts were dishonoured, the Alliance Bank of Simla was only entitled to be registered as a creditor and receive payment *pari passu* along with other creditors. [p. 216, col. 2.]

First appeal from the order of the Additional Judge, Lahore, dated the 17th November 1914.

Mr. B. Beran Petman, for the Appellant.

Messrs. Herbert and Madan Gopal, for the Respondent.

JUDGMENT.—The facts of this case are simple and may be stated in a few words. The Alliance Bank of Simla, Delhi Branch, sent two bills for collection to the Gwalior Branch of the Amritsar Bank and

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directed the latter to send "your drafts on realization" after deducting the usual charges. It appears that the Amritsar Bank realized the money, made a slight deduction for exchange, and remitted the balance by two drafts on the Delhi Branch of the People's Bank, Limited. But before the drafts could be cashed, both the People's Bank and the Amritsar Bank went into liquidation.

On the facts set out above, which are not disputed by the parties, the Alliance Bank claims payment in full of the amount due on the drafts and contends that the Amritsar Bank was a trustee and not a debtor *qua* that money. The learned Additional Judge has overruled this contention, and after hearing arguments on both sides and considering the law bearing on the subject we are of opinion that the view taken by him is correct and that this appeal must be dismissed.

Now, the principle of law is firmly established that when a person employs another to collect money and remit it to him, the latter stands in a fiduciary relation towards the former and may in respect of the money so collected be regarded as a trustee; *vide, inter alia, In re Hallett's Estate, Knatchbull v Hallett* (1), *Ex parte Plitt, In re Brown* (2), *Official Assignee of Madras v. Rajam Aiyar* (3). The money is held by him for a specific purpose and does not at his bankruptcy pass to the trustee in bankruptcy as the bankrupt's property. As observed by Cave, J., during the argument in *Ex parte Plitt, In re Brown* (2): "where the debtor is to collect and remit, there is confidence and trust. Where the debtor is to use and repay on demand there is no trust." Further, it is clear that the fact that the money so received has been mixed with other money of the agent is immaterial so long as there is a fund on which the *cestui que trust* can lay his hands. *In re West of England and South Wales District Bank, Ex parte Dale & Co.* (4), which lays down the contrary rule, is not now good law and that judgment has been expressly dissented from by the Court of Appeal in *In re Hallett's Estate Knatchbull v. Hallett* (1).

(1) (1879) 13 Ch. D. 696; 49 L. J. Ch. 416; 42 L. T. 421; 28 W. R. 732.

(2) (1869) 60 L. T. 397; 37 W. R. 463; 6 Morrell 81.

(3) 8 Ind. Cas. 138; 33 M. 299.

(4) (1879) 11 Ch. D. 772; 48 L. J. Ch. 600; 40 L. T. 712; 27 W. R. 815.

The case so far presents no difficulty and satisfies all the requirements which are essential to the creation of a fiduciary relationship. But the matter does not end here. As stated *supra*, the appellant Bank distinctly asked the Amritsar Bank to send drafts on Delhi and this direction was fully carried out. We consider that as soon as the drafts in accordance with the instructions were despatched, the special business, for which the agency had been created, was completed. The agency then *ipso facto* terminated (*vide* section 201, Indian Contract Act) and the fiduciary relationship came to an end. Henceforward the appellant Bank was simply a creditor of the Amritsar Bank and if the drafts were dishonoured, the remedy was for the recovery of the debt due on those drafts. It seems to us clear that if a suit had been filed, it would have been one for money due by a debtor to a creditor and the ordinary rule of limitation applicable to such cases would have governed the action.

In view of the facts and the law referred to above, we think that this is a case of an ordinary debtor and creditor and that the claim for payment in full has not been established. The appellant must be registered as a creditor and shall receive payment *pari passu* along with other creditors. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 223 OF 1913.

September 8, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

RAMASAMY CHETTY—PLAINTIFF—

APPELLANT

versus

KARUPPAN CHETTY AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Two suits with regard to same subject-matter tried together—Judgment in one following that in the other—Appeal against one, whether barred because no appeal against the other—Principal and agent—Silence or acquiescence of principal, whether amounts to ratification—Agent obtaining pecuniary advantage for himself, duty of—Trusts Act (II of 1882), s. 88—Decree in favour of principal—Execution sale—Purchase by agent

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of immoveable property outside British India—Principal entitled to decree for mesne profits—Mandatory injunction directing reconveyance of property, whether allowed.

Where two suits with regard to the same subject-matter are tried together on the same evidence and disposed of by the same Judge and the judgment in one follows the judgment in the other though separate decrees are drawn up, the fact that no appeal has been filed against one of these decrees does not make it operate as *res judicata* and does not bar an appeal against the other decree. [p. 218, col. 1.]

Panchanada Velan v. Vaithinatha Sastriar, 29 M. 333; 16 M. L. J. 63 (F. B.), followed.

In the case of an agent exceeding his authority ratification may be implied from the mere silence or acquiescence of the principal. [p. 219, col. 2.]

Ramaswamy Chetty v. Alagappa Chetty, 28 Ind. Cas. 135; 28 M. L. J. 199, followed.

An agent who purchases property under circumstances in which his own interests are adverse to those of his principal and thereby obtains a pecuniary advantage for himself, must hold the advantage so gained for the benefit of his principal under section 88 of the Indian Trusts Act. [p. 219, col. 2.]

Where an agent purchased some immoveable property outside British India at a sale in execution of a mortgage-decree passed in favour of his principal and the principal sued him for an account of the profits of the property and for a reconveyance of the property to him:

Held, that the principal was entitled to a decree for an account of the profits of the property, but that a mandatory injunction directing the agent to execute the conveyance of the property itself could not be granted. [p. 220, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Original Suit No. 48 of 1911.

Mr. A. Krishnaswami Aiyar, for the Appellant.

Messrs K. V. Krishnaswami Aiyar and K. V. Sesa Aiyangar, for the Respondents.

This appeal coming on for hearing on the 28th, 29th and 30th July 1915, respectively, the Court delivered the following

JUDGMENT.—Plaintiff's father and the 3rd defendant were doing business as money-lenders in partnership at Kuala Lumpur under the name and style of S. L. V. The 1st defendant was engaged as an agent to conduct the business of the firm for three years and he executed the usual salary chit to the 3rd defendant on the 3rd of November 1903. He transacted the business of the firm as such agent till about the end of the year 1907 and came back to India in the beginning of 1908.

The 3rd defendant released his interest in the partnership to the plaintiff's father.

Plaintiff's father is dead and the plaintiff is now the sole owner of the firm.

The suit is instituted to take the accounts of the agency. A preliminary decree was passed for an account and in pursuance of that decree statements of accounts were filed, and the plaintiff after the examination of the accounts charged the 1st defendant with misconduct in respect of particular loans which have since become irrecoverable and sought to recover their amount from him. The Subordinate Judge of Ramnad has disallowed the claim as to most of the items and the plaintiff appeals in respect of some of them.

The respondent has taken an objection to the hearing of the appeal, on the ground that the question of the liability of the 1st defendant has been adjudicated upon by a prior decision which operates as *res judicata*. The facts necessary for the disposal of this question are these: The 1st defendant when he was appointed an agent was given a 1/5th share in the profits and losses of the firm; but instead of his being given this share in the S. L. V. firm, a subsidiary firm of L. R. M. was started which was to have a 1/3rd share in the profits and losses of the transactions of the main S. L. V. firm, and in the L. R. M. firm the 1st defendant was to have a one-half share, the plaintiff's father and the 3rd defendant, the partners of the S. L. V. firm, being entitled to the other half. The L. R. M. firm was not to transact any independent business, but was simply to share to the extent of 1/3rd in the profits and losses of the transactions of the S. L. V. firm. It is obvious that though in name there was a separate firm of L. R. M. in which the 1st defendant had a one-half share, the practical effect of the arrangement was to give the 1st defendant a 1/6th share in the firm of S. L. V. The plaintiff simultaneously with the suit instituted another suit, Original Suit No. 10 of 1912, against the 1st defendant for the dissolution of the L. R. M. firm. As the question of the 1st defendant's liability was the same in both the suits, they were tried together on the same evidence and disposed of by the same Judge. The judgment in Original Suit No. 10 of 1912 is based on and follows the judgment in Original

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Suit No. 48 of 1911, though separate decrees were drawn up. Plaintiff has not appealed against the decree in the Original Suit No. 10 of 1912 and it is this judgment which is pleaded as a bar to the trial of this appeal. The respondent's Vakil relies on a decision of the Calcutta High Court reported as *Madanpore Zemindar Co., Ltd. v. Nitya Kali Dasi* (1), but we think the question has been decided by a Full Bench of this Court in *Panchanada Tulan v. Vaithinatha Sastri* (2). Following that decision we overrule the plea of *res judicata* raised by the respondent.

Coming to the merits of the appeal, the items for which the plaintiff seeks to make the agent responsible may be divided into three classes. Class one consisting of items said to have been lent negligently to persons who were not in a position to repay them. These items are Nos. 23, 40, 56, 143 and 72 of the A schedule. The 1st defendant has given evidence with respect to these items, and the lower Court on a consideration of the evidence has come to the conclusion that the 1st defendant was not guilty of negligence with regard to these items. Our attention has been drawn to the evidence with respect to each of these transactions, and we agree with the lower Court that there was no negligence on the part of the 1st defendant in making these loans. The next class consists of three items, Nos. 18, 102 and 110, in respect of which the charge against the 1st defendant is that he lent these items to Tamils and Muhammadans contrary to the instructions of the principals. Loan No. 18 was made on the 23rd of April 1904, No. 102 in July 1905, and No. 110 in October 1905. The earliest letter in which there is a prohibition against lending to Tamils and Muhammadans is Exhibit E, dated the 13th April 1904, written by the 3rd defendant to the 1st defendant. The 1st defendant replied on the 4th of May 1904 [Exhibit E2] and stated that he had lent to three Muhammadans prior to the receipt of the instructions in Exhibit E and said that for the future he would not lend to Tamils and Muhammadans. One of those

persons to whom he had already advanced is creditor No. 18, and so far as that item is concerned, the agent has not disobeyed the instructions of the principals. With regard to the other items the respondent contends that although the principals gave instructions as to not lending to Tamils and Muhammadans, those instructions were not intended to be taken as positive prohibitions, but were merely in the nature of directions which he was to follow as far as possible. He also contends that the principals regularly received copies of the Day Books in which these transactions were entered and were asked by him to examine them and write to him if they had any objections, that the principals though they took objections to the loans made to one or two particular debtors, they took no objection to the loans made to Tamils and Muhammadans as such; in fact they have ratified these particular transactions. The lower Court agreed with these contentions and we agree with it.

After the writing of Exhibit E2, it appears that the 1st defendant was lending moneys to Tamils and Muhammadans and the principals became aware of it when the monthly *kurippus* were sent to them; they took no objection to the loans to Tamils and Muhammadans as such, though they objected to a loan made to one Chellayya on the ground that the sum lent was too large. [Exhibit TS, dated 2nd August 1904, and Exhibit XV dated 6th August 1904.] Correspondence went on between the 1st defendant and the 3rd defendant with regard to this particular man, Chellayya. Finally in Exhibits XXI and XXVIII, dated 18th September 1904 and 27th September 1904 respectively, written by the plaintiff's father and 3rd defendant to the 1st defendant, satisfaction was expressed as to the mode in which the 1st defendant was transacting the business of the firm. The next important letter is Exhibit E1, dated 8th March 1915, in which the 3rd defendant asked the 1st defendant not to have dealings with Tamils and Muhammadans in future. Even after this letter the 1st defendant had transactions with Tamils and Muhammadans which were brought to the notice of the principals when the copies of the Day Book were sent. On the 30th of July 1905 the 1st defendant wrote to the 3rd defendant pro

(1) 24 Ind. Cas. 243.

(2) 29 M. 333; 16 M. L. J. 63 (F. B.).

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testing against the prohibition of loans to Tamils and Muhammadans and stating that he had lent to some Tamils who were well known to him and had not incurred any loss in consequence [Exhibit XXI (a)]. Exhibit F2 was the reply in which no exception was taken to the 1st defendant's course of dealing. In Exhibit F, dated 28th of September 1905, the 1st defendant, writing to the 3rd sending copies of the *kurippu*, asked him to examine them and write to him with regard to any objections he might have with reference to the transactions therein contained.

The reply was Exhibit F1, dated 12th October 1905, and no objection was taken to the transactions now complained of. The 1st defendant in October 1905 gave a loan to debtor No. 110 and copies of the *kurippu* were sent to the principals and no objection was taken to these transactions. It appears from Exhibit XXXVI, dated 7th September 1906, a letter written by the plaintiff's father to the 1st defendant, that the 3rd defendant who was till then principally supervising the business of the 1st defendant, had asked the plaintiff's father to supervise the work of the 1st defendant thereafter, and the plaintiff's father asked for the balance-sheet and for a list of debtors. Subsequent to that we find Exhibits H, F5 and XXXVIII (b), letters from the 3rd defendant and the plaintiff's father, asking the 1st defendant to close the business of the firm. On the 7th of November 1906 the plaintiff's father wrote Exhibit XXVI to the 1st defendant expressing satisfaction with the manner in which the 1st defendant was conducting the business, and in Exhibits XXVII(a) and XXXVIII(c), dated 9th December 1906 and 27th February 1907, written by the 3rd defendant and the plaintiff's father respectively to the 1st defendant, they expressed their entire approval of the manner in which the 1st defendant was doing the business; and on 8th May 1907, the 3rd defendant asked the 1st defendant to become a partner with him and open new accounts. The evidence above set out, shows that the principals took no objection to the transactions now in question and must, we think, be taken to have ratified them. The learned Pleader for the appellant contended that these facts

are not legally sufficient to prove ratification and relied upon the decision in *De Busche v. Alt* (3). There is really no doubt or difficulty as regards the principle of law applicable to this case. In the case of an agent exceeding his authority ratification may be implied from the mere silence or acquiescence of the principal, and this principle has been adopted in *Ramasamy Chetty v. Alagappa Chetty* (4.)

The appellant does not press his claim to the item in D Schedule. There is only one other item which remains to be dealt with, and that relates to a purchase of lead mines by the 1st defendant. The 1st defendant had lent money to a Chinaman from whom he obtained a mortgage of certain lead mines. He obtained a decree and in execution of that decree brought the mortgaged properties to sale. As the price of lead was falling, the 1st defendant was apprehensive that this property would not fetch a fair price and wrote to his principals that if there was no satisfactory bidding at the auction, it would be necessary for them to purchase and hold the properties until they could find a buyer (see Exhibit XXXVII (j), dated 18th September 1907, and Exhibit XX, dated 6th November 1907). But instead of purchasing the property on behalf of the mortgagees, the 1st defendant purchased it for the subsidiary L. R. M. firm, in which he had a half share. If the 1st defendant had purchased the property on behalf of the mortgagees, as he said he would, the principals would be entitled to a 5/6ths share in the property purchased and the 1st defendant 1/6th. By purchasing for the L. R. M. firm, the 1st defendant got half the properties. The principals claim 5/6ths of the properties, on the ground that the 1st defendant who was bound to protect their interests purchased the property under circumstances in which his own interests were adverse to those of his principals and thereby obtained a pecuniary advantage for himself (see section 88, Indian Trusts Act). We think this contention is sound.

(3) 8 Ch. D. 286; 47 L. J. Ch. 381; 28 L. T. 275.

(4) 28 Ind. Cas. 135; 28 M. L. J. 199.

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It is, however, contended for the respondent that the principals have acquiesced in this purchase and have ratified the same. The principle laid down in *De Bussche v. Alt* (3) applies precisely to this transaction, and there is no evidence which goes to show that the principals ever intended to release the 1st defendant from his obligation to hold the property for the benefit of the principals.

The respondent also argued that as the lands are situate outside British India, the Ramnad Sub-Court had no jurisdiction to determine the title to or decree possession of the lands. This objection was not taken in the first Court, but we allowed the question to be argued here. The plaintiff does not want an adjudication as to the title of the lands nor does he seek to recover possession. The title is admittedly in the 1st defendant. What, however, the plaintiff seeks in the suit is the enforcement of a personal equity against the 1st defendant, a British Indian subject residing within the jurisdiction of the Ramnad Sub-Court. In so far as he asks for an account of the profits of the property received by the 1st defendant from the properties so enjoyed by him and for payment of 5/6ths of such profits, we think he is entitled to a decree; but this 5/6ths will include the one-half share awarded to him in Original Suit No. 10 of 1912. The plaintiff also wants us to direct the 1st defendant to execute a conveyance to the plaintiff of a 5/6ths share of the properties in question. As these properties are situate outside the jurisdiction we could not avail ourselves of the procedure provided in Order XXI, rule 34, Civil Procedure Code, if the 1st defendant disobeyed the order. The only other way in which we could grant this relief would be by granting a mandatory injunction directing the 1st defendant to execute the conveyance which could be enforced by attachment under Order XXI, rule 52, Civil Procedure Code. We have not been referred to any precedent for issuing a mandatory injunction to compel the execution of a conveyance, and are not prepared to grant one, more especially in the case of lands situate out of British India.

The decree of the lower Court in favour of the plaintiff and the 3rd defendant will be modified accordingly and the necessary accounts will be taken by the lower Court and a final decree passed there. The parties

will pay and receive proportionate costs of this appeal.

JUDGMENT.—If the defendants Nos. 1 and 2 execute a conveyance to the plaintiff and the 3rd defendant of a 1/3rd share of the property mentioned in the schedule to the plaintiff's objection statement, they will be entitled to credit for a 1/3rd share of the purchase-money with Nadappu interest in taking the accounts in this suit up to the date of the final decree in the lower Court.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 118 OF 1914.

August 10, 1915.

Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.

KILOTH CHOZHAN OYDAL KURUP AND
OTHERS—DEFENDANTS NOS. 1 TO 6 AND 8 TO 11
—APPELLANTS

versus

KIRATHWA ILLATH NARAYANAN
NAMBUDRI AND ANOTHER—PLAINTIFF
AND DEFENDANT NO. 7—RESPONDENTS.

Landlord and tenant—Disclaimer of landlord's title, what is—Forfeiture of tenancy.

As between landlord and tenant to constitute a disclaimer by tenant of landlord's title there must be a direct repudiation of the relationship of landlord and tenant or a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it. [p. 221, col. 1.]

Doe d. Gray v. Stanton, (1836) 1 M. & W. 695; 5 L. J. Ex. 253; 1 Tyr. & G. 1065; 2 Gale, 154; 150 E. R. 614; 46 R. R. 464, followed.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 106 of 1913, preferred against that of the Court of the District Munsif, Kuthuparamba, in Original Suit No. 530 of 1911.

Mr. T. L. Rozario, for the Appellants.

Messrs. T. R. Ramachandra Aiyar and A. S. Venku Aiyar, for the Respondents.

JUDGMENT.—Appellants in this case admittedly hold the suit property under Exhibit I executed by plaintiff's predecessor, on what is known as *kudima jenm* or *kudimanir* tenure: the incidents of which are

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set out at pages 307, 417 and 418 of Moore's Malabar Law and Custom and also in Graime's Glossary. Plaintiff is the *jenmi* of the said land; he has been given a decree for eviction of appellants on the ground of disclaimer of his paramount title.

The chief point for decision is whether plaintiff has made out a disclaimer of his title. He relies on passages in certain documents (Exhibits C and D) taken by appellants from tenants of their own in respect of the suit lands in a plaint, Exhibit C, filed by appellants in a suit for recovery of rent. These passages refer to the land as the *jenmam* of appellants; and it is argued that this constitutes a denial of the *jenmam* title of plaintiff. For appellants it is argued that nothing of the kind is intended but that the phrase "*jenmam*" is loosely used, where *kudima jenmam* is meant.

Mr. Ramachandra Aiyar for respondent has argued that the intention of appellants is a question of fact; and that the finding of the District Judge cannot be questioned in second appeal. It appears to us that the learned District Judge has proceeded on a wrong construction of the passages in question and that if they be properly construed, there is no evidence to support a finding of disclaimer of title. He has also, as it seems to us, failed to realise what is implied in disclaimer of a landlord's title: "To constitute a disclaimer there must be a direct repudiation of the relation of landlord and tenant or a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it." [Vide Baron Parke in *Doe d. Gray v. Stanion* (1) quoted in *Srimati Mallika Dassi v. Makham Lal Chowdhry* (2).]

Bearing this definition in mind, we think it is impossible to construe the phrase *jenmam* in the documents in question as "a direct repudiation" or "distinct claim." The wording of the other exhibits in the case shows that the phrase was commonly used in a loose sense and it is not

denied that right up to the date of suit the nominal quit rent, which alone was reserved to plaintiff under Exhibit I, was scrupulously paid.

We think there was no disclaimer of plaintiff's title: whether, if there had been one, it would have worked forfeiture of the tenure is a question into which we need not enter.

We reverse the decree of the District Judge and restore that of the District Munsif. Appellants will get their costs in this and the lower Appellate Court.

Appeal allowed; Suit dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 86 of 1913.

May 10, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Leslie Jones.

GUL MUHAMMAD—DEFENDANT—
APPELLANT
versus

TOTA RAM—PLAINTIFF, AND ANOTHER—
DEFENDANT—RESPONDENTS.

Punjab Laws Act (IV of 1872), s. 9—Sale—Exchange—Consideration—Money and land—Principle on which nature of transaction should be determined—Pre-emption, evasion of, by lawful means.

Every transaction in which the consideration does not consist merely of money but also of the conveyance to the vendor by the vendee of some land, must be considered upon its own facts to decide whether it is purely a sale or an exchange or is of a mixed character, being partly sale and partly exchange. [p. 223, col. 2.]

Where the consideration for a transaction consisted of a cash payment of Rs. 3,600 and the transfer by the vendee to the vendor of land valued at Rs. 1,100 and the transaction was an indivisible one:

Held, that the transaction was not a 'sale' which could be pre-empted. [p. 224, col. 1.]

Gul Muhammad Khan v. Khan Ahmad Shah, 29 P. R. 1893; *Khairulla v. Mir Hamza*, 111 P. R. 1885 referred to.

The evasion of pre-emption by lawful means is quite legitimate. [p. 224, col. 2.]

Chowdhri Asa Nand v. Mamun, 64 P. R. 1888; *Tikaya Ram v. Dharam Chand*, 45 P. R. 1895, referred to.

Second appeal from the decree of the Divisional Judge, Multan, dated the 26th November 1912.

(1) (1838) 1 M. & W. 695; 5 L. J. Ex. 253; 1 Tyr. & G. 1065; 2 Gale, 154; 150 E. R. 614; 46 R. R. 464.

(2) 9 C. W. N. 928; 2 C. L. J. 389.

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Mr. *Fazl-i-Hussain* and *Bhagat Goriad Das*, for the Appellant.

Mr. *Santanam*, for the Respondents.

JUDGMENT.—The history of this very protracted litigation is given in detail up to May 1910 in the order of the present Chief Judge in Civil Appeal No. 228 of 1910, which concluded with the words, "the District Judge should now take up this long delayed case and dispose of it with all convenient speed." This order is dated 30th May 1910, and by that time the case had, for one reason or another, been dragging along since the 5th November 1902 when the suit was first instituted. The District Judge, after this Court's order of remand, proceeded to re-try the case and eventually gave judgment in favour of plaintiff, Tota Ram, on the 22nd March 1911, granting him a decree for possession by pre-emption of the lands specified in the plaint upon payment of Rs. 4,700 by the 23rd May 1911. Defendant-vendee appealed to the Divisional Judge, but his appeal was dismissed on the 26th November 1912, whereupon he preferred a further appeal to this Court, and it is this appeal which came up for hearing before us on the 6th instant. The case has thus been before the Courts for a period of some 12½ years, but it is difficult to apportion the blame for this excessive delay in the disposal of a case which, so far as the facts are concerned, is simple enough. Briefly stated these facts are as follows:—

By deed dated the 21st November 1901 and duly registered, one Lal Ditta Mal, an Arora of *Mauza Hazratwala* in the Dera Ghazi Khan District, transferred the following lands in *Mauza Pir Bakhsh Sharki* to defendant No. 1, Gul Muhammad, an Arain *lambardar* of *Mauza Arain*, namely:—

- (1) 75 kanals 17 marlas of well Hasanwala;
 - (2) 305 kanals 12 marlas of well Israiwala;
- and

- (3) 248 kanals 18 marlas of well Niaziwala.

The consideration for the transaction is stated in the deed to have been (a) the sum of Rs. 3,900 paid in cash, and (2) the conveyance by the vendee to the vendor of the following lands, valued at Rs. 1,100, namely:—

- (1) 75 kanals 16½ marlas of well Bhatiwala;
 - (1) 36 kanals 16 marlas of well Kutabwala;
- and

- (3) 7 kanals 13¾ marlas of well Tharawala.

The three wells last mentioned are situate in *Mauza Baghewala*, which is about 2 kos distant from the vendor's place of residence. A suit for pre-emption was instituted against the vendee on the 5th November 1902 by three persons, *Malik Mahmud Bakhsh*, *Ahmad Ali* and *Tota Ram*, but the first two claimants have dropped out of the case and we are now concerned merely with the claim of the third, *Tota Ram*, an Arora, resident of *Mauza Hazratwala*. He bases his right to pre-empt on the ground that he is a co-sharer in the land sold, and it is not denied that under the law as it existed at the time when the claim was preferred (that is to say, under the Punjab Laws Act, 1872) he has the right to pre-empt, (1) if the transaction can be regarded as a "sale" within the meaning, and for the purposes, of section 9 of that Act, and (2) if defendant's plea that plaintiff consented to the sale is not established.

The District Judge found that the transaction was a "sale," that plaintiff had not waived his right to claim pre-emption, that the lands given by the vendee to the vendor were not worth more than Rs. 1,100 and that the actual amount paid in cash by the vendee was Rs. 3,600. He accordingly granted plaintiff a decree for possession on payment of Rs. 4,700 by the date specified.

The Divisional Judge on appeal upheld the decree. He was of opinion that the fact that the consideration was received partly in cash and partly in kind did not affect the nature of the transaction which was in reality a sale, "the exchange part of the transaction being inseparable from the sale part." He further agreed with the District Judge that the alleged waiver by plaintiff had not been established. Defendant has preferred a second appeal to this Court and the main question before us is whether the Divisional Judge was right in construing the deed as one of sale. Mr. *Santanam* for respondents further urged that even if this Court was of opinion that the deed interpreted simply with reference to its terms was not a sale pure and simple, he was still entitled to prove *aliunde* that the transaction, though disguised as a mixed transaction of sale and exchange,

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was nevertheless in essence and in fact merely a sale, effected in this peculiar form in order to evade the claims of pre-emptors. Respondent who was no party to the deed is obviously entitled to refer to the conduct of the parties and to extraneous matters to establish this plea, and we have accordingly heard the appeal argued at length on this basis.

As regards the deed itself we may at once clear the ground by saying that we entirely agree with the learned Divisional Judge that it represents one entire transaction, in the sense that it is impossible to divide it into two separable portions, of which one represents a sale and the other an exchange transaction. As a matter of fact it is, we think, exactly what it purports to be, a sale and an exchange inasmuch as part of the consideration is money and part other land given in exchange, but it is not possible to say of any part of the land transferred to Gul Muhammad that that part was sold or that that part was exchanged. In other words, though it was partly a sale and partly an exchange, the transaction must be regarded as indivisible and plaintiff's claim to pre-empt can succeed only if he can establish that the transaction as a whole was a sale within the meaning of section 9 of the Punjab Laws Act, it not being contended that by custom obtaining among the parties the right of pre-emption exists in respect of an exchange of immoveable properties.

Now, as we have remarked, the deed itself purports to be one of sale and of exchange, and it is not denied that the actual consideration consisted not merely of money but also of the conveyance to the vendor of a large area of land valued (and apparently not over-valued) at Rs. 1,100. This latter part of the consideration is not of such trifling character as to be ignored, on the contrary, it forms a considerable and by no means negligible portion of the consideration. In this respect, then, the present case differs radically from that upon which Mr. Santanam especially relied, *Gul Muhammad Khan v. Khan Ahmad Shah* (1), where the consideration for the

transfer consisted of Rs. 4,500 in cash and one *ghumao* of land, valued at Rs. 40 or Rs. 50, and it was held that the mere addition of this small piece of land could not alter the real nature of the transaction which was that of sale. As Plowden, S. J., observed in his judgment in that case, "without attempting to define sale or exchange, we entertain no doubt that a permanent transfer of land in a village for a sum of money *plus* something that is not money does not, merely because of such addition, of necessity cease to be a sale within the meaning of the Act. If a transfer of land for Rs. 100 is a sale, we entertain no doubt that the parties to the transaction by agreeing that the price should be Rs. 100 and (for example) a brass *loti* could not alter the true character of the sale and exclude it from being the subject of a claim for pre-emption, otherwise the whole law of pre-emption in the Punjab as contained in this title of the Laws Act might be reduced to a dead letter. We consider that whatever form the parties to the transaction may choose to give it for their own purposes or for the purpose of defeating a pre-emptor's claim, the question remains open to the Courts to decide whether the particular transaction does or does not amount to a sale within the meaning of that section." We entirely accept this statement of the law and agree that every case must be decided upon its own facts. But is it possible to describe an indivisible transaction as purely a sale when the consideration consists (as it does here) of a cash payment of Rs. 3,600 and the transfer of land valued at Rs. 1,100? This is, it seems to us, a very different case from that dealt with by the learned Judges who decided *Gul Muhammad Khan v. Khan Ahmad Shah* (1), and the authority most in point is *Khairatulla v. Mir Hamza* (2), where a Divisional Bench of this Court held that a transfer of land for a consideration of Rs. 280 *plus* the addition of 11 *kanals* of land was not a sale but an exchange and as such not subject, apart from established custom, to a claim for pre-emption (see the judgments of Burney, J., dated 28th February 1884 and 12th July

(1) 20 P. R. 1803.

(2) 111 P. R. 1885.

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1884). In our opinion the transaction with which we are concerned was of a mixed character, being partly sale and partly exchange, the two parts being, however, so inextricably connected that it is impossible to separate them. In the circumstances, we cannot regard the transaction as a sale and as a result the plaintiff, who claims a very exceptional privilege based upon a provision of law which must be strictly construed, must fail unless he can satisfy us by extraneous evidence that this transaction was in fact a sale and not what it purports to be. Here the plaintiff has a very difficult case, as he is forced to admit that a large portion of the consideration consisted of land given by the alienee to the alienor. He tries, however, to overcome this difficulty by pointing to the fact that on a previous occasion when the present alienee exchanged certain lands with a third person, he subsequently re-purchased his land. The District Judge refers to this incident and remarks that it took place under similar circumstances, but we are unable to find any justification for the remark. It is not shown that on that occasion the present alienee did more than exchange a plot of his land for a plot of land belonging to another, and that about a year afterwards he re-purchased his own land. But apart from this objection, the broad fact remains that in the present case some 13 or 14 years have elapsed since the transaction in question and that the alienee has made no attempt to re-purchase the land transferred by him to Lal Ditta Mal. On the other hand, we have the emphatic assertion of the latter that he actually wanted land and would not have agreed to the transaction had it been only money that was offered to him by the alienee. To quote his own words, "I exchanged lands because my lands were dry and for 14 years had produced no crops, and Gul Muhammad's land was cultivated. My land was the larger area. We exchanged lands. Had the defendant not given me land, I would not have sold him any, i. e., without lands in exchange." Mr. Santanam argued that this was a mere subterfuge; that Lal Ditta Mal was badly in need of money and not of land, and that the transaction between him and Gul Muhammad took

the shape it did simply to evade the claims of pre-emptors. The best answer to this argument is that though some 14 years have since elapsed, Lal Ditta Mal is still in possession of the land transferred to him by Gul Muhammad, and apparently has no intention of parting with that land which, he says, he has found most valuable. Moreover, even if the transaction had as its object the evasion of pre-emptor's claim, the means employed were not unlawful and it was open to the parties to effectuate their common intentions in a manner which would preclude pre-emptors from interfering with their wishes, [see *Chowdhri Asa Nand v. Mamun* (3), *Tikaya Ram v. Dharam Chand* (4), *per Stogdon, J.*]

For the reasons given we hold that the alienation in favour of Gul Muhammad was not a "sale" within the meaning of section 9 of the Punjab Laws Act and that no right of pre-emption accrued in respect of it. We accordingly accept the appeal and direct that plaintiff's suit stand dismissed with costs throughout.

Appeal accepted.

(3) 64 P. R. 1888.

(4) 45 P. R. 1895.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 32 OF 1913.

April 29, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

A. M. ROSS, DULY AUTHORISED AGENT OF
CERTAIN TEA COMPANIES AND
LABOUR ASSOCIATIONS IN ASSAM—
PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—DEFENDANT—RESPONDENT.

Assam Labour and Emigration Act (VI of 1901)
—Principal and agent—Liability of Government for
tortious acts of its servants—Government servant acting
under statutory powers, whether agent—Illegal order
—Government, whether liable—Public policy—Government
servant, when personally liable—Defamation—
Defamatory words published in course of official duties
—Reasonable and probable cause—Prohibition of illegal
business—Action, right of.

The Government cannot be made liable for illegal orders passed by a Government servant purporting to act under a statutory power conferred upon him. [p. 226, col. 2.]

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The plaintiff sued the Secretary of State for India in Council to recover damages for loss of business on the grounds: (a) that the Collector and District Magistrate of Ganjam on the 22nd February 1910 closed a labour-recruiting depot at Berhampore, that recruiting depot having been intended for the accommodation of coolies recruited on behalf of certain Tea Planting Associations in Assam, of which Associations the plaintiff had been appointed an agent, (b) that the Governor-in-Council by a G. O. dated 12th October 1910, ratified and confirmed the Collector's order closing the depot till that date, (c) that the Government in the said order made certain defamatory remarks concerning the plaintiff, and (d) that on account of the Collector's order the plaintiff was prevented from recruiting coolies and earning commission:

Held, (per *Sadasiva Aiyar, J.*)—(1) that the Government could not be made liable for illegal orders made by the Collector and District Magistrate inasmuch as he could not be treated as the agent of the Government of Madras, nor could the Government ratify that act so as to make itself liable; [p. 226, col. 2; p. 227, col. 1.]

(2) that on the highest grounds of public policy the Government should not be made liable for the tortious acts of its agents or servants, except probably for acts done in the course of those kinds of transactions, which even an ordinary private mercantile firm can enter into; [p. 227, col. 1.]

Thames Eates Rogers v. Rajendra Dutt, S. M. I. A. 103 at p. 131; 2 W. R. 51 (P. C.); 13 Moo. P. C. 209; 3 L. T. 160; 9 W. R. 149 (Eng.); 1 Suth. P. C. J. 413; 1 Sar. P. C. J. 755; 19 E. R. 469; 15 E. R. 78; 132 R. R. 82, followed.

(3) that the District Magistrate himself even in his personal capacity could not be made liable to the plaintiff for the order made by him, as there was no proof that he acted maliciously or that his object was to injure the plaintiff's legal right; [p. 227, cols. 1, 2; p. 228, col. 2.]

(4) that the Governor-in-Council was not liable for publishing words concerning the plaintiff in the course of the official duties of the Governor-in-Council since it was not alleged that the publication was made maliciously and without reasonable and probable cause. [p. 228, col. 2.]

Held also (per *Bakewell, J.*) that the prohibition of an illegal business does not give a right of action. [p. 230, col. 1.]

Appeal from the judgment of Mr. Justice Wallis, dated the 6th February 1913, in the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 51 of 1911 reported as 19 Ind. Cas. 353.

Messrs. C. P. Ramaswami Aiyar and A. Krishnaswami Aiyar, for the Appellant.

Mr. F. H. M. Corbett, Advocate-General, and Mr. Barton, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—Plaintiff is the ap-

pellant. So far as this suit, which is brought to recover damages against the Secretary of State for India in Council, is based upon the suspension and dismissal of Rama Sastry (a "local agent" of the Assam Planters) by the Collector and District Magistrate of Ganjam, the plaintiff gave up his contention that such suspension and dismissal were wrongful.

The remaining facts on which the claim is founded are (a) that the Collector and District Magistrate on the 22nd February 1910 closed a labour-recruiting depot at Berhampore, that recruiting depot having been intended for the accommodation of coolies recruited on behalf of certain Tea Planting Associations in Assam, of which Associations the plaintiff had been appointed as agent; (b) that the Governor-in-Council by a Government Order, dated 12th October 1910, ratified and confirmed the Collector's order closing the depot till that date; (c) that the Government on the said 12th October 1910 in the said order made the defamatory remark that "the conduct of Mr. Ross (the plaintiff) was not wholly above suspicion" in the matter of the irregularities committed by the local agent, T. S. Rama Sastri, on account of which irregularities Rama Sastri's license as local agent was cancelled by the Collector and District Magistrate.

The learned Chief Justice who tried this case on the original side, dismissed the suit making certain observations in his judgment, which observations might be stated as follows, using in great part the words of the learned Chief Justice:—

1. The Collector's order of February 1910, closing the depot to recruiting by the garden *sardars* working under the Assam Labour and Emigration Act, VI of 1901, on behalf of the Assam Planting Associations was *ultra vires*.

2. The Secretary of State in Council is not legally liable for the tortious acts of the Collector of Ganjam or of the Governor of Madras in Council. If section 416 of the old Civil Procedure Code really laid down that the Secretary of State can be made liable for the tortious acts of a local Government or of an officer of that Government notwithstanding that the East India Company would not have been liable for

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such acts, that section is *ultra vires* of the Indian Legislature, as opposed to the provisions of the Indian Councils Act of 1861. If the decision in *Vijaya Ragava v. Secretary of State for India* (1) holds otherwise, it is no longer an authority as opposed to the Privy Council decision in *Secretary of State for India v. Moment* (2). See also *Shivabhanjan v. Secretary of State for India* (3). In *Dhacker Dadaji v. East India Company* (4) Sir Erskine Perry held that the only ratification which would bind the Company was a ratification by the Court of Proprietors itself. This is not a case in which a petition of right would lie against the Crown. Hence this action against the Secretary of State, who is not alleged to have himself ratified the Collector's acts or the local Government's acts, cannot lie.

3. In *Tubin v. Reg.* (5) it was held that, independently of the doctrine that the King can do no wrong, the Crown could not be made liable for the action of a Government servant purporting to act under statutory power conferred upon him, because the action of a Government servant purporting to exercise a statutory power cannot be held to be an act done as an agent of the Crown. See *Shivabhanjan v. Secretary of State for India* (3). There can be no ratification by the principal of such an act, as such an act was not done on behalf of the principal.

4. As regards the alleged libel by the Madras Government the Secretary of State (defendant) is not liable for reasons already stated, as the publication of the libel was not (a) made under the orders of the Secretary of State, or (b) made on his behalf and ratified by him. [See *Jehangir v. Secretary of State for India* (6).]

5. In *Grant v. Secretary of State for India in*

Council (7) it was held that the Secretary of State was not liable for the publication of an alleged libel in the Fort St. George Gazette as, at all events, the libel was not alleged to have been published maliciously and without reasonable and probable cause; see also *Chatterton v. Secretary of State for India in Council* (8).

In the decision of this appeal, I shall confine myself to the following questions on which we have heard arguments from the appellant's learned Vakil, Mr. C. P. Ramaswami Aiyar:—

(1) Whether the Collector's act in closing the plaint depot gave a cause of action to the plaintiff against the Government.

2. Whether even the Collector and District Magistrate of Ganjam who passed the order closing the depot, is liable to the plaintiff.

3. Whether assuming that the remark in the Government Order referred to in the plaint is libellous and was published, the statement is privileged and the Governor-in-Council cannot be made liable for making and publishing that statement.

There can be no doubt that the Collector and District Magistrate in ordering the closing of the depot intended to use the powers given to him by section 22, clause 3, of the Assam Labour and Emigration Act, VI of 1901. That clause says: "Where the Superintendent" (in this case the Collector and District Magistrate) "considers that any depot is unhealthy or has become unsuitable for the purpose for which it was established, he may, by order in writing, prohibit the use of the depot for the reception and lodging of labourers."

I am clear that the Government cannot be made liable for illegal orders made by the Collector and District Magistrate purporting to use the powers given by this Statute Law, the authority of *Tubin v. Reg.* (5) followed in *Shivabhanjan v. Secretary of State for India* (3) being, in my opinion, almost conclusive on this point. The District Magistrate who purported to use the powers given by the Statute Law cannot

(1) 7 M. 466.

(2) 18 Ind. Cas. 22; 40 C. 391 (P. C.); 24 M. L. J. 459; 13 M. L. T. 53; 17 C. W. N. 169; (1913) M. W. N. 5; 16 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 191; 6 Bur. L. T. 1; 7 L. R. R. 10; 40 I. A. 48.

(3) 18 B. 314; 6 Bom. L. R. 65.

(4) 2 Morley's Digest 307; Perry, O. C. 244; 4 Ind. Dec. (o. s.) 587.

(5) (1864) 16 C. B. (N. s.) 310; 33 L. J. C. P. 199 at p. 210; 10 Jur. (N. s.) 129; 10 L. T. 762; 12 W. R. 838; 139 R. R. 104; 143 E. R. 1148.

(6) 6 Bom. L. R. 131.

(7) (1877) 2 C. P. D. 445 at p. 453; 46 L. J. C. P. 681; 37 L. T. 188; 25 W. R. 848.

(8) (1895) 2 Q. B. 189; 64 L. J. Q. B. 676; 14 R. 504; 72 L. T. 858; 59 J. P. 596.

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be treated as the agent of the Government of Madras, nor can the Government ratify that act so as to make itself liable for that act, because that act was not done *on its behalf* and the Government cannot be treated as a principal and the District Magistrate as its agent when the latter purported to exercise statutory powers. "When the duty to be performed is imposed by law" on the agent..... "the employer is not liable for the wrong done by the agent in such employment." [See *Tubin v. Reg.* (5) and *Nireaha Tamaki v. Baker* (9).] Before leaving this part of the case I might finally add that on the highest grounds of public policy, the Government should not be made liable for the tortious acts of its agents or servants, except probably for acts done in the course of those kinds of transactions, which even an ordinary private mercantile firm can enter into. This, namely, the civil irresponsibility of Government "for tortious acts" of its agents has been assumed as undoubted law in *Thomas Eales Rogers v. Rajendro Dutt* (10) and though it may be argued that the observation was *obiter*, the *obiter* of the Privy Council expressed through the mouth of that most eminent jurist, His Lordship the Right Hon'ble Dr. Lushington, ought, I think, to be followed by this Court.

I am further of opinion that the District Magistrate himself even in his personal capacity cannot be made liable to the plaintiff for the order made by him to close the depot, though it was an illegal order. I shall assume that the depot was a place which was provided not only by the local agent (who was bound to provide such a depot under clause 8 of rule 11 made by the Local Government in exercise of the power conferred on the Governor-in-Council by section 91, clause (b), of the Assam Labour and Emigration Act) but that that same depot was also the depot provided by the planters' garden *sardars* under section 62, clause (1), of Act VI of 1901. The illegal order of the District Magistrate affected directly only the local agent and then it affected the

garden *sardars*; the local agent's license having been probably cancelled, he had no cause of action against the District Magistrate. Assuming that the garden *sardars* and even the plaintiff's employers whose labour supply was cut off are entitled to sue the Collector and District Magistrate for damages, they have not brought any suit. It is the plaintiff who has lost his expected commission as agent that has brought this suit. No malice or fraud or deceit is alleged as against the Collector and District Magistrate. Has an agent a right to bring a suit for recovery of damages incurred by him against a person who illegally prevented his principal's garden *sardars* from taking their coolies to the Emigration depot if the tortfeasor is not proved guilty (a) of personal malice directed against the agent or of fraud or deceit, (b) or, if it is not proved that his object was to injure the plaintiff's legal right (to receive commission from his employers for coolies sent through the depot)? The Collector and District Magistrate was under no obligation created by contractual, Statute or any other law to the plaintiff in the plaintiff's individual capacity. The Collector's action in closing the depot was passed against the local agent directly and indirectly against the garden *sardars* and still more indirectly against the planters. So far as that action affected the plaintiff's pocket, it did so in the third or fourth degree of remoteness, so to say. Passages from some of the judgments, in well known cases of *Lumley v. Gye* (11), *South Wales Miners' Federation v. Glamorgan Coal Co.* (12) and *Quinn v. Leathem* (13) might be quoted (and they are usually quoted in those cases where a person, who is not directly affected by an alleged tortious act, seeks to recover damages) which passages, taken apart from the context, can ingeniously be interpreted to support claims by a person most remotely connected with the wrongful act for recovery of damages of as remote a kind.

(9) (1901) A. C. 561 at p. 575; 70 L. J. P. C. 66; 84 L. T. 633; 17 T. L. R. 498.

(10) 8 M. I. A. 103 at p. 131; 2 W. R. 51 (P. C.); 13 Moo. P. C. 209; 3 L. T. 160; 9 W. R. 149 (Eng.); 1 Suth. P. C. J. 413; 1 Sar. P. O. J. 755; 19 E. R. 469; 15 E. R. 78; 132 R. R. 82.

(11) 1853) 2 El. & Bl. 216; 22 L. J. Q. B. 463; 17 Jur. 827; 1 W. R. 432; 95 R. R. 501; 118 E. R. 749.

(12) (1905) A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; 53 W. R. 593; 21 T. L. R. 441.

(13) (190) A. C. 495 at p. 50; 70 L. J. P. C. 76; 86 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

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[See the observations of Lord Halsbury in *Quinn v. Leathem* (13) itself as to the right mode of interpreting such passages.] As Mr. Justice Joyce put it in *National Phonograph Co., Ltd. v. Edison Bell Consolidated Phonograph Co., Ltd.* (14): "What was said was never intended to be, and ought not to be, treated and construed as an Article of a Code or a section of an Act of Parliament." In *Allen v. Flood* (15) six very learned Law Lords formed the majority and three other learned Lords including Lord Halsbury were in the minority. In *Quinn v. Leathem* (13), the House of Lords, led by Lord Halsbury without overruling *Allen v. Flood* (15) explained its real effect. Even Lord Halsbury, who seems to have gone furthest in his judgment in *Allen v. Flood* (15) in favour of the claims of a plaintiff who is injured by the defendant's bringing about a breach of relations between plaintiff and a third party, said that the defendant should be held liable if he "maliciously and wrongfully with intent to injure the plaintiff's intimidated and coerced" the third party "not to enter into contracts with the plaintiffs." I need not say that the question of remoteness of damages is much more strictly considered against a plaintiff who makes a claim based on other torts committed by a defendant than the tort of inducing a breach of contractual relations of a third party with the plaintiff. Even as regards cases of the procuring of a breach of contract, see Rigby, L. J., in *Exchange Telegraph Company v. Gregory & Co.* (16) and Justice Joyce's remarks at page 350 in *National Phonograph Company Ltd. v. Edison Bell Consolidated Phonograph Company, Ltd.* (14).

In the present case, there is not a word in the plaint to indicate that the Collector and District Magistrate in closing the depot maliciously intended by his order to hit at the plaintiff's right to the benefit of the commission obtainable by the plaintiff from the plaintiff's employers, or that the Collector

and District Magistrate was actuated by any indirect motive directed against the plaintiff. I am clear that even if the garden *sardars* and the planters have claims for damages against the Collector (on which I express no opinion), the plaintiff who is an agent of the planters has no legal claim to recover damages for any injury caused to himself pecuniarily and not to his employers.

On the question of the alleged liability of the Governor-in-Council for defaming the plaintiff, I have nothing to add to the reasons given by the learned Chief Justice (in which I concur) for holding that the Governor-in-Council is not liable for publishing words concerning the plaintiff in the course of the official duties of the Governor-in-Council, when it is not alleged that the publication was made maliciously and without reasonable and probable cause.

In the result, I would dismiss the appeal with costs.

Two Counsels certified.

BAKEWELL, J.—By virtue of section 3 of the Assam Labour and Emigration Act, 1901, and the notification of the Local Government made thereunder, all persons are prohibited from recruiting, engaging, inducing or assisting any native of India to emigrate from certain parts of the District of Ganjam to any labour District of Assam, otherwise than in accordance with the provisions of Chapters III and IV of the Act; and under section 163 of the Act any person who knowingly does or attempts to do any of the acts so prohibited, is punishable with imprisonment or fine or with both. Under section 4 of the Act, the Local Government has appointed certain of its officers, by virtue of their official position, to exercise the powers and perform the duties therein mentioned. The general scheme of the Act is that the acts mentioned shall only be done by particular persons duly licensed by the specified authority, under the supervision and control of specified officers and in a particular manner; and the different classes of licensees and their respective powers and duties are carefully enumerated and described.

The Act provides that every intending emigrant shall be brought by the recruiting agent before a registering officer, but the Local Government has enabled certain licensees termed "local agents" to perform the duties

(14) (1908) 1 Ch. 335 at p. 349; 77 L. J. Ch. 218; 95 L. T. 291; 24 T. L. R. 201.

(15) (1898) A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595; 14 T. R. 125.

(16) (1896) 1 Q. B. 147 at p. 157; 65 L. J. Q. B. 262; 74 L. T. 83; 60 J. P. 52.

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of this officer. The local agents represent the employees of the emigrants in all matters connected with supervision of garden *sardars* under Chapter IV of the Act (section 64), the garden *sardar* being a person employed on an estate and deputed by his employer to engage labourers [section 2 (1) (h)]. Every garden *sardar* is bound under section 62 to provide sufficient and proper accommodation in a suitable place for the labourers or persons intending to become labourers collected by him and under section 68 to produce them before the registering officer.

The plaintiff owns a building at Berhampore, in the District of Ganjam, which has been used by numerous garden *sardars* working in the district as a joint depot for the accommodation of the labourers collected by them. In his evidence, the plaintiff said, 'the depot belongs to me. I purchased it. I own the building. I did not rent it to my employers. I bought it out of the commission paid to me.....Now it has been passed as a depot under Chapter IV of the Act since 1906. It is a place of accommodation which *sardars* are bound to maintain.'

The plaintiff holds Powers-of Attorney from various Tea Companies and Superintendents of Companies owning tea gardens in Assam, who are 'employers' within the Act; an 'employer' being the chief person for the time being in charge of any estate upon which labourers are employed [section 2 (1) (f)]. In his evidence, the plaintiff said that the Superintendents were resident in Assam and the chief authorities on the spot: 'they hold Powers-of-Attorney from the Companies. In 1906, I held a contractor's license. I gave it up that year. Since then I have taken no license. I first began to work with local agents about October or November 1906, if I remember a right, and continued up to the present time. I was working with local agents.' In paragraph 3 of his plaint, he alleges that various labour employers in Assam have nominated him 'as their emigration agent for the Madras Presidency for the purpose of securing coolies for labour on the several tea estates.' The plaintiff holds general Powers-of-Attorney from the several companies aforesaid and by agreement with them is entitled to be paid Rs. 7 for every coolie recruited by him; and in paragraphs 8 and 11 he says: 'The plaintiff has several local agents working under him and several

garden *sardars* engaged in recruiting..... Both the *sardars* and the local agents mentioned above and working on behalf of the various tea Companies and employers of labour, are placed under the direction and superintendence of the plaintiff and work under him subject to his orders. And the depot mentioned above is also maintained under his supervision and control.'

In his evidence the plaintiff speaks repeatedly of 'my local agents', 'my depot' and 'my business.'

In February 1910 the District Magistrate and Superintendent of Emigrants, suspecting that the local agent at Berhampore was collecting coolies from parts of the District of Ganjam in which recruiting was absolutely prohibited under the Act, suspended his license and issued orders to the local officials to close the plaintiff's depot, which was under the superintendence of this agent. The plaintiff claims that these acts of the Magistrate were unauthorised and *ultra vires*, that they have resulted in stopping the work of emigration, have 'interfered seriously with plaintiff's business' and have prevented him from earning his commission of Rs. 7 per head of adult coolie recruited and forwarded to Assam under his supervision and of the local agent. The plaintiff in his cross-examination, and his Vakil in his argument before us, contended that he was in the position of an employer, and not one of the agents mentioned in the Act, but a kind of diplomatic agent between the employers and the local authorities. It is, however, perfectly clear from the allegation of the plaint and the plaintiff's evidence that he has been carrying on the business of a wholesale emigration agent and supplying tea planters in Assam with labourers at a fixed rate per head, and that the injury which he complains of, is the damage caused to his own business.

I think that the act contemplates only two classes of persons to whom it shall be lawful to carry on this business, namely, the employer and the employer's licensed agent, and that the plaintiff is not included within either of these classes and was, therefore, prohibited from carrying on this business and was criminally liable for so doing. The only argument of the

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learned Vakil for the plaintiff when this aspect of the case was put to him was that this point was not taken before the learned trial Judge, and that argument might avail him in most cases; but this Court cannot possibly ignore the facts that the plaintiff has been carrying on an illegal business and that his complaint is that the defendant and his agents have interrupted its course and prevented him from reaping its profits. I am of opinion that this suit might have been dismissed on the ground that the plaintiff has no right of action in respect of an illegal business.

If the plaintiff's contentions were correct, and he should be considered to be in the position of an employer, I am still of opinion that he has no remedy. His Vakil has abandoned the first part of the case, the suspension and subsequent dismissal of the local agent, and has relied upon the closing of the plaintiff's depot, and the latter act did not result in any direct damage to the plaintiff or his employers. The plaintiff has not shown that the garden *sardars* could not accommodate their labourers in other suitable places, and could not register their coolies with the Government registering officers and that the business of his employers could not be carried on without using this building, and the evidence goes to show that the stoppage in the flow of emigrants resulted from the plaintiff's attempt to continue the system of registration by a 'local agent' and the resistance thereto of the District Magistrate. The latter's power of appointing local agents is discretionary, [section 64 (1)], so that the plaintiff could not base his claim upon a refusal to appoint. It has not been shown that the District Magistrate was aware of the terms of the contract between the plaintiff and his principals, or of the manner in which a stoppage of the flow of emigrants would injure the plaintiff. The only evidence on this point appears in Mr. MacMichael's cross-examination, 'Q. You know that by this order (that is, to close the depot) you would not only be causing loss to these tea associations but also to Mr. Ross personally? A. I knew in a general way that Mr. Ross was commonly interested. Q. And, therefore, that he would

be financially a loser by this order? A. Probably.'

The District Magistrate cannot be presumed to have known that the plaintiff was remunerated in a manner which suggests an active recruitment of labour by him, and an infringement of the provisions of the Act. The doer of an unlawful act is liable for its ordinary consequences, but not for consequences which he did not and could not reasonably be expected to foresee [*Sharp v. Powell* 17)], and I am of opinion that the District Magistrate could not be expected to foresee that his act in closing the depot would result in so injuring the business of the plaintiff's principals that further damage would result to the plaintiff himself. The observations of Lord Penzance in *Simpson v. Thomson* (18) relate to a negligent act, but indicate the manner in which the Court will limit the liability of a tortfeasor.

I am of opinion that the plaintiff has failed to show that the damage complained of was the consequence of the Magistrate's act, and that in any case it is too remote to give a cause of action.

I agree with the judgment of the learned Chief Justice with respect to the claim for damages for defamation and with the order proposed by my learned brother.

Appeal dismissed.

(17) (1872) 7 C. P. 253; 41 L. J. C. P. 95; 26 L. T. 436; 20 W. R. 584.

(18) (1877) 3 A. C. 279; 38 L. T. 1; 3 Asp. M. C. 567.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 258 OF 1913.

May 11, 1915.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

FAZL-UD-DIN—DEFENDANT—APPELLANT
versus

KHARAK SINGH—PLAINTIFF,

AND OTHER—DEFENDANTS—RESPONDENTS.

Regulation (XVII of 1806), s. 7—Legal representative, meaning of—'Amount due', meaning of—Redemption by owner of share in equity of redemption or by person having interest in portion of mortgaged property, if allowed.

The expression 'legal representative' ordinarily designates a person who represents the estate of a deceased but in Regulation XVII of 1806, it is used to denote a person who is the mortgagor's representative in law *qua* the mortgaged property. In other

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words, it means any person who is interested in protecting the estate and it is immaterial whether the interest is created by the operation of law or by a contract between the parties. [p. 232, col. 1.]

Dirgaj Singh v. Debi Singh, 1 A. 449, *Kishen Bullabh Mehta v. Belasoo Commur*, 3 W. R. 230, referred.

The words 'amount due' in the proviso to section 7 of the Regulation refer to the earlier portion of the section and denote the sum lent under a mortgage-deed plus the interest, if any, but do not include the costs of improvements or the rent which under the deed may be chargeable on the estate. [p. 233, cols. 1 & 2.]

Budree v. Oodho, 1853 N. W. P. S. D. 161, referred to.

When a mortgage is with possession, the amount required to be deposited is the sum lent under the mortgage. [p. 233, col. 2.]

Any person who is entitled to redeem may make the deposit though he is owner of only a share in the equity of redemption. [p. 233, col. 2.]

Norender Narain Singh v. Dwarika Lal Mundur, 5 I. A. 18 at p. 27; 1 C. L. R. 369; 3 C. 397; 3 Suth. P. C. J. 440; 3 Sar. P. C. J. 771; 2 Ind. Jur. 117, referred to.

Ram Bakhsh Singh v. Ram Lall Dass, 21 W. R. 428, dissented from.

A person having an interest in a portion of the mortgaged property is entitled to redeem the whole, unless his claim is opposed by a part owner of the equity of redemption (who may be the mortgagee himself), and in that case he must redeem only the part to which he is entitled. [p. 234, col. 1.]

Rathna Mudali v. Perumal Reddy, 17 Ind. Cas. 837; 12 M. L. T. 484; (1912) M. W. N. 1168; 23 M. L. J. 376; 38 M. 310; *Hall v. Heward*, (1886) 32 Ch. D. 430; 55 L. J. Ch. 604; 54; L. T. 810; 34 W. R. 571, and *Bikram Khan v. Sidal Khan*, 2 P. R. 1904; 18 P. L. R. 1904, referred to.

Nawab Azimut Ali Khan v. Jowahir Singh, 13 M. L. A. 444; 14 W. R. 17 (P. C.); 2 Suth. P. C. J. 343; 2 Sar. P. C. J. 573; 20 E. R. 602 *Girish Chunder Dey v. Jaramoni De*, 5 C. W. N. 83, distinguished.

Second appeal from the decree of the Divisional Judge, Lahore, dated the 14th November 1912.

The Hon'ble Mr. Muhammad Shafi, K. B., and Lala Nihal Chand, for the Appellant.

Mr. Broadway, for the Respondents.

JUDGMENT.—This appeal arises out of a suit with respect to a plot of land which was the property of two brothers, Ghulam Rasul and Ilahi Bakhsh, who are defendants in the case. On the 16th of November 1892 they executed a deed in favour of the defendant-appellant by which they mortgaged the estate with possession for Rs. 3,400. The other terms of the mortgage which are relevant to the points in issue in this appeal are that (1) the mortgagors shall redeem the property on the expiry of eight years, the term of the mortgage, and (2) they shall at the time of the redemption, pay in addition to the mortgage-

money, the cost of any improvements effected by the mortgagee, which cost shall constitute a charge on the mortgaged property. Ilahi Bakhsh, one of the mortgagors, executed on the same day a rent-deed in favour of the mortgagee, by which he took the land on lease on a yearly rent of Rs. 206 plus the land revenue assessed thereon, and further stipulated that the unpaid portion of the rent, if any, and the land revenue, if paid by the mortgagee, would be chargeable on the land. It appears that the lessee remained in possession for two years and as he made default in the payment of the rent, a decree for Rs. 412 (the amount of the rent for two years) and costs was passed on the 7th November 1895 against his person and the mortgaged property. In 1908 the mortgagee after the expiry of the period of the mortgage issued notices of foreclosure to the mortgagors, claiming Rs. 11,000 as the amount due on the strength of the mortgage-deed and before the expiry of the year of grace, the plaintiff, Kharak Singh, who had purchased on the 16th of January 1909 Ghulam Rasul's half share in the land for Rs. 9,000, deposited Rs. 3,400 in the Court of the District Judge for payment to the mortgagee and claimed redemption of the entire estate. The mortgagee refused to accept this sum and Kharak Singh consequently brought the present action for redemption of the mortgaged property.

These are briefly the facts of the case and we may state at once that the learned Divisional Judge has, after a consideration of the material upon the record, found that the mortgagee's allegations as to an oral sale and an oral agreement to sell have not been established and that the amount claimable by him on account of repairs and improvements is Rs. 868-5-0. These are obviously findings of facts, and the law precludes us from going behind them in a second appeal. Further, the sale in favour of the plaintiff being admitted by Ghulam Rasul, it is not open to the mortgagee to impugn its validity on the ground of the non-payment of part of the consideration. Assuming that the whole consideration did not pass, it is clear that Ghulam Rasul had every right

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to make a gift of his property to any person he pleased and that the mortgagee has no right to challenge the title of the donee.

The questions of law, which require determination, relate to the sufficiency of the deposit made by the plaintiff to prevent foreclosure and to the right of the purchaser of the equity of redemption in a part of the estate to redeem the whole. On both these points the learned Divisional Judge has found against the mortgagee and for the reasons to be stated *infra* we think his decision is correct and must, therefore, be maintained.

Before discussing the points referred to above, it is necessary to deal with a contention which is raised for the first time in this Court. It is urged that Regulation XVII of 1806 allows only the mortgagor or his legal representative to make the payment, tender or deposit, and as the purchaser of the equity of redemption is not the legal representative of the mortgagor, the plaintiff had no right to make the deposit and that the deposit of Rs. 3,400 made by an unauthorised person did not bar foreclosure. We have given our consideration to this argument and have no hesitation in holding that it is erroneous and opposed to all canons of the interpretation of the Statutes. The expression "legal representative" ordinarily no doubt designates a person who represents the estate of a deceased, but the context points to the irresistible conclusion that in the Regulation it is used to denote a person who is the mortgagor's representative-in-law *qua* the mortgaged property. In other words, it means any person who is interested in protecting the estate, and it is immaterial whether the interest is created by the operation of law or by a contract between the parties. The narrow construction sought to be placed upon the term ignores altogether the object and the scope of the Regulation and leads to all sorts of absurd results which could not possibly be within the contemplation of the Legislature. It comes to this that as soon as there is a transfer of the equity of redemption, there is nobody who is entitled to redeem the mortgage, because a transferor is apparently not the "mortgagor and owner" within the purview of section 7 of the Regulation and the transferee has no *locus standi* for, according to the appellant, he is not the "legal representa-

tive" of the "mortgagor and owner." The same remark applies to the foreclosure proceedings under section 8, and it is clear that there would be no person upon whom the service of the notice of foreclosure could lawfully be made. No Court of Justice can give effect to a construction which brings about an *impasse* of this kind.

Further, we observe that the matter is by no means *res integra* and that there is a long series of published judgments decided under the Regulation which recognise the transferee of the mortgagor as his legal representative, *vide, inter alia*, *Mohun Lall Sookool v. Goluck Chunder Dutt* (1), *Dirgaj Singh v. Debi Singh* (2) and *Mulraj v. Sobha Ram* (3). The principle of law is firmly established that the term "mortgagor's legal representative" is intended to apply to all or any persons who possess title to the equity of redemption, whether absolute or defeasible under the mortgage [see *Dirgaj Singh v. Debi Singh* (2) and *Kishen Bullubh Mehta v. Belasoo Commur* (4)]. Upon an examination of the terms of the Regulation and the rulings, we are quite clear that the contention of the appellant is altogether untenable and must be overruled.

Coming now to one of the main points of the appeal, namely, the sufficiency or otherwise of the deposit made by the plaintiff, we notice that under section 7 of the Regulation the amount required to be paid or tendered is the "sum lent" under the deed, plus interest due thereon if the mortgage is without possession. It is, however, contended on behalf of the appellant that the proviso to the section which deals with deposits in Court, contains the words "amount due" and that these words are wide enough to include, not only the principal and interest, if any, but also the costs of improvements which under the deed are chargeable on the estate. No authority is cited in support of this novel contention and it is impossible to sustain it in the face of the plain language of the Regulation and the decisions which deal directly with this matter. The learned Counsel for the appellant concedes (and the terms of the section leave him no alternative) that for payment or tender the law does not require anything more than the balance of the principal mortgage money

(1) 10 M. I. A. 1; 1 W. R. 19 (P. O.); 1 Suth. P. O. J. 523; 2 Sar. P. C. J. 49; 19 E. R. 873.

(2) 1 A. 490.

(3) 31 P. R. 1883.

(4) 3 W. R. 230.

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and the interest, if any; and we fail to understand why a distinction should be drawn between a deposit in Court and a payment or tender out of Court. There is absolutely no valid reason why the law should insist upon the deposit of a larger amount than that required to be paid or tendered by the mortgagor to the mortgagee. We think there is no doubt that the words "amount due" refer to the earlier portion of the section and denote not the amount due on the footing of the mortgage, but the sum ascertained in accordance with the rule laid down in the section itself.

This conclusion receives support from the language of Regulation I of 1798 which, it is to be remembered, is the principal enactment on the subject of the redemption of mortgages by way of conditional sale. The subsequent Regulation, namely, Regulation XVII of 1806, is practically an extension of the earlier Regulation and gives the mortgagor a year of grace and allows him to redeem therein the mortgaged property in the same manner as the Regulation of 1798. Now, we find that section 2 of the earlier Regulation places the matter in respect of the amount of the deposit beyond all possible dispute by enacting as follows:—"That there may be no doubt to what amount the deposit in question is to be made, it is required to be as follows:—When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent, with the stipulated interest thereon, not exceeding the legal rate of 12 per cent. per annum; or, if interest be payable and no rate has been stipulated, with interest at the established rate of 12 per cent.; but, if the lender has held possession of the land, the principal sum borrowed only need be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either case, a deposit made as above required, shall be considered to preserve to the borrower his full right of redemption; and if the land be in the possession of the lender, shall entitle him to demand the immediate recovery thereof, subject to the adjustment of account specified in the following section."

The object of the Regulation is to determine definitely and precisely the

amount which has to be deposited, and it is clear that the mortgagor is not bound to deposit the amount of any improvements, though he has agreed to pay for them. Nor is it necessary for him to deposit any money due as rents, though that money was chargeable on the estate under the deed. This proposition of law is absolutely clear, and if any authority is needed, we would refer to the decision in *Budree v. Oodho* (5), and to the discussion on the subject in Ghosh on Mortgages, 3rd edition, page 971. In this case, the mortgage being with possession, the amount required to be deposited was the sum lent under the mortgage, and it is beyond dispute that that amount was deposited within time.

There is no doubt that any person who is entitled to redeem may make the deposit, though he is owner of only a share in the equity of redemption. As observed by their Lordships of the Privy Council in *Norender Narain Singh v. Dawarka Lal Mundur* (6), "each and every one of the mortgagors was interested in the payment of that money and the redemption of the estate, and each and every one of them had a right by payment of the money to redeem the estate, seeking his contribution from the others." The judgment in *Ram Bakhsh Singh v. Ram Lal Das* (7), cited for the appellant is not good law and has not been followed in subsequent cases. Further, it is distinguishable on the ground that in the case before us the deposit was made on behalf of the mortgagors. No objection can, therefore, be taken to the validity of the deposit made by the plaintiff.

Lastly, it is urged upon us that the plaintiff as the purchaser of one-half of the mortgaged property is not entitled to redeem the whole. It will be observed in this connection that the owner of the remainder, who is a defendant in the case, does not oppose the plaintiff's claim and the only person, who resists it, is the mortgagee. Now, the principle of law applicable to a case of this kind has been enunciated in a series of judgments and it

(5) (1853) N. W. P. S. D. 161.

(6) 5 I. A. 18 at p. 27 (P. C.); 1 C. L. R. 369; 3 C. 397; 3 Suth. P. C. J. 480; 3 Sar. P. C. J. 771; 2 Ind. Jur. 117.

(7) 21 W. R. 428.

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is to the effect that a person having an interest in a portion of the mortgaged property is entitled to redeem the whole, unless his claim is opposed by a part owner of the equity of redemption (who may be the mortgagee himself), and in that case he must redeem only the part to which he is entitled. This is the rule laid down even in the judgment reported as *Rathna Mudali v. Perumal Reddy* (8) which has been so strongly relied upon by the appellant's Counsel. *Nawab Azimut Ali Khan v. Jowahir Singh* (9) and other cases cited on behalf of the appellant are inapplicable, for the very simple reason that the claim for redemption of the entire property was opposed in those cases by a person who was owner of a portion of the equity of redemption. The only case in which the suit of the plaintiff owning a part of the mortgaged property was successfully resisted by the mortgagee is that reported as *Girish Chunder Dey v. Jaramoni De* (10). But the facts of that case are not clear and it does not appear whether the owners of the remaining portion were or were not opposed to the plaintiff's claim. If that judgment intended to lay down the rule that the claim of a part owner of the equity of redemption can be defeated simply at the instance of the mortgagee, who is not at the same time owner of any portion of the mortgaged property, we must, with all respect, state that it is not good law. The right of a part owner to redeem the whole is fully recognised by English Courts and is borne out by the following observations of Lord Justice Cotton in *Hall v. Heward* (11):—

"The mortgage comprises two properties—one of which, subject to the mortgage, belongs to the executrix. She, therefore, is entitled to redeem, but to redeem what? The appellant says 'to redeem the one estate which belongs to her.' But there is no precedent for that. The owner of the equity of redemption in one of the two estates comprised

in the same mortgage cannot claim to redeem that estate alone. The mortgagee might refuse to allow him to do so. So, on the other hand, the mortgagee cannot compel him to redeem that estate alone—he is entitled to redeem the whole, reserving the equities between him and the other part-owner—he can redeem the whole, leaving the rights of the other parties interested in the equity of redemption to be decided afterwards. The case of *Pearce v. Morris* (12) is an instance of this—the owner of one-fourth of the equity of the redemption was allowed to redeem the whole, leaving open the rights of the owners of the other three-fourths as between them and the party redeeming."

The exposition of law in *Bahram Khan v. Saidal Khan* (13) is also to the same effect. This and other authorities leave no doubt in our minds that the plaintiff, the owner of a part of the equity of redemption, is entitled to redeem the entire mortgaged property and that the mortgagee has no *locus standi* to oppose his claim.

The result is that our decision on the points argued in this second appeal coincides with that of the lower Appellate Court. We, therefore, affirm the judgment and the decree of the learned Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

(12) 5 Ch. 227; 39 L. J. Ch. 342; 22 L. T. 190; 19 W. R. 196.

(13) 2 P. R. 1904; 48 P. L. R. 1904.

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 325 OF 1914.

September 17, 1915.

Present:—Mr. Justice Coutts-Trotter and Mr. Justice Phillips.

A. L. A. R. ARUNACHELLAM
CHETTIAR AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

LAKSHMANA AIYAR AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 14—Withdrawal of suit by plaintiff—Subsequent suit—Exclusion of time, whether allowed—Civil Procedure Code (Act V of 1908), O. XXIII, rr. 1, 2.

Section 14 of the Limitation Act has no application to a case where the plaintiff's suit has not been

(8) 17 Ind. Cas. 837; 23 M. L. J. 576; 12 M. L. T. 484; (1912) M. W. N. 1168; 38 M. 310.

(9) 13 M. I. A. 404; 14 W. R. 17 (P. C.); 2 Suth P. C. J. 346; 2 Sar. P. C. J. 573; 20 E. R. 602.

(10) 5 C. W. N. 83.

(11) (1886) 32 Ch. D. 430; 55 L. J. Ch. 604; 54 L. T. 810; 34 W. R. 571.

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dismissed by the Court, but has been voluntarily withdrawn by him on discovery of a technical defect which would involve failure. [p. 236, col. 1.]

Varajalal v. Someshwar, 29 B. 219, 7 Bom. L. R. 90 *Upendra Nath Nag Chowdhury v. Surya Kanta Roy Chowdhury*, 20 Ind. Cas. 205, followed.

Second appeal against the decree of the District Court of Tinnevely in Appeal Suit No. 273 of 1912, preferred against that of the Court of the Additional District Munsif of Tinnevely, in Original Suit No. 303 of 1910.

FACTS of the case appear from the judgment.

Mr. K. Raja Aiyar, for the Appellants.—Under the Code of Civil Procedure, the plaintiff obtained permission to institute a fresh suit, but that suit was instituted after the period of limitation. Under section 14 of the Limitation Act he is entitled to a deduction of the time the previous suit was pending in his favour, and the provisions of the Code of Civil Procedure are subject to the provisions of the Limitation Act.

Mr. E. S. Chidambaram Pillai, for the Respondents.—The plaintiff would have been entitled to the deduction of the time only if his suit had been dismissed by the Court and not when he withdrew the suit or abandoned it. The decisions in *Varajalal v. Someshwar* (1), *Upendra Nath Nag Chowdhury v. Surya Kanta Roy Chowdhury* (2) are clear on this point.

JUDGMENT.—This appeal raises a question of some interest and the circumstances in which it is raised are these:—The appellant brings this suit against two persons, who were at one time partners, in respect of moneys advanced by him to them. The only question for decision is whether this action is barred by limitation as regards the various items in the account, which became due more than three years before the date of this suit. The Courts below have held that this suit was barred in respect of these items. An ingenious argument has been adduced before us to show that that decision was wrong and the plaintiff is entitled to take the benefit of section 14 of the Limitation Act. The circumstances in which he claims that benefit are these. He instituted a previous suit against the

same parties as those in this proceeding, and as originally framed, that suit included his claim now said to be barred and apparently included nothing that would have made that suit, as originally launched, bad for misjoinder or any other cause, but during the pendency of the proceeding, he was allowed to amend the plaint and to put in another cause of action as to which it is not seriously disputed that it rendered the suit as it then stood bad for misjoinder of causes of action. Thereupon he applied to the Court in which the suit was pending for leave to amend it, or withdraw it with permission to institute a fresh suit in respect of the subject-matter of that action, at any rate in so far as it coincided with the claim he makes here to-day. That can be done under the provisions of rule 1 of Order XXIII. Rule 1 of Order XXIII says:—

"(1) At any time after the institution of a suit, the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim, with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim."

That is what the plaintiff did in this case. Whether he abandoned the whole of his claim or such part of it as we are concerned with in this appeal, he obtained the right to institute a fresh suit. Rule 2 of Order XXIII is in these terms: "In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted." On the face of it, that appears to be conclusive and fatal to the appellant's case; but he contends that the rule with its reference to the law of limitation impliedly subjects the whole matter to the provisions of the law of

(1) 29 B. 219; 7 Bom. L. R. 90.

(2) 20 Ind. Cas. 205.

MADDALA BAGAVANNARAYANA v. VADAPALLI PERUMALLACHARYULU.

limitation then in force and that section 14 of the Limitation Act expressly preserves his rights. Section 14 of the Limitation Act is as follows:—"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it." It may be conceded for the purposes of this case, though it is not altogether clear, that there is no express finding against the plaintiff that he did not prosecute his suit in the other Court with due diligence. The question then arises whether section 14 preserves his rights in a case where his suit has not been dismissed by the Tribunal, but has been voluntarily abandoned by himself on discovery of a technical defect which would involve a failure. The matter is not free from difficulty and it has been decided in *Varajlal v. Someshwar* (1) that the section in question of the Limitation Act has no application to a case of withdrawal of the suit and can only apply to cases where the failure of the suit was due to the action of the Court. The same result has been arrived at by the Calcutta High Court in *Upendra Nath Nag Chowdhury v. Surya Kanta Roy Chowdhury* (2). These are quite clear authorities for the position advanced by the respondent and we think they should be followed, particularly when it is seen that, by so construing the section of the Limitation Act, [there is the avoiding of] any such result as the clashing of the two sections, or the necessity for reconciling any apparent inconsistencies between them. If we treat the section of the Limitation Act as unconcerned with suits which are voluntarily abandoned or withdrawn, then there is no trouble to reconcile the sections, because they do not need reconciling as they each deal with a separate subject-matter. The Limitation Act deals with suits which are terminated by the action of the Court, while the Civil Procedure Code deals, as the heading of the order shows, with cases where suits are

withdrawn or abandoned by a voluntary act of the plaintiff.

We think that the appeal fails and should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 144 TO 146 OF 1912

March 23, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

MADDALA BAGAVANNARAYANA AND
ANOTHER—PLAINTIFFS—APPELLANTS

versus

VADAPALLI PERUMALLACHARYULU

AND OTHERS—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Sanction given to more than two persons—Suit by only two, whether competent.

Where more than two persons interested in a trust have obtained the necessary sanction under section 92 of the Civil Procedure Code, any two of them cannot sue without the others. [p. 237, col. 1.]

Appeals against the decrees of the Court of the Subordinate Judge of Kistna at Ellore, in Original Suits Nos. 84, 86 and 87 of 1910.

FACTS.—Four persons obtained the sanction under section 92, Civil Procedure Code, but only two of them brought the suit, alleging that the other two had been won over by the defendants and refused to join in the suit. The Court allowed the defendants' contention that sanction having been given to four persons, only two of them could not sue without obtaining fresh sanction. The plaintiffs appealed.

Mr. B. Somayya (with him Mr. P. Narayana-murti), for the Appellants.

Mr. V. Ramesam (with him Mr. B. N. Sarma), for the Respondents.

JUDGMENT.—Section 92 of the Code of Civil Procedure provides that "two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General" may institute a suit under that section. The question is whether when more than two persons interested in the trust have obtained the necessary consent, any two of them may

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sue without the others. We think the language used shows that the persons authorised to sue are all the persons to whom the consent has been given, and not any two of them. On the opposite contention, there might be competition between the various persons authorised as to who should sue. Besides, the provision for giving consent to two or more persons shows that the Legislature considered that in some cases it might not be desirable for only two to sue.

In this connection it is worth mentioning that Romilly's Act, upon which this section was founded, enabled any two persons interested to apply, and that here the Legislature has empowered any two or more persons with the consent of the Advocate-General. The appeals are dismissed with costs. The memorandum of objections in Appeal No. 146 of 1912 is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 662
OF 1914.

May 11, 1915.

Present:—Sir Donald Johnstone, Kt., Chief
Judge.

Musammât MAHANT DEVI—PLAINTIFF—
APPELLANT

versus

MADHO AND OTHERS—DEPENDANTS—
RESPONDENTS.

*Guardians and Wards Act (VIII of 1890), ss. 7, 8—
Minor girl living with mother—No property—Applica-
tion to be appointed guardian—Applicant not suitable
—Court's duty.*

When the sole question before the Court is whether the applicant is a suitable person to be appointed guardian of the minor or not, it is not necessary for the Court to do anything more than accept or reject his application.

Where a minor girl is living with her mother, the Court should leave things as they are, especially when she has no property, and should not appoint a statutory guardian, the mother remaining the natural guardian.

Miscellaneous first appeal from the order of the District Judge, Gurdaspur, dated the 12th February 1914.

Pandit Rambhaji Datta, for the Appellant.

JUDGMENT.—This case is a good illustration of the uncalled-for extension of juris-

diction assumed by many District Courts in guardianship work. The sole question before the Court was whether Madho, applicant, should be guardian of the minor or not. He was found unsuitable, probably with very good reason, and it was really not strictly necessary for the Court to do anything more than reject his petition. The girl was living with her mother and things might just as well have been left as they were, especially as the girl has no property. But the Court learnt that the child was said to have been married to one Rasila, who was thereupon called up; and after examining him the Court summarily held the marriage "unlawful and brought about by force," appointed the mother guardian and demanded Rs. 500 security from her, for what purpose is not stated, but perhaps by way of enforcing the Court's further injunction that she was not to marry off the girl without the Court's permission.

Though the mother, who now appeals here, does not specifically ask for cancellation of her appointment as guardian, I think this is what she would really like. She does ask for cancellation of the decision as to the minor's marriage and of the security order; and if these are cancelled she practically ceases to be a statutory guardian. I accept the appeal set aside the whole of the lower Court's order except that Madho's application stands rejected. I cancel the appointment of the appellant as statutory guardian and the demand for security and she remains natural guardian. I cancel the finding that the marriage to Rasila is unlawful, and leave that to be decided, if the matter is ever in dispute, by regular suit. I also cancel the order regarding appellant's power of marrying off the girl, should it prove that she is unmarried in law.

Appeal accepted.

SUKHLAL CHUNDERMULL P. EASTERN BANK, LTD.

SOHNA P. KHAWAJA.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL APPEAL No. 5
OF 1915.

January 18, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief
Justice, and Mr. Justice Woodroffe.

SUKHLAL CHUNDERMULL—

DEFENDANT—APPELLANT

versus

EASTERN BANK, LTD.—PLAINTIFF—

RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXXVII—
Order to furnish security—Letters Patent, cl. 15—
Appeal.*

No appeal lies against the order of a single Judge on the original side of the High Court directing the defendant in a suit under Order XXXVII of the Civil Procedure Code to furnish security before granting him leave to defend the suit.

Appeal against an order of the Hon'ble Mr. Justice Chitty, dated the 4th January 1915, in Original Suit No. 1271 of 1914.

FACTS.—The plaintiff Bank instituted a suit on the original side of the High Court under Order XXXVII of the Civil Procedure Code against the defendants for amounts due on several Bills of Exchange. The defendant applied to be allowed to appear and defend the suit, on the ground that he had a good defence to the suit. The Judge on the original side allowed the application conditional on the defendant giving security to the satisfaction of the Registrar of the Court to the extent of the plaintiff Bank's claim in the suit. The defendant appealed against this order.

Mr. Zorab, for the Appellant.

Mr. Aretoom, for the Respondent.

JUDGMENT.

JENKINS, C. J.—According to a course of decisions in this Court, the order complained of is not a "judgment" from which an appeal lies under the Letters Patent. Reference has been made to a number of Madras authorities, which are entitled to every respect but which we cannot follow in preference to the course of decisions in this Court. It has always been recognised that the Madras High Court has taken a somewhat broader view of clause 15 of the Charter than has prevailed here. The decisions of this Court rest upon what was said by Sir Richard Couch in *Justices of the Peace for Calcutta v. Oriental Gas Company* (1). In

(1) 8 B. L. R. 433; 17 W. R. 364.

this case there is not even an appeal allowed under the Code, so that it cannot be suggested, if the order made been had in a Mofussil Court, that an appeal would have lain under Order XLI. But that perhaps is not so material here, as it would be in Bombay where it would possibly have been regarded as decisive of the question against the appellant: *Sombai v. Ahmedbhai Habibhai* (2).

We must, therefore, dismiss this application with costs.

WOODROFFE, J.—I agree.

Appeal dismissed.

(2) 9 B. H. C. R. 398.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 227 of 1914-15.

August 19, 1915.

Present:—Sir M. W. Fenton, Kt.SOHNA AND ANOTHER—DEFENDANTS—
APPLICANTS*versus*KHAWAJA AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 4 (15), 5 (1) (d)—*Muafi*—*Mujawar*—*Village servant*—*Jagirdar*.
The *mujawar* of a village *khangah* to whom some land has been granted as a '*muafi*' by the village proprietors for the maintenance of the *khangah*, is a '*village servant*', and is, therefore, excluded from the definition of '*jagirdar*' as given in section 4 (15) of the Punjab Tenancy Act. [p. 239, col. 2.]

Rattan Singh v. Fajju Shah, 12 P. R. 1878; *Dogar Mal v. Secretary of State*, 4 P. R. 1904 Rev.; 82 P. L. R. 1904, distinguished.

Revision from the order of the Commissioner of Rawalpindi, dated the 13th May 1915.

ORDER.—The only question which I need consider among those raised by this revision application is whether the assignee enjoying a *muafi* granted for the maintenance of a *khangah* is a '*jagirdar*' within the meaning of section 4 (15) and section 5 (1) (d) of the Punjab Tenancy Act, or is excluded from that definition as being a '*village servant*.' The issue thus raised is clearly put in the following extract from the judgment of the learned Commissioner:—

SOHNA v. KHAWAJA.

"The principal point for decision is whether the persons in charge of this *khangah*, of Haji Suleiman, are village servants. If they are village servants, then they are not "*jagirdars*" as defined in section 4 (15) of the Tenancy Act. I consider that there is great force in the line of argument put forward by Major Coldstream, in spite of the fact that in *Rattan Singh v. Fajju Shah* (1) a *takiadar* has been regarded as *muafidar* or *jagirdar*, and that in *Dogar Mal v. Secretary of State* (2) an assignee of land revenue for the maintenance of a *thakardawara* was granted occupancy rights under section 5 (1) (d) of the Tenancy Act. As regards the first ruling, which was under the old Act, I would note that the term *jagirdar* was not defined in the old Tenancy Act, XXVIII of 1868. The point as to whether the *takiadar* was a village servant, and as such not entitled to the status of a *jagirdar* in claiming occupancy rights, was not discussed. In *Dogar Mal v. Secretary of State* (2) the proprietor of the land was the Crown, and here again the point now in issue was not discussed. The position of Government as a proprietor of land in respect of a *thakardawara* in its estate would perhaps be somewhat different from that of the private proprietors of a village in respect of a *khangah*.

"Taking the present case on its merits the *mujawars* were required to keep the *khangah* in repair and to serve travellers, giving them a smoke and water and generally attending to their needs. It was in return for this service that the village proprietors gave them certain land rent free as regards cash or payment. But the land was not actually rent free, as the rent was a service rent. I am strongly of the opinion that the *mujawars*' status was that of the servants of the village proprietors. These felt bound to arrange for the discharge of certain offices at the *khangah* and they employed the appellants for this purpose. I agree, therefore, with Major Coldstream that these *mujawars*, the appellants, were servants of the village proprietors and that they do not possess the status of

jagirdars under section 4 (15) of the Tenancy Act."

Of the two judgments cited by the Commissioner the first, *Rattan Singh v. Fajju Shah* (1), may be disregarded because under the Tenancy Act of 1868 *muafidars* who were village servants were not excluded from the definition of "*jagirdar*." It is true that in *Dogar Mal v. Secretary of State* (2) the assignee of land revenue for the maintenance of a *thakardawara* was granted occupancy rights under section 5 (1) (d) but, as noticed by the Commissioner, the point was not discussed whether a person in that position could be regarded as a "village servant." In addition to the reasons given by the Commissioner for distinguishing that case from the present, it may be mentioned that the claimant to the status of *jagirdar* in 1904 was a descendant of the original founder of the *thakardawara*.

The real point in the present case is whether service of a religious or quasi-religious character, such as that performed by the custodians of a village *khangah*, is to be regarded as bringing the persons responsible for such service within the category of "village servant," so as to exclude them from the definition of "*jagirdar*." I have no hesitation in accepting the views of the Collector and Commissioner on this point. When the present Tenancy Act was under consideration as a Bill, the Lahore Committee, appointed to revise and re-draft the Bill, reported as follows with reference to the definition of "*jagirdar*":—

"The words 'other than a village servant' have been inserted because small assignments have often been made to priests and menials in consideration of village service, and we do not consider such persons to be equitably entitled to rights of occupancy in plots so held by them."

This seems conclusive. The *muafi* in the present case was originally granted by the *zemindars* of the village for the service of the *khangah*. I must hold that the defendants Sohna and Allah Lok are "village servants" and as such are not entitled to be treated as "*jagirdars*" or ex-*jagirdars* for the purpose of section 5 (1) (d) of the Tenancy Act.

(1) 12 P. R. 1878.

(2) 4 P. R. 1904 Rev.; 82 P. L. R. 1904.

DHARMARAJA IYER v. SREENIVASA MUDALIAR.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 711 OF 1915.

September 22, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.DHARMARAJA IYER AND ANOTHER—
PETITIONERS

versus

K. G. SREENIVASA MUDALIAR AND
OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2), 47, 148, O. XXXIV, r. 8, proviso—Order extending time for payment of money due under mortgage-decree, if appealable—Extension of time—Time limit under decree—Preliminary decree by Appellate Court—Determination of other questions—Suit, remitting of—“Court” in O. XXXIV, r. 8 proviso, meaning of.

An order extending time for payment of money due under a mortgage decree is neither “a decree” within the meaning of section 2 (2) nor a determination of any question coming within section 47 of the Code of Civil Procedure and, therefore, no appeal lies against such an order. [p. 240, col. 2.]

Section 148 of the Code of Civil Procedure does not apply to the extension of time for doing acts allowed by decrees. [p. 240, col. 2.]

Het Singh v. Tika Ram, 14 Ind. Cas. 240; 34 A. 388; 9 A. L. J. 381; *Suranjan Singh v. Ram Bahal Lal*, 17 Ind. Cas. 912; 10 A. L. J. 520, followed.

It is the Court of first instance, to which a suit is remitted after the preliminary decree has been passed by an Appellate Court, which has the exclusive jurisdiction to deal with an application for extension of time presented under Order XXXIV, rule 8, proviso. [p. 240, col. 2.]

Venkata Krishna Aiyar v. Thiagaraya Chetti, 23 M. 521; 10 M. L. J. 145; *Sheonarain v. Chunni Lal*, 23 A. 88; A. W. N. (1900) 209; *Ram Dhani Sahu v. Lalit Singh*, 2 Ind. Cas. 220; 6 A. L. J. 251; 31 A. 328; *Shama Dhone Dutt v. Lakhinani Debi*, 6 Ind. Cas. 323; 13 C. L. J. 459, followed.

The word “Court” in Order XXXIV, rule 8, proviso, does not in all cases mean “the Court which passed the decree.” [p. 241, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbaconam, in Original Petition No. 927 of 1912, in Appeal Suit No. 653 of 1909 (Original Suit No. 136 of 1908 on the file of the Court of the District Munsif of Mannargudi).

Messrs. S. Varadachariar and Ramabhadra Aiyar, for Mr. T. R. Venkatarama Sastriar, for the Petitioners.

Messrs. G. S. Ramachandra Aiyar and T. Muthia Pillai, for Mr. S. Muthiah Mudliar, for the Respondents.

JUDGMENT.—There is a preliminary objection taken that no appeal lies against the order of the lower Court extending the

time for payment of the mortgage amount, an order passed under the proviso to Order XXXIV, rule 8, and under section 148 of the Civil Procedure Code. (As regards that portion of the order of the lower Court which effected an addition of parties under Order XXII, rules 10 and 11, we were told that this appeal was not directed against that portion).

We think that the preliminary objection is sound. The order extending time does not come within the definition of a decree (See section 2, clause 2, of the Civil Procedure Code). We are clear that it does not determine any question coming within section 47, as was ingeniously contended by the appellant's learned Vakil, Mr. S. Varadachariar.

We, however, allowed this appeal to be converted into a revision petition under section 115, Civil Procedure Code.

The question for consideration on this footing will be whether an Appellate Court, which passed the preliminary decree in a mortgage suit (which was treated as a combined suit for redemption as regards a prior mortgagee and for sale as regards the mortgagor), has jurisdiction to entertain an application for extension of time under Order XXXIV, rule 8, proviso, and section 148.

As regards section 148 we concur with the decisions of *Het Singh v. Tika Ram* (1) and *Suranjan Singh v. Ram Bahal Lal* (2) that that section does not apply to the extension of time for doing acts allowed by decrees.

As regards Order XXXIV, rule 8, we agree with the cases of *Venkata Krishna Aiyar v. Thiagaraya Chetti* (3), *Sheonarain v. Chunni Lal* (4), *Ram Dhani Sahu v. Lalit Singh* (5) and *Shama Dhone Dutt v. Lakhinoni Debi* (6) that it is the Court of first instance, to which the suit was remitted after the preliminary decree was passed by the Appellate Court, which has the exclusive jurisdiction to deal with an application under Order XXXIV, rule 8, proviso. Section 37, quoted by the respondents' learned

(1) 14 Ind. Cas. 240; 9 A. L. J. 381; 34 A. 388.

(2) 17 Ind. Cas. 912; 10 A. L. J. 520.

(3) 23 M. 521; 10 M. L. J. 145.

(4) 23 A. 88; A. W. N. (1900) 209.

(5) 2 Ind. Cas. 220; 31 A. 328; 6 A. L. J. 251

(6) 6 Ind. Cas. 323; 13 C. L. J. 459.

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Vakil, has no relevancy as Order XXXIV, rule 8, proviso, does not contain the expression "Court which passed a decree" or "words to that effect" but only the one word "Court" occurring in that expression. But it is argued that the word "Court" means, from the context in the former portions of that rule 8, only the "Court which" (actually) "passed the decree" even if that Court be the Appellate Court. But even if the word "Court" has that meaning in the former portions, we do not see that the single word "Court" constitutes the expression "Court which passed a decree" or "words to that effect" when that single word is not followed by any words corresponding to the words "which passed a decree." The said word "Court" in the clauses 1, 2 and 4 of that rule (8) which relates to the passing of final decrees in mortgage suits would, no doubt, mean the same thing as the expression "Court which passed a decree," when the Court which passed a preliminary decree was (as it would ordinarily be) the Court of first instance. But to argue, therefore, that the word *must* mean in all cases "the Court which passed the decree" even if that Court was the Appellate Court, and not the Court of first instance, and that, therefore, the word "Court" in the proviso also means only the Appellate Court, if that is the Court which passed the decree, and does not include the Court of first instance, except by a reference to section 37, seems merely to beg the question in issue.

Further, section 37 includes the Court of first instance only where proceedings have to be taken "in relation to the execution of decrees" in certain contingencies. The application now in question does not, in the first place, relate to the execution of any decree and in the second place, the decree-holder seeks, not to include the Court of first instance on the strength of section 37, but to either include or to mean only the Appellate Court.

In the result, we allow the revision petition and direct the Sub-Court to return the petition, so far as it prays for an extension of time, to be presented to the Court of first instance. Costs hitherto will abide. A fair copy of the petition might be attached to the original petition (which is really a combination of two separate petitions) when the latter is presented to the Court of first

instance, the words "may be pleased to add them as plaintiffs Nos. 3, 4 and 5" being omitted from the fair copy attached.

Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 26 OF 1911.

April 6, 1915.

Present:—Justice Sir Donald Johnstone, Kt., and Mr. Justice LeRossignol.

SHER SINGH AND OTHERS—DEFENDANTS—
APPELLANTS

versus

SALIG—PLAINTIFF—RESPONDENT.

Custom—Succession—Pagwand—Chundawand—Mouza Kakrola, Delhi Tahsil

Among the *Jats* of Mouza Kakrola in the Delhi Tahsil *chundawand* and not *pagwand* is the rule of succession. [p 242, col. 1.]

Second appeal from the decree of the Additional Judge, Delhi Division, dated the 8th October 1910.

Pandit Rambhaya Datt, for the Appellants.

Lala Gopal Chand, for the Respondents.

JUDGMENT.—The parties are *Jats* of Kakrola village of Delhi Tahsil, and the main question for decision is whether they follow the *pagwand* or *chundawand* rule of succession.

Both the Courts below have found in favour of the plaintiff that the *chundawand* rule prevails in this village, and defendants have preferred this further appeal.

Ground 2, which alleges an earlier division of the property on *pagwand* principles, has been dropped in this Court, whilst ground 3, which raises a question of estoppel, was not any part of the defence in the Courts below, is quite an after-thought and has not been even mentioned before us.

Consequently the only point which calls for our decision, is whether the instances proved by the plaintiff justify the finding that the *chundawand* custom prevails among the parties.

Ten instances are set forth in the first Court's judgment, but of these, three are

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taken from villages other than that in which the parties reside.

On the remaining seven we have heard the criticisms of the appellants' Counsel.

Instances 1 and 2 appear to be genuine *chundawand* cases and so is instance 3; the only criticism levelled at this is that the parties were minors. But the party prejudiced by the application of the rule has never contested it, nor did his guardian object at the time of the mutation.

Instance 4 is admitted to be a strong case in favour of *chundawand*.

Instance 5 is also a clear case, although the parties were not full proprietors.

In instance 6 the ancestral property was divided on *chundawand* principles.

Instance 10 corroborates the view that *chundawand* prevails in the village, although the parties to this mutation decided to share on *pagwand* principles.

Now the proprietors in this village are all descended from two men, founders of the village, who themselves were relatives and of the same tribe.

The instances date in some cases from a time anterior to 1880, and we concur without hesitation in the finding of the Courts below that, among these *Jats* of Kakrola, *chundawand* and not *pagwand* is the rule of succession which is followed.

One final objection raised by the appellants is that the plaintiff's suit was bad in form, inasmuch as he should have sued for possession of one-sixth, the difference between the one-third he has and the one-half he claims.

This objection we overrule; the plaintiff is in joint possession of the undivided estate with defendants and he need not ask for more than a declaration that he is entitled to one-half either by division of the joint income or by partition of his share of the land.

In this view, we dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1748 AND 2023 OF 1912.

August 2, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

IN No. 1748 OF 1912

BROJENDRA KISHORE ROY
CHOWDHURY—PLAINTIFF—APPELLANT

IN No. 2023 OF 1912

BAIKUNTHA NATH SHARMA AND OTHERS
— PLAINTIFFS—APPELLANTS

versus

BHARAT CHANDRA ROY AND OTHERS—
DEPENDANTS—RESPONDENTS IN BOTH.

Limitation Act (IX of 1908), s. 23, Sch. I, Arts. 120, 142—Property attached under s. 146, Criminal Procedure Code, suit to recover possession of, and for declaration—Limitation—Continuing wrong—"Dispossession," meaning of—"Discontinuance of possession," meaning of—Attachment, ownership during—Continuing injury—Suit against Magistrate, if maintainable—Specific Relief Act (I of 1877), s. 42—Criminal Procedure Code (Act V of 1898), s. 146.

The plaintiffs claimed title to the disputed property by purchase at a sale in execution of a mortgage-decree. They took possession, but were resisted by the defendants. Proceedings were instituted under section 145 of the Criminal Procedure Code and the Magistrate being unable to satisfy himself as to which of the parties was in possession of the subject of dispute, attached it under section 146 of the Criminal Procedure Code on the 25th April 1902. In 1909 two suits were instituted by two sets of plaintiffs for declaration of their title and for recovery of possession. The plaintiffs were found to have been in possession when, on the 25th April 1902, the property was attached by order of the Magistrate.

Held, that the suits, though framed as suits for possession, could not be treated as such and were not governed by Article 142 of the Limitation Act. [p. 244, col. 2.]

Held, further that the suits were for declaration of title under section 42 of the Specific Relief Act and there was continuing wrong independent of contract within the meaning of section 23 of the Limitation Act and that consequently a fresh period of limitation under Article 120 of the Limitation Act began to run at every moment of the time the wrong continued, and the suits were, therefore, not barred by time. [p. 245, col. 2.]

Semle:—Dispossession implies the coming in of a person and the driving out of another from possession. [p. 244, col. 1.]

Discontinuance of possession implies the going out of the person in possession and his being followed into possession by another. [p. 244, col. 1.]

If the seisin or legal possession is, during the attachment of a property under section 146 of the Criminal Procedure Code, in the true owner, the

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attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession within the meaning of Article 142 of the Limitation Act. [p. 244, col. 1.]

If the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then, in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*. [p. 246, col. 1.]

No action can be brought against a Magistrate for recovery of possession of a property attached by him under section 146, Criminal Procedure Code. [p. 243, col. 2.]

Appeals against the decrees of the District Judge, Sylhet, dated the 19th April 1912, reversing those of the Subordinate Judge of Sylhet, dated the 27th June 1911.

IN APPEAL NO. 1748

Babus Dwarka Nath Chakrabarty and Ramini Mohan Chatterjee, for the Appellants.

IN APPEAL NO. 2023

Babus Tara Kishore Chaudhuri and Broja Lal Chakrabarty, for the Appellants.

Babu Gopal Chandra Das, for the Respondents in both.

JUDGMENT.—The events antecedent to the litigations, which have culminated in the present appeals, are no longer in controversy and may be briefly recited. The plaintiffs claimed title to the disputed property by purchase at a sale in execution of a mortgage-decree. They took possession, but were resisted by the defendants, and a breach of the peace became imminent. Proceedings were consequently instituted under section 145 of the Criminal Procedure Code; but as the Magistrate was unable to satisfy himself as to which of the parties was in possession of the subject of dispute, he attached it under section 146 of the Criminal Procedure Code, until a competent Court should determine the rights of the parties thereto or the person entitled to possession thereof. This order was made on the 25th April 1902. On the 3rd July and 11th October 1909 these suits were instituted by the two sets of plaintiffs who claim respectively an eight-annas and a five-annas share of the property, for declaration of their title and for recovery of possession. The Courts below have concurrently found that the plaintiffs have fully proved their title, and that the defendants have no case on the merits. The Courts below have also found that the plaintiffs were in possession when on the 25th April 1902, the property was attached by order of the

Magistrate. But while the trial Court held that the claims were not barred by limitation, as the plaintiffs were in possession within twelve years of the suit, the lower Appellate Court has concluded on the authority of the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1) that the suits are barred by limitation, as they have been instituted more than six years after the order of the Magistrate. The result of this divergence of opinion has been that the District Judge has reversed the decrees of the Subordinate Judge and has dismissed the suits, although he has found that the plaintiffs have established their title. The plaintiffs have now appealed to this Court and have impugned the correctness of the view adopted by the District Judge. The question, consequently, arises, what is the period of limitation, if any, applicable to a suit for determination of the rights of the parties to an order under section 146 of the Criminal Procedure Code, where it is found that the party who is the rightful owner was in possession when the property was attached by the Magistrate. Three alternative views have been placed before us for consideration, *viz.*, first, that the suit is in essence for recovery of possession of immoveable property, and must under Article 142 of the Schedule to the Indian Limitation Act be instituted within twelve years from the date of the order of the Magistrate; secondly, that the suit is in substance for declaration of title to immoveable property, and must, under Article 120, be instituted within six years from the date of the order of the Magistrate when the right to sue accrues; and thirdly, that the suit is for declaration of title to land, but that there is no bar of limitation applicable, as under section 23 a fresh period of limitation begins to run at every moment of the time during which the attachment continues. If the first or the third view is adopted, these suits are not barred by limitation, while the suits must be deemed barred if the second alternative is accepted.

As regards the first possible point of view, it is clear that no action can be brought against the Magistrate for recovery of possession. In the words of Lord Morris in *Khagendra Narain Chowdhry v. Matangini Debi* (2), the Magistrate is in the position

(1) 26 M. 410.

(2) 17 C. 814 at p. 619; 17 I. A. 62; 5 Sar. P.C.J. 528.

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of a stake-holder, or, as was said in *Ramaswamy Aiyar v. Muthusamy Aiyar* (3), when the property is attached, it passes into legal custody, and during the continuance of the attachment, such custody must be held to be for the benefit of the true owner: *Beni Prasad v. Shahzada Qhja* (4), *Kara Singh v. Bakar Ali Khan* (5). It is further plain that there is no cause of action against the Magistrate, as he has acted in the exercise of his statutory powers. The suit must, consequently, be brought against the rival claimant, but obviously the suit cannot be framed as one for recovery of possession of the disputed land from him, as he is admittedly not in possession. The plaintiff may have been deprived of possession, but he cannot aptly be said to have been dispossessed, or, to have discontinued possession within the meaning of Article 142 of the Indian Limitation Act. Dispossession implies the coming in of a person and the driving out of another from possession. Discontinuance implies the going out of the person in possession and his being followed into possession by another. These elementary principles are deducible from the decision of the Judicial Committee in *Trustees and Agency Company v. Shert* (6) and *Secretary of State v. Krishnamoni Gupta* (7). To the same effect is the observation of Baron Parke in *Smith v. Lloyd* (8), that to make the Statute of Limitation applicable, there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected. It follows that if the seisin or legal possession is, during the attachment, in the true owner, the attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession. We must accordingly hold, as was done in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1) that Article 142 has no application to a suit of this description, and we are unable to accept the contrary opinion on this point as

formulated in *Goswami Ranchor Lalji v. Sri Girdhariji* (9). We are not unmindful that in *Khagendra Narain v. Chowdhry Matangini Debi* (2), the suit was framed as one for recovery of possession and that the Judicial Committee ordered that each of the parties "be decreed to be put into possession" of an equal moiety of the disputed property. It is clear, however, that the question now under consideration was not raised before the Judicial Committee, for the obvious reason that the suit there was in time, whether the six years' or the twelve years' rule was applied; the record shows that the order of attachment was made on the 10th December 1877 and the suit was commenced on the 14th December 1880. It may also be observed that the language of the order by the Judicial Committee is consistent with the view that the parties were to be put into possession by the Magistrate. It may be added that the decision in *Nazir Ali Sheikh v. Adaluddi Shana* (10), to which reference was made in the course of argument, is clearly distinguishable. There the Magistrate had, after the attachment, placed a stranger in possession, contrary to the provisions of section 146, Criminal Procedure Code; a suit against such stranger for recovery of possession is clearly governed by Article 142 or Article 144. We need not refer in detail to the case of *Chunmull v. Khyratee* (11), *Goswami Ranchor Lalji v. Girdhariji* (9), *Akilandammal v. Periasami Pillai* (12), *Rajah of Venkatagiri v. Isakapalli Subbiah* (1), *Deo Narain Chowdhury v. Webb* (13), in so far as they merely recognise the doctrine that Article 47 of the Indian Limitation Act is restricted to cases where an order for possession has been made in favour of one of the parties and has no application when the land has been attached under section 146. We hold accordingly that the suits before us, though framed as suits for possession, cannot be treated as such and are not governed by Article 142 of the Indian Limitation Act.

As regards the second and third possible points of view, it is clear, from what has

(3) 30 M. 12; 16 M. L. J. 541; 1 M. L. T. 397.

(4) 32 C. 856.

(5) 9 I. A. 99; 5 A. 1; 4 Saraswati's P. C. J. 382.

(6) 13 App. Cas. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 43; 53 J. P. 132.

(7) 29 I. A. 104; 29 C. 518; 6 C. W. N. 617; 4 Bom. L. R. 537.

(8) 9 Exch. 562; 96 R. R. 87; 2 Com. L. R. 100; 23 L. J. Ex. 194; 2 W. R. 271; 22 L. T. (o. s.) 259.

(9) 20 A. 120; A. W. N. (1897) 214.

(10) 16 Ind. Cas. 670; 16 C. W. N. 1073.

(11) 3 Agra H. C. R. 65.

(12) 1 M. 301.

(13) 28 C. 86; 5 C. W. N. 160.

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already been stated, that the suits must be treated as suits for declaration of title under section 42 of the Specific Relief Act. What then is the period of limitation, if any, applicable to these suits? We have been pressed, on the one hand, to adopt the view propounded in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1), that Article 120 is applicable and that the suit is required to be instituted within six years from the date of the order of attachment when the right to sue accrues. We have been pressed, on the other hand, to hold that this is a case of continuing wrong under section 23 and that the right to sue accrues from moment to moment. The first alternative, though adopted by the Madras High Court, leads to an obvious anomaly. If the suit is not instituted within six years from the date of the order of attachment, neither of the claimants can obtain a declaration of title; yet the title continues unaffected in the true owner, for under section 28 his right is extinguished only at the determination of the period limited for the institution of a suit for possession. The Magistrate thus continues as a stake-holder for an indefinite period, as there is no statutory provision for forfeiture after the lapse of a prescribed term. According to the Madras High Court, however, the true owner, although not in a position to seek a declaration of title for purposes of recovery of the property, can obtain a declaration of title to the profits in the hands of the Magistrate; in other words the Magistrate is constituted his manager in perpetuity. The Madras High Court further seems to hold that, although a declaration of title cannot be embodied in the decree, because the prayer for declaration is barred by lapse of time, yet the finding in the judgment on the issue of title, will have the force of *res judicata* and will practically operate as a determination of the question of right for purposes of section 146, Criminal Procedure Code. With all respect, this bears the appearance of a distinction without a difference. To adopt the language of Lord Ellenborough in *Luxmore v. Robson* (14) "the common sense, the practice, and the general convenience of mankind,

require that a construction different from that in the case cited should be adopted." In our opinion, the true view of the matter is that section 23 of the Indian Limitation Act governs the case. To maintain this position, it is not essential to accept the broad proposition formulated in *Chukkun Lal Roy v. Lalit Mohan Roy* (15) [which was reversed on appeal on another point by the Judicial Committee in *Lalit Mohan Singh Roy v. Chukkun Lal Roy* (16)] that a suit for declaration of title to immoveable property cannot be held to be barred so long as the plaintiff has a subsisting right to such property; nor is it necessary to depart in any way from the rule recognised in *Mohabharat Shaha v. Abdul Hamid Khan* (17), that a suit for declaration of title to immoveable property is governed by Article 120. On the other hand, as was explained in the case last mentioned, and as had been previously indicated in the cases of *Brinda v. Kaunsilia* (18), *Ananda Razu v. Viyanna* (19), *Jugal-kishore v. Lakshmandas Raghunathdas* (20), Article 120 and section 23 may have to be simultaneously applied to determine whether or not a suit is barred by limitation, for instance, in suits for partition of joint property. The answer to the question, when does the right to sue accrue, must depend on the circumstances of the particular case, and very refined distinctions have, indeed, been sometimes drawn, as may be seen from *Yamuna Bai Rani Sahiba v. Solayya Karundan* (21) and *Pamu Sanyasi v. Zamindar of Jeypur* (22). In the case before us, the view may reasonably be maintained that there is a continuing wrong independent of contract and that consequently a fresh period of limitation under Article 120 begins to run at every moment of the time the wrong continues. It is needless for our present purpose to attempt an exhaustive definition of the expression "continuing wrong." But it may generally be stated that if the act

(15) 20 G. 906 at p. 925.

(16) 24 I. A. 76; 24 C. 834; 1 C. W. N. 367.

(17) 1 C. L. J. 73.

(18) 13 A. 176; A. W. N. (1891) 15.

(19) 15 M. 492; 2 M. L. J. 258.

(20) 23 B. 659.

(21) 24 M. 339.

(22) 25 M. 540.

(14) 1 B. & Ald. 584; 19 E. R. 396; 106 E. R. 215.

complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance, then, in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises *de die in diem*. To put the matter in another way, where the wrongful act produces a state of affairs every moment's continuance of which is a new tort, a fresh action for the continuance lies, for there is a real distinction between continuance of a legal injury and continuance of the injurious effects of a legal injury. Tested from this point of view, what is the position here? The defendants attempted to interfere with the possession of the plaintiffs, and a breach of the peace became imminent. The Magistrate intervened, as it was incumbent upon him to do, and attached the property. The result was that the plaintiffs were deprived of the enjoyment of their property. This state of things has continued, though it could have been terminated if the defendants had intimated to the Magistrate that they abandoned all claim to the property and would not cause a breach of the peace by an endeavour to obtain possession by force. We think, in these circumstances, that the case may aptly be treated as one of continuing wrong within the meaning of section 23 of the Indian Limitation Act. From this view, no question of limitation arises.

The result is that these appeals are allowed, the decrees of the District Judge set aside, and the suits decreed with costs in all the Courts. The title of the plaintiffs in each case to the share claimed will be declared, and it will be further declared that they are entitled to have the property released from attachment and to be placed in possession by the Magistrate.

Appeals allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2557 OF 1913.

September 16, 1915.

Present:—Mr. Justice Ayling and

Mr. Justice Tyabji.

K. R. MANIKAM MUDALIAR—PLAINTIFF

—APPELLANT

versus

KUMMALANGUTTAY MUNUSWAMI

NAIDU—DEFENDANT—RESPONDENT.

Malicious prosecution—Causing or procuring another to be prosecuted—Suit for damages, maintainability of.

A person who causes or procures another to be prosecuted is liable notwithstanding the intervention of some other person as the direct or technical prosecutor; it can make no difference whether the other person is or is not an officer of the law. [p. 248, col. 1.]

Where, therefore, in a suit for damages for malicious prosecution, it appeared that the defendant did not set the law in motion against the plaintiff:

Held, that the plaintiff was not entitled to any relief. [p. 248, col. 2.]

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 175 of 1913, preferred against that of the Court of the Subordinate Judge of North Arcot, in Original Suit No. 74 of 1911.

FACTS.—The plaintiff is a Forest Ranger in North Arcot District. Defendant is a contractor. There was a sale in auction of the sandal wood and plaintiff conducted the auction sale. The defendant, *i.e.*, the contractor made a statement before the District Forest Officer that the plaintiff sold sandalwood at Rs. 9 a cwt. but he entered its price in the Government accounts as Rs. 5 and pocketed the rest. The District Forest Officer then intimated this to the Joint Magistrate, who sent for the defendant but he would not come, and he sent a summons upon which he appeared and the Magistrate took a statement from him. The Forest Department charged the plaintiff with criminal misappropriation. He was tried and acquitted by the Sessions Court of North Arcot. He brought the present suit for damages for Rs. 4,000 against the defendant. Both the lower Courts dismissed the suit. The present appeal is against the decree.

Mr. C. Narasimhachari, for the Appellant:—In this case the statement was first of all made to the District Forest Officer. He did not at first believe it. Subsequently the District Forest Officer on independent enquiries was satisfied as to the truth of his

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statement. Then he sent a summons to the defendant to appear before the Joint Magistrate. He appeared and made a statement.

The question is whether it cannot be said that it is the statement of the defendant that led to the prosecution of the plaintiff. *Fitzjohns v. Mackinder* (1) is clear on the point.

The view of the District Judge that the defendant made the statement under compulsion to the Magistrate is entirely wrong. What the law requires is that the statement should have been made and the prosecution should have followed.

Mr. L. A. Venkataraghava Aiyar, for the Respondent:—In this case the defendant took no further steps than making a statement to the District Officer. He did not even appear as a witness in the Sessions case. It is the Department that instituted the prosecution against the plaintiff and there is no reason for charging the defendant with the prosecution of the plaintiff.

Further, in this case the statement was made to an officer who could not do anything himself and it cannot be said that the defendant prosecuted the plaintiff. *Gaya Prasad v. Bhagat Singh* (2), *Musa Yakub v. Mani Lal* (3), *Henderson v. Broomhead* (4), *Dubois v. Keats* (5), *Allen v. Flood* (6), *Revis v. Smith* (7) show that it must appear that he set the law in motion and should be the prosecutor himself.

JUDGMENT.—This appeal arises out of a suit for damages for malicious prosecution.

The question in the present case is, whether the defendant "was directly responsible for any charge at all being made against the plaintiff." *Gaya Prasad v. Bhagat Singh* (2). Persons who have made the original report of the alleged crime knowing it to be false, have been made by the Privy Council to "abide the consequences of their

misconduct" notwithstanding that the "prosecution was not technically conducted by them," but by the Police.

The facts in *Gaya Prasad v. Bhagat Singh* (2) were that the Sub-Inspector instituted the charge at the instigation of the defendants and not of his own motion (page 533) and the defendants had concocted and produced false evidence to get the plaintiff charged with the crime (page 532).

The instigation to prosecute apparently consisted in making the original report upon which the prosecution was ultimately based, and in giving a list of the persons containing the plaintiff's name and saying that the chief cause of the riot was the plaintiff. In the conduct of the case the defendants took the principal part both before the Police and in the Magistrate's Court and instructed the prosecution Counsel that the plaintiff joined the riot, which the Magistrate found had never taken place; moreover on the day of the alleged riot the plaintiff was ill at Lucknow.

The Privy Council mention two alternative cases, in one of which they say it would be improper to make the defendant responsible in damages for failure of the prosecution, and in the other, that it would be equally improper to allow him to escape (pages 533-534). The present defendant does not come under either of these categories. For on the allegations, which have not been investigated so far but which we must for the present purposes assume to be true, (1) he certainly went beyond giving what he believed to be correct information; but on the other hand, (2) it has been found that he did not bring suborned witnesses to support the charge, nor did he influence the Police or any one else to assist him in sending an innocent man for trial.

It does not follow that when a person does not come within the terms of the second alternative, he must necessarily succeed in a suit against him for malicious prosecution any more than it follows that if he fails to satisfy the first alternative, the suit must necessarily be decreed. For as already stated, the ultimate question as laid down by the Privy Council, is whether the defendant was directly responsible for the charge being brought against the plaintiff. In this connection it is necessary to refer to two

(1) 9 C. B. (N. S.) 505; 30 L. J. C. P. 257; 7 Jur. (N. S.) 1283; 4 L. T. 149; 9 W. R. 477; 142 E. R. 199; 127 R. R. 746.

(2) 30 A. 525; 12 C. W. N. 1017; 10 Bom. L. R. 1080; 8 C. L. J. 337; 5 A. L. J. 665; 35 I. A. 189.

(3) 25 B. 308; 7 Bom. L. R. 20.

(4) (1859) 4 H. & N. 569; 28 L. J. Ex. 360; 5 Jur. (N. S.) 1175; 7 W. R. 492; 118 R. R. 618.

(5) 11 A. & E. 329; 3 P. & D. 306; 9 L. J. Q. B. 66; 4 Jur. 148; 52 R. R. 361; 113 E. R. 440.

(6) (1898) A. C. 1; 62 J. P. 595; 67 L. J. Q. B. 119; 77 L. T. 717; 14 T. L. R. 125; 46 W. R. 258.

(7) (1856) 18 C. B. 124; 25 L. J. C. P. 195; 2 Jur. (N. S.) 614; 4 W. R. 506; 27 L. T. (O. S.) 106; 107 R. R. 236; 139 E. R. 1314.

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matters: (1) A person may be directly responsible for the proceedings, notwithstanding that he may not have originally contemplated prosecution as the result of his acts or statements, and have been required by the Court to prosecute the plaintiff: *Fitzjohn v. Mackinder* (1), per Blackburn, J., and notwithstanding that the proceedings may be of such a special character as to require the intervention of the Political Officers of the Government with which the defendant may not have any direct connection, much less any control, over it: *Cf. Musa Yakub v. Mani Lal* (3), (where extradition proceedings were held to be part of the cause of action in a suit for malicious prosecution). The safeguard for the defendant in such cases is that probably he would succeed in proving that he had no malice: *Fitzjohn v. Mackinder* (1), "the recognizance would then furnish an answer", in the words of Littledale, J., "for this reason only, that in such a case the plaintiff could not prove that the defendant was actuated by a malicious motive in making his charge before the Magistrate." *Dubois v. Keats* (5). (2) On the other hand, it is clear that the mere giving of false evidence does not make the perjured witness liable to civil action: *Revis v. Smith* (7), *Henderson v. Broomhead* (4). Such an action would be not for malicious prosecution, but for damages for defamation: *Dubois v. Keats* (5), and it does not lie because the occasion is absolutely privileged: the reason being that "if this action could be maintained, it would tend very much to discourage witnesses from giving evidence by fear of infinite vexation": *Henderson v. Broomhead* (4), cf. also *Allen v. Flood* (6) (per Lords Herschell and Davey).

The Subordinate Judge was, therefore, clearly wrong in considering that inasmuch as the defendant gave information in the first instance not to "an officer of the law", but to a Forest Officer, the suit cannot lie. If the defendant causes or procures the plaintiff to be prosecuted, he is liable notwithstanding the intervention of some other person as the direct or technical prosecutor: it can make no difference whether the other person is or is not an officer of the law.

The District Judge, however, after holding that the defendant did not come within the second of the two categories mentioned by

the Privy Council, also finds that the defendant was unwilling to complain against the plaintiff, that he made his statement to the Joint Magistrate more or less under compulsion, that the plaintiff was probably already suspected by his official superior, and that the Government resolved to prosecute the plaintiff without any further interference on the part of the defendant beyond the statement made by him to the plaintiff's official superior.

The argument for the appellant is that on these facts on the authority of *Fitzjohn v. Mackinder* (1), the defendant ought to be held liable. It is unnecessary to decide whether the defendant would have been liable if the prosecution had been caused (even though not intentionally) by the defendant's statement to the plaintiff's official superior; and if his had been the only substantial evidence for the prosecution or if the main part of the other evidence had been procured or suborned by him. In such a case it may be, we do not decide, that the defendant is responsible for the prosecution, though it has been conducted in the name of some other person and even though the Court or some other person has directed that the plaintiff should be prosecuted. Nor can it be considered in the present case whether the statement made by the defendant to the plaintiff's official superior would have made him liable to a suit for defamation; the present suit is not so framed, and the issues in a suit for defamation would have been entirely different, though it may be [as pointed out by Lords Herschell and Davey in *Allen v. Flood* (6)] that on principle the two classes of suit are connected.

It is thus clear that the present suit can be supported (if at all) only on the contention that the statement in question shows that it was the defendant who set the law in motion against the plaintiff. The District Judge's findings clearly negative this view; and when the circumstances are considered in the light of the authorities to which we have referred, there is no doubt that the result at which he arrived was perfectly correct.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

HAZARI LAL SARKAR V. MAHARAJ KUMAR KSHAUNISH CHANDRA ROY.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 741 OF 1912.

March 25, 1915.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Newbould.HAZARI LAL SARKAR—PLAINTIFF—
APPELLANT

versus

MAHARAJ KUMAR KSHAUNISH
CHANDRA ROY BAHADUR AND OTHERS—
DEFENDANTS—RESPONDENTS.*Landlord and tenant—Durputni lease—Chakran tenants—Khut rent, agreement to pay—Government revenue—Resumption of chakran land—Durputnidar, right of Zemindar, if can settle land with tenants—Mesne profits.*

A was originally holding the lands in dispute as *chakran* lands under B, the *zemindar*. B resumed the lands and settled them at a money rent with A. The plaintiff, who was the *durputnidar*, sued for *khās* possession of the lands and in the alternative prayed that fair and equitable rents might be fixed for them. It was a condition of the *durputni* settlement that the tenants who held *chakran* lands for service should pay to the *durputnidar* *khut* rent which was assessed on the proportion of land revenue payable to Government on that portion of the estate.

Held, that the payment of the *khut* rent could not create the relationship of landlord and tenant between the *durputnidar* and the tenant A. [p. 250, col. 1.]

Held, further, that so long as the *chakran* tenancy continued B, and not the plaintiff, had the right to settle tenants on the land, but that B had no right after he had resumed the *chakran* tenancy. [p. 250, col. 1.]

Held, also, that under the circumstances, the plaintiff was entitled to *khās* possession as well as mesne profits. [p. 250, col. 1.]

Appeal against the decree of the District Judge of Nadia, dated the 2nd January 1912, reversing that of the Munsif of Krishnagore, dated the 11th February 1911.

Babus Julu Nath Kanjilal and Jogendra Kumar De, for the Appellant.

Babus Ram Chunder Mozumdar, Biraj Mhan Mojumdar and Harendra Lal Roy, for the Respondents.

JUDGMENT.—In this case the defendant No. 1 is the *zemindar* and the defendants Nos. 2 to 4 are the tenants in occupation of the lands in suit. These defendants were originally holding the lands as *chakran* lands under the *zemindar*. In 1901, the *zemindar* resumed these lands and settled them with these defendants at a money rent. The plaintiff who is the *durputnidar* brought this suit to recover *khās* possession of these lands and also prayed, in the alternative, that fair and equitable rents might be fixed for them.

The first Court granted a decree holding that the *zemindar* was liable to pay rent to the plaintiff. On appeal to the District Judge, the plaintiff has been granted a decree against the defendants Nos. 2 to 4 and has had his title declared to realise from them fair and equitable rents for the lands, the amount of which will be settled in a rent suit.

As the appeal has been argued, the only question we have to decide is whether the plaintiff is entitled to *khās* possession or not. This point turns on the question whether these lands were really *chakran* lands or not.

It has been found by the lower Court that the *zemindar*, under the terms of the *putni* and *durputni* leases, had no right to resettle the lands in suit. The plaintiff who is the appellant contends that on that finding, he is entitled to a decree for *khās* possession. For the respondent, it is contended that the tenancy of the defendants Nos. 2 to 4 in these lands is not a purely *chakran* tenancy. It was a condition of the *durputni* settlement that the tenants who held *chakran* lands for services should pay to the *durputnidar* what is called *khut* rent, and this *khut* rent was assessed on the proportion of land revenue that would be payable to Government on this portion of the estate. The condition, therefore, was that the *chakran* tenants did not get the land rent-free, but instead of paying rack rent, they had to pay only the share of the revenue on the land they held. It was contended on behalf of the respondent that this payment of *khut* rent to the *durputnidar* was sufficient to create the relationship of landlord and tenant between them and that consequently the *durputnidar* has now no right to *khās* possession.

It is to be observed that in their written statement, these defendants denied ever having paid this *khut* rent to the plaintiff, but now on their behalf, reliance is placed on the statement in the plaint that the defendants Nos. 2, 3 and 4 have stopped paying *khut* rent to the plaintiff, which clearly implies that before the settlement made by the *zemindar*, these defendants had been paying this rent to the plaintiff. It is clear that under the terms of the *durputni* lease, these defendants were liable to pay *khut* rent to the plaintiff and it is immaterial whether it was actually paid or not. This *khut* rent was not really rent but a proportion

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of the revenue payable to Government which, under the terms of the *durputni* lease, was payable to the plaintiff in respect of those lands of which he got no benefit under his lease. Such a payment could not create the relationship of landlord and tenant between the plaintiff and these defendants. The plaintiff never recognised these defendants as his tenants. So long as the *chakran* tenancy continued, the *zemindar*, and not the plaintiff, had the right to settle tenants on the land. On the termination of the *chakran* tenancy, the *zemindar*, although he had no right to do so, settled these tenants on the land. This settlement would not give these defendants the right to remain on the land against the wish of the plaintiff.

As was held in the case of *Upendra Narain Bhattacharjee v. Pratap Chunder Pardhan* (1), it is clear that the proper remedy in this case is a decree for *khas* possession and this has not been seriously contested on behalf of the respondent, who bases his objection to a decree for *khas* possession on the contention that the tenancy was not a purely *chakran* tenancy.

We accordingly decree this appeal with costs and modify the decree of the lower Court by declaring that the plaintiff is entitled to *khas* possession of the lands in suit. He will be entitled to recover mesne profits for three years before the institution of the suit and also for a period from the date of the institution of the suit until recovery of possession. An inquiry will be made by the lower Court to ascertain the amount of mesne profits payable to the plaintiff.

Appeal decreed.

(1) S C. W. N. 320; 31 C. 703.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1656 OF 1911.

August 17, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

T. S. SUBBA AIYAR—PLAINTIFF—
APPELLANT

versus

SU. SUBBA AIYAR AND ANOTHER—
DEPENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11—Order passed under s. 283 of old Civil Procedure Code, suit to set aside—Limitation.

Article 11 of Schedule I to the Limitation Act of 1908 has reference only to orders passed under the new Code of Civil Procedure. Therefore, an order passed in 1905 under section 283 of the Civil Procedure Code of 1882 need not be set aside by a suit instituted within one year from its date. [p. 253, col. 2.]

Rajah of Pittapur v. Gani Venkat Subba Row, 30 Ind. Cas. 94; 29 M. L. J. 1; 18 M. L. T. 67; 2 L. W. 661; (1915) M. W. N. 547; *Gopeshwar Pal v. Jiban Chandra*, 24 Ind. Cas. 37; 18 C. W. N. 804; 19 C. L. J. 549; 41 C. 1125; *Lala Soni Ram v. Kanhaiya Lal*, 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74, referred to.

Second appeal against the decree of the District Court of Tinnevely in Appeal Suits Nos. 81 and 99 of 1911, presented against the decree of the Court of the District Munsif of Ambasamudram in Original Suit No. 174 of 1910.

This second appeal first came on for hearing on the 13th December 1912, before Abdur Rahim and Sundara Aiyar, JJ. who delivered the following

JUDGMENT.—This second appeal is pressed with reference only to the properties in the 3rd schedule. They were bought by four brothers, of whom the plaintiff's father was one. This seems to be the finding of the learned District Judge, but it is not clear whether the Judge intends to find that the properties belonged to the four brothers jointly.

The other point in the defence was whether the plaintiff's right was barred. There is no finding on this question. All that the learned Judge finds is that the plaintiff has not proved that the land to which he wants his title to be declared, fell to his share or rather to his father's share on division. Supposing that to be so, still the plaintiff, unless his rights are barred, would be entitled to a share in the disputed land, and there is no reason why his title to such share should not be declared in the present suit. We, therefore, reverse the findings of the District Judge so far as the 3rd schedule properties are concerned and ask him to submit a clear finding on the following points:

(1) Whether the properties in the 3rd schedule were acquired by the plaintiff's father and his three brothers.

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(2) If so, whether the plaintiff's right is barred.

(3) If the plaintiff's right is not barred, whether he is entitled to the entirety of the properties or only to a fourth share therein.

The finding will be submitted within six weeks from the receipt of this order and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment of this Court, the District Judge of Tinnevely submitted the following

FINDINGS.—1. The questions remanded for findings are :—

(1) Whether the properties in the 3rd schedule were acquired by the plaintiff's father and his three brothers.

(2) If so, whether the plaintiff's right is barred.

(3) If the plaintiff's right is not barred, whether he is entitled to the entirety of the properties or only to a fourth share therein.

2. (1) Defendants assert that plaintiff and his father had no interest in the lands purchased under Exhibit B. The document itself contradicts this assertion. Exhibits C, D and F refer specifically to $\frac{1}{4}$ th shares in these lands, raising a presumption that they were purchased jointly and divided by four persons. Exhibit G, again, mentions the purchase as being by the four brothers.

It cannot, I think, be doubted that the 3rd schedule property is part of a joint purchase by plaintiff's father and his three brothers. I would accordingly answer the 1st question in the affirmative.

3. (2) Plaintiff's case is that his father disappeared in 1893, prior to which there was a partition of the property acquired under Exhibit B, in which 3rd Schedule property fell to his father's share. His case as to the partition is supported by the references to $\frac{1}{4}$ th shares in Exhibits C, D and F. There is, at the same time, nothing to show specifically that it was 3rd schedule property that fell to his father's share. That it did, is an inference based on a process of exclusion. It is argued that, the 3rd schedule property not having been dealt with in certain deeds executed by defendants, it must have fallen not to their share, but to that of plaintiff's father. Assuming, how-

ever, for argument's sake, that it was 3rd schedule property that fell to plaintiff's father, plaintiff has entirely failed to prove any enjoyment by his father or by himself subsequent to the purchase in 1890, to the partition or to his father's disappearance in 1893. His claim would, therefore, seem to be barred. His Vakil now sets up a new case of tenancy-in-common, but he cannot, I think, "have it both ways." Only if he gives up his case of partition, can he plead joint tenancy. If he elects to stand by the partition, he must prove his separate enjoyment, which he has not done. I would, therefore, answer the 2nd question, also, in the affirmative.

4. (3) This question it is unnecessary to answer. Were it necessary, my answer would be

(a) that, assuming joint purchase, partition and enjoyment within 12 years of suit to have been proved, plaintiff would be entitled to the whole of 3rd schedule property;

(b) that, if plaintiff and defendants be held to be tenants-in-common, plaintiff is entitled to $\frac{1}{4}$ of this property—both parties conceding that it would not be only one-fourth. Plaintiff, I may add, claims the whole, which would seem to show that his case rests entirely on the partition (which he has proved) and separate enjoyment (which he has not).

This second appeal coming on again for hearing on the 4th August 1914, after receipt of the findings of the lower Appellate Court called for by the order of this Court, dated the 13th December 1912, the Court delivered the following

JUDGMENT.—The finding of the District Judge on the question whether the 1 acre 70 cents in dispute fell to the plaintiff's share or not is not definite. Out of the 7 acres 74 cents purchased by all the four brothers under Exhibit B, there is the evidence of plaintiff's 1st witness to show that 67 cents was sold away by the brothers in 1891. The sale-deed, however, or a copy thereof, ought to have been filed and proved, and we shall ask the District Judge to allow the plaintiff to put it in and prove the sale, with liberty, of course, to the 1st defendant to adduce counter-evidence.

Assuming that 67 cents had been so sold away, there remains 7 acres 7 cents out of which

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- (a) one of the brothers treated 1 acre 38 cents in 1896 as his one-fourth share of the land (Exhibit D),
- (b) another treated 2 acres 43 cents as his one-fourth share (see Exhibit C), and
- (c) the third treated 1 acre 36 cents as his one-fourth share (see Exhibit F). Total 5 acres 37 cents. Deducting the 5 acres 37 cents out of the 7 acres 7 cents to be divided, there is left the remainder of 1 acre 70 cents (3rd schedule property) which the plaintiff claims as the one-fourth share of his father.

The District Judge, though he states that the plaintiff has not established that this 1 acre 70 cents it was that fell to his father's share, does not state that it fell to the share of any of the other three brothers. At least, two of these brothers repudiate any claim to this 1 acre 70 cents. On the question of possession also, while the District Judge states that the plaintiff has not proved his possession after the division of about 1891 or 1892 between the four brothers, he does not definitely state who has or who have been in possession of the 1 acre 70 cents after that date till the 1st defendant got possession and whether such possession (prior to the possession of the 1st defendant) was adverse to the plaintiff. We are unable to dispose of this second appeal without a fresh finding on the question of the title to this 1 acre 70 cents and findings on some other questions which we shall formulate below this :—

(1) To whose share or shares did the 1 acre 70 cents in dispute fall in the division between the 4 brothers in or about 1891 or 1892?

(2) Who has or who have been in possession of the 1 acre 70 cents (3rd schedule lands) from the time of the division of the 7 and odd acres in 1891 or 1892 till the 1st defendant got possession?

(3) Was the person or were the persons in possession of the said 1 acre 70 cents holding adversely to the plaintiff or on behalf of the plaintiff alone, or on behalf of

the plaintiff and others in common and for the whole period or for portions (and if so, which portion) of that period?

Parties will be at liberty to adduce further evidence only on the transaction of the sale of 67 cents.

Findings should be submitted within six weeks from the date of the receipt of the records and ten days will be allowed for filing objections.

In compliance with the order contained in the above judgment of this Court the District Judge of Tirunelveli submitted the following

FINDINGS.—I. Findings have been called for on the following issues:—

1. To whose share or shares did the 1 acre 70 cents in dispute fall in the division between the 4 brothers in or about 1891 or 1892?

2. Who has or who have been in possession of the 1 acre 70 cents (3rd schedule lands) from the time of the division of the 7 and odd acres in 1891 or 1892 till the 1st defendant got possession?

3. Was the person or were the persons in possession of the said 1 acre 70 cents holding adversely to the plaintiff or on behalf of the plaintiff alone, or on behalf of the plaintiff and others in common and for the whole period or for portions (and if so, which portion) of that period?

II. *Issue 1.* The sale-deed relating to 67 cents has been proved and filed as Exhibit J. If this extent be deducted, the remainder of the land purchased by the four brothers amounts to 77 acres. It is clear that there was a division into four shares. One of these, 2'43 acres in extent, fell to one brother (Exhibit C). Another—1'38 acres in extent—went to the second (Exhibit D). Another—1'56 acres in extent—was the share of the third (Exhibit G). The balance of 1'70 acres would, therefore, seem to have fallen to the fourth.

Two, however, of the items of property claimed by plaintiff, measuring 1'41 acres, were mortgaged by two of his uncles under Exhibit I. In the mortgage were included (among other properties) S. Nos. 69 and 73, which indubitably had fallen to their share in the partition. All four of these S. Nos. are referred to in Exhibit I as

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properties they had been "enjoying by right of purchase". This dealing with S. Nos. 144B and 261D is quite inconsistent with Exhibits D and G, in which no claim was made by the mortgagors to these properties.

On the whole, I think that more importance attaches to Exhibits D and G than to the recital in Exhibit I. Plaintiff's father certainly had a share and it could only have been the share now claimed by plaintiff. If his uncles dealt with part of it, they must be held to have done so impliedly on his behalf, as he was absent from the village. Exhibit G, which is two years later than Exhibit I, is tantamount to an admission by one of them that the suit property did not fall to his share in the partition.

III. *Issues II and III*:—It may be presumed from Exhibit I that plaintiff's uncles were in possession of the lands. The evidence of D. W. No. 11 would seem to show that their possession was on his behalf. The recital in Exhibit I may, of course, be understood as an assertion of an adverse title, but it was made within twelve years of the suit and in plaintiff's absence and without his knowledge.

IV. The findings, therefore, are that the suit property fell to the share of plaintiff's father and that it was in possession of his uncles on his behalf.

This second appeal came on this day for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court on the 4th August 1914 for trial.

Messrs. T. R. Venkatarama Sastri and T. V. Muthukrishna Aiyar, for the Appellant:—In Article 11 of the present Limitation Act (IX of 1908) the words "Code of Civil Procedure, 1908" are found, and it means that orders passed under the old Code need not be set aside within one year from its date. In this case, the order was passed in 1905, and on the date, the new Limitation Act came into force there was a general right of suit, which is not expressly taken away by the new Act.

Messrs. L. R. Govindaraghava Aiyar and L. S. Veeraraghava Aiyar, for the Respondents:—The suit to set aside the order, not

having been instituted within one year under Article 11 of the new Limitation Act, is barred.

JUDGMENT.—We accept the findings of fact arrived at by the lower Appellate Court.

Mr. Govindaraghava Aiyar, for the Respondent, contended that a suit for the relief claimed by the plaintiff, though it might have been brought till 31st December 1908, could not be brought on or after 1st January 1909, as the new Civil Procedure Code and the new Limitation Act of 1908 made an order passed on a claim petition conclusive unless set aside within one year, and he refers to Order XXI, rule 63, of the new Civil Procedure Code and Article 11 of the new Limitation Act. The new Limitation Act Article 11 refers to an order passed under the Civil Procedure Code of 1908 and neither section 158 of the Civil Procedure Code nor section 8 of the General Clauses Act constrains us to read the phrase "the Code of Civil Procedure 1908" in Article 11 as including a reference to the earlier Civil Procedure Code of 1882. The order of 1905 which is relied upon as conclusive (because not set aside within one year) need not have been set aside under the old law (as it was not passed after investigation) and Article 11 of the old Limitation Act, 1877, did not, therefore, apply; nor need it be set aside under the new Code, as it was not an order passed under the new Code and Article 11 of the new Limitation Act refers only to orders passed under the new Code. In this view, it is unnecessary to consider the question whether the provisions of the new Civil Procedure Code and the new Limitation Act were intended to and could take away the right of suit under the general law which plaintiff had till 31st December 1908 [see, however, *Rajah of Pittapur v. Gani Venkat Subba Row* 1) and *Gopeshwar Pal v. Jiban Chandra* (2).] The Privy Council case, *Lala Soni Ram v. Kanhaiya Lal* (3), was decided on the ground that an acknow-

(1) 30 Ind. Cas. 94; 29 M. L. J. 1; 18 M. L. T. 67; 2 L. W. 661; (1915) M. W. N. 547.

(2) 24 Ind. Cas. 37; 18 C. W. N. 804; 19 C. L. J. 549; 41 C. 1125.

(3) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 485; 15 Bom. L. R. 489; 25 M. L. J. 13; 40 I. A. 74.

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ledgment did not create any title in the person whose right was acknowledged and no question of taking away any right or title arose by reason of a change of the law in respect of what kind of acknowledgment will afford a fresh starting point for limitation.

In the result, we modify the decree of the lower Appellate Court by giving relief to the plaintiff as regards the 3rd schedule properties thus restoring the Munsif's decree.

The parties will bear their respective costs here and in the lower Appellate Court.

Appeal partly allowed; Decree modified.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 590 OF 1914.

May 10, 1915.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge.

SAWAN MAL AND OTHERS—DEFENDANTS—
APPELLANTS
versus

SHIB DIYAL AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 65, O. XXI, rr. 92, 94—Auction sale—Passing of title to purchaser—Confirmation of sale—Sale certificate—Presumption.

An auction sale becomes absolute (i. e., title passes) only on its confirmation by the Court. But in the absence of such a certificate the Court's confirmation may sometimes be inferred from the nature of the action taken by it on receipt of report of sale. [p. 254, col. 2; p. 255, col. 1.]

Budhu v. Hira, 27 P. R. 1892; *Khushal Panachand v. Bhimabai*, 12 B. 589; *Than Singh v. Kazim Ali*, 92 P. R. 1893; *Ajudhia Pershad v. Chandan*, 9 P. R. 1903; 36 P. L. R. 1903; *Girdhari Lal v. Bhago*, 92 P. R. 1907, referred to.

Budh Singh v. Hardial Singh, 52 P. R. 1897, distinguished.

Second appeal from the decree of the Additional Divisional Judge, Amritsar Division, at Gurdaspur, dated the 3rd January 1914.

Mr. Nand Lal, for the Appellants.

Mr. Manohar Lal, for the Respondents.

JUDGMENT.—In this case plaintiffs, as representing some of the original owners, sued for redemption of half of a house on payment of Rs. 400. The mortgage dates back to

1864. Defendants, representatives of the original mortgagees, pleaded right to refund of their expenditure on the house, and also that Lila Ram, mortgagee, bought at auction one-eighth share of the house which was sold by auction under a decree against one mortgagor, Bilas. The latter is the only question now for consideration. The first Court gave plaintiffs a decree for redemption of three-eighths of the house on condition of their paying Rs. 319-2-0. The lower Appellate Court, however, found that the aforesaid auction sale had never been "confirmed" and so allowed redemption of the whole one-half of the house, but disallowed defendants' claim for expenses, thus awarding redemption for Rs. 400.

Defendants have again appealed here. I find the real facts are that Bilas's one-eighth share was put up to auction and sold to Lila Ram on 9th August 1866. As mortgagees were in possession, this sale made no difference in actual occupation. When the sale was reported to the Court, it did not in so many words "confirm" the sale. It passed the following order:—

"Digridar ko bad waaza hakk-i-commission wa rasum-i-stamp wa zar-i-rahn ke ba-akhaz-i-rasid (rupiye ?) diye jayen." The available money was paid to the decree-holder; and in my opinion, this order was tantamount to confirmation of the sale. If the sale had not been confirmed, the Court would have ordered fresh auction or taken some other step; and in my opinion, the acceptance of the money by the Court and the order for payment to the decree-holder prove confirmation of the sale.

It is urged, however, that title never passed because no sale certificate was ever taken out. I have been referred to sections 256-259, Act VIII of 1859 (in force at date of this auction), to sections 311/314, Civil Procedure Code (1882); and to Order XXI, rules 92 and 94, Civil Procedure Code, now in force. I agree with plaintiffs that confirmation of auction sale is necessary before title passes, but then I hold that the sale was confirmed, and perusal of rule 92 (1), Order XXI, Civil Procedure Code, shows that the sale becomes absolute (i. e. title passes) on confirmation. As the learned commentators Woodroffe and Ameer Ali abundantly show in their notes under section 65 of the Code, the sale certifi-

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cate is little more than evidence of title, a view that is further fortified by a glance at rule 94, under which the certificate is to bear the date on which the sale became absolute, i. e., day of confirmation.

It is perhaps hardly necessary to support by reference to rulings a point that seems fairly clear, but the following cases are indirectly in favour of the views I have expressed above—*Budhu v. Hira* (1) [following *Khushal Panachand v. Bhimabai* (2)], *Than Singh v. Kazim Ali* 3, *Ajudhia Pershad v. Chandan* (4), *Girdhari Lal v. Bhago* (5). I have also studied *Budh Singh v. Hardial Singh* (6), but find it deals with the state of affairs between sale and confirmation.

I hold, then, that confirmation of an auction sale, where not made in precise terms, may sometimes be inferred from the nature of the action taken by the executing Court on receipt of report of sale, that in the present case the proper inference is that sale was confirmed; and that the absence of a sale certificate, where the sale has been otherwise proved to have become absolute, does not prevent title passing to the purchaser.

I, therefore, dismiss this appeal with costs.

Appeal dismissed.

- (1) 27 P. R. 1892.
- (2) 12 B. 589.
- (3) 92 P. R. 1893.
- (4) 9 P. R. 1903; 36 P. L. R. 1903.
- (5) 92 P. R. 1907.
- (6) 52 P. R. 1897.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 93 OF 1911.

September 15, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

Sree Rajah VATSAVAYA VENKATA SIMHADRI JAGAPATIRAJU

BAHADUR GARU AND ANOTHER—PLAINTIFF
AND HIS LEGAL REPRESENTATIVE—APPELLANTS

versus

Sree Rajah THYADA PUSAPATI RUDRA SRI LAKSHMI NRUSIMHA ROOPA SADRUSANNAMARAD DUGARAJU DAKSHINA KAVATA DUGARAJU
BAHADUR GARU AND OTHERS—

DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 69—"Person interested

in the payment of money," meaning of—Duty of registered holder to pay Government revenue—Co-sharers, whether personally liable—Revenue—Charge on estate—Suit to enforce charge—Jurisdiction.

It is only the registered holder who is personally bound to pay the revenue to Government. Co-owners or co-sharers who are not also registered holders are not under any such obligation though the Government revenue may be a charge on the lands in their holding. [p. 256, col. 2.]

Rajah of Vizianagram v. Setrucherla Somasekharaiah, 26 M. 686 at p. 713, distinguished.

Subramania Chetty v. Mahalingaswami Sivan, 3 Ind. Cas. 624; 33 M. 41; 19 M. L. J. 627; 6 M. L. T. 198, followed.

The "person interested in the payment of money" in section 69 of the Contract Act must be a person who is not himself bound to pay the whole or any portion of the amount. [p. 259, col. 1.]

Where, therefore, a person who is himself under an obligation to pay a portion of the Government revenue pays the whole amount due, he is not entitled to a personal decree for the amount against all his co-sharers, but can only recover a share payable on account of the property in the hands of him who is also under a personal obligation to pay. [p. 258, col. 2.]

Mangalathammal v. Narayanaswami Aiyar, 17 M. L. J. 250; 30 M. 461; *Manindra Chandra Nandy v. Jamahir Kumari*, 32 C. 643; 9 C. W. N. 670, referred to.

A suit to enforce such a charge should be brought only in that Court within whose jurisdiction the portion of the estate liable to pay the share is situate. [p. 257, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 46 of 1908.

FACTS.—Plaintiff, the *zemindar* of Tuni, was the purchaser in auction sale of four villages attached to Pachipenta Estate. First defendant was the proprietor of that estate, and defendants Nos. 2 to 5 were the members of his family. Defendant No. 6 is the Maharaja of Jeypore who purchased another portion of the Pachipenta Estate lying within the limits of Jeypore *zemindari*. The Government revenue on the *zemindari* of Pachipenta from April 1907 to November 1908 fell into arrears and the four villages of which the plaintiff was in possession, were attached. The plaintiff paid a sum of Rs. 6,124-0-5 and got the villages released from attachment. The present suit is to recover the whole of the amount paid from 1st defendant and 6th defendant, persons who were in possession of the rest of the estate. The 1st defendant pleaded that as he was in possession of only a portion of the estate, he was not liable for the whole of the amount

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paid, and 6th defendant pleaded that the suit should have been brought in the Court within whose jurisdiction the portion of the estate lay. The Sub-Court dismissed the suit as against 6th defendant and decreed against the 1st defendant only Rs. 1,250-9-10, the amount in proportion to the portion of the estate of which he was in possession. The present appeal was against that decree.

The Hon'ble Mr. B. N. Sarmu, for the Appellants.—The decision of the lower Court is entirely wrong. Under section 69 of the Indian Contract Act the plaintiff is entitled to claim the whole amount from 1st defendant and 6th defendant. Under section 69 and 70 of the Indian Contract Act he has a right to claim. *Rajah of Vizianagram v. Setrucherla Somasekharaiah* (1) clearly says that all co-owners are personally liable. The facts that the estate lies within the jurisdiction of another Court is no reason for refusing a decree. *Gajapathi Krishna Chandra Deo Garu v. Seiviyasa Charlu* (2).

As regards the liability of the 1st defendant, it is only by his conduct that the villages were brought to sale and my client is entitled to claim the whole from him under section 69 of the Indian Contract Act.

Mr. V. Ramesam, for the Respondents:—As regards the liability of the 6th defendant it is clearly not personal. The decisions are unanimously to that effect. *Subramania Chetty v. Mahalingaswami Sivan* (3), *Puthenpurayil Amman Parupkyi v. Mangalaseri Pullikandi Pakram Haji* (4), *Naraina Pai v. Appu* (5). And the suit must be one to enforce a charge and should be brought in the place within whose jurisdiction the estate lies. As regards the 1st defendant, the right is one to claim contribution and that is analogous to section 82 of the Transfer of Property Act and section 55 of the Transfer of Property Act. Where the person who is interested in the payment pays it the claim is only one for contribution. *Mangalathammal v. Nara-*

yanaswami Aiyar (6), *Manindra Chandra Nandy v. Jamahir Kumari* (7), *Moule v. Garrett* (8).

This appeal coming on for hearing on the 26th and 27th July 1915, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SEINIVASA AIYANGAR, J.—Two points are raised in this appeal, first as to the liability of the 6th defendant, second as to the amount recoverable from the 1st defendant, the registered holder.

So far as the 6th defendant is concerned, it is clear that the plaintiff cannot recover anything personally from him as he was under no personal obligation to pay the proportionate revenue to the Government. It is now settled that the only person who is personally bound to pay the revenue to Government is the registered holder, who is called the defaulter in the Revenue Recovery Act, and that co-owners or co-sharers who are not also registered holders, are not under any such obligation, though the Government revenue may be a charge on the lands in their holding. *Subramania Chetty v. Mahalingaswami Sivan* (3). Payment of the revenue by the plaintiff could not give him a larger or higher right than what the Government had. See Ghose on Mortgages, page 371; Freeman on Co-tenancy, pages 254 and 349. On this principle this Court has held in *Puthenpurayil Ammal Parupkyi v. Mangaleswari Pullikandi Pakram Haji* (4) and *Naraina Pai v. Appu* (5) that a person who pays the whole revenue to the Government under circumstances similar to the present case, is not entitled to a personal decree against the co-owners or co-sharers who were not under a personal obligation to pay to the Government. The observations of Bhashyam Ayyangar, J., in *Rajah of Vizianagram v. Setrucherla Somasekharaiah* (1), were based on the assumption that all the co-owners or co-sharers were liable personally to pay to the Government. Nor do we think that section 70 of the Contract Act has any application to the

(1) 26 M. 686 at p. 713.

(2) 20 Ind. Cas. 445; 25 M. L. J. 433; 14 M. L. T. 20; (1914) M. W. N. 99; 38 M. 235.

(3) 3 Ind. Cas. 624; 33 M. 41; 19 M. L. J. 627; 6 M. L. T. 198.

(4) 15 Ind. Cas. 262; 24 M. L. J. 548; 36 M. 493.

(5) 28 Ind. Cas. 456.

(6) 17 M. L. J. 250; 30 M. 461.

(7) 9 C. W. N. 670; 32 C. 643.

(8) 7 Ex. 101; 41 L. J. Ex. 62; 26 L. T. 367; 20 W. R. 416.

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present case. The case of *Gajapathi Kristna Chendra Deo Garu v. Srinivasa Charlu* (2), on which Mr. Sarma relied, has not been followed in *Rajah of Pittapuram v. Secretary of State* (9), in which all the previous cases were reviewed by Spencer, J., and this case was followed in *Narain Pai v. Appu* (5) by Sadasiva Aiyar, J., who was himself a party to the decision of *Gajapathi Kristna Chendra Deo Garu v. Srinivasa Charlu* (2). The case of *Yogambal Boyee Ammani Ammal v. Naina Pillai Markayar* (10) is also to the same effect. If the 6th defendant had been personally liable to pay, the Sub-Court of Vizagapatam would have jurisdiction to pass a money decree, though the 6th defendant was residing in the Agency Tracts, as the cause of action arose at least in part within the jurisdiction of the Vizagapatam Sub-Court; but that Court has no jurisdiction to enforce a charge over the portion of the estate purchased by the 6th defendant as it is situated in the Agency Tracts, and the plaintiff must be left to enforce his charge in the Agency Courts. We, therefore, confirm the decree of the lower Court as regards the 6th defendant.

The next question which alone admits of any doubt, is the amount which the plaintiff is entitled to recover from the first defendant, the registered holder. The plaintiff, the 1st defendant and the 6th defendant are each in possession of portions of the estate. The Government revenue paid by the plaintiff accrued due after the purchase by the plaintiff and the 6th defendant of portions of the property in execution of a mortgage decree. If it was a case of a private sale under section 55 of the Transfer of Property Act, the plaintiff and the 6th defendant would each be bound to pay the proportionate share of the Government revenue due on the lands in their possession; the fact that the purchase was made in a Court-sale does not make any difference. The position, therefore, is this: there was a charge on the whole estate in favour of the Government, and the registered holder, the 1st defendant, was also personally liable to pay the amount of the charge to the Government. (We are assuming that the statutory liability of the regis-

tered holder is a personal liability.) The case is analogous to that of a mortgagor who has covenanted to pay the mortgage money and who afterwards sells portions of the mortgaged property to several persons subject to the mortgage. As between the mortgagor and his vendees, the mortgagor would be liable in proportion to the value of the property in his hands while his vendees would be liable in proportion to the value of the property in their hands. This, of course, would not affect the right of the mortgagee to enforce the personal covenant against the mortgagor or the charge against any portion of the mortgaged property. If in such a case the whole amount is collected from the mortgagor on his personal liability or by the sale of the property in the hands of any one of the owners, the person who so paid the money or out of whose property the mortgage amount was realised, would be entitled to contribution from the property of the other owners under section 82 of the Transfer of Property Act. The mortgaged property is considered the primary fund for payment of the mortgage-debt. [Jones on Mortgages, section 736 and section 749; also see *Palmer v. Hendrie* (11).] If, therefore, the present plaintiff had asked for contribution out of the properties, he could not have recovered more than the amount payable by the 1st defendant in proportion to the value of the property in his hands. For example, if the plaintiff was the purchaser of a $\frac{1}{3}$ rd share, 6th defendant another $\frac{1}{3}$ rd, the 1st defendant remaining in possession of the other third, whoever paid the whole of the charge, whether plaintiff or the 6th defendant or the 1st defendant, would be entitled to recover $\frac{1}{3}$ rd from each of the remaining two as a charge on the property. Does the fact that the plaintiff sues under section 69 of the Contract Act to recover the money personally from the registered holder, make any difference as regards the amount claimable from him? Reading the terms of section 69 literally. In the case supposed, the plaintiff, it may be contended, would be entitled to recover the whole amount and not merely $\frac{2}{3}$ rd or $\frac{1}{3}$ rd personally from the registered holder, for the 1st defendant was the person who in law was bound to pay the revenue; the plaintiff, of course, was interested in the payment, i. e., he was not a

(9) 25 Ind. Cas. 783; 16 M. L. T. 375.

(10) 3 Ind. Cas. 110; 33 M. L. T. 162; 19 M. L. J. 489.

(11) 27 Beav. 319; 54 E. R. 136; 122 R. R. 426.

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volunteer. That, I think, would be manifestly absurd, for the property in the hands of the plaintiff is itself liable to pay $\frac{1}{3}$ rd of the Government revenue and it is this liability on his part that gives him a right to make the payment at all to the Government, so as to enable him to recover back from the co-owners the share of the revenue which they personally were bound to pay or for which the property in their hands was liable. A simple illustration will make this matter clear. A mortgages certain lands to B and sells the property subject to the mortgage to C. Supposing B sues C on the mortgage, and C to save the property pays the mortgagee; could C recover the money from A, he being the person who under law was bound to pay within the meaning of section 6? Clearly not; for as between A and C, C is the person who is bound to discharge the debt, though so far as B, the mortgagee, is concerned, there is novation of the liability of A; the position of A in such cases is said to be analogous to that of a surety, C being the principal debtor. It is the ultimate liability that determines the right to recover the amount paid to discharge the original liability. It is possible to contend in the case above said that C is entitled to recover from A personally the amount of the mortgage debt, but that A, in his turn, would be entitled to a charge upon the mortgaged property for the sum which he paid to C and recover as much as he can from the mortgaged property, which amount may conceivably be less than the amount which he paid; this would be untenable, because the purchaser of the property subject to the mortgage would then be entitled indirectly to recover back the amount paid by him for the sale of the equity of redemption. To put the converse case, if A had been sued by the mortgagee personally and had been obliged to pay B, he certainly would be entitled to call on C to pay back the money which he paid. In an English conveyance on sale of the equity of redemption a covenant would be implied on the part of the vendee to indemnify the vendor from all the consequences of non-payment of the mortgage amount by the vendee. Under the Transfer of Property Act, section 55, though there is no implied covenant of indemnity, the same result would follow as the Statute makes it obligatory on the part of the vendee to discharge the mort-

gage as between him and his vendor, though the liability of the vendor-mortgagor to his mortgagee is not affected. It is clear, therefore, that the person who is interested in the payment mentioned in section 69 must be a person who, as between himself and the defendant, was not bound to pay, though the defendant may be under an obligation to pay to a third party. [See *Mangalathamma v. Narayanaswami Aiyar* (6) and *Manindra Chandra Nandy v. Jamahir Kumari* (7)]. Whether the basis of section 69 is the Common Law action of "money paid at the defendant's request" or the equitable doctrine of subrogation, does not much matter, as the plaintiff can in either case recover only from the person ultimately liable. [See *Moule v. Garrett* (8), per Cockburn, C.J., citing Leake; *Sheldon on Subrogation*, page 15, section 11]. In this case, if the plaintiff and the 1st defendant were the only two persons who had an interest in the property, and if the plaintiff had paid the whole of the Government revenue, he could not have recovered more than the share payable on account of the property in the hands of the defendant. Is the plaintiff also entitled to recover from the 1st defendant the proportionate share of the revenue payable on account of the properties in the hands of 6th defendant, because the plaintiff is not the person liable to pay that sum? If the plaintiff is allowed to recover from the 1st defendant the amount payable both on account of the properties in his hands and in the hands of the 6th defendant, unless the first defendant is in his turn subrogated to the rights of the plaintiff (which is more than doubtful), the first defendant would have been compelled to pay the amount really payable by the 6th defendant; that, I think, would be unfair. The present suit is a suit for contribution and it was, of course, necessary to make all persons who are liable to contribute, whether personally or out of their properties, parties, in order to fix the proportionate amount which each person was ultimately bound to pay. If section 69 applies to a suit for contribution, it may be that no effective relief could be given against all the parties so as to dispose of all matters in controversy and avoid multiplicity of suits. In *Futteh Ali v. Ganganath Roy* 12 it was doubted whether a suit for contribution comes within the (12) S. C. 113; 10 C. L. R. 20.

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scope of section 69.

"The person interested in the payment of money" must, we think, be a person who is not himself bound to pay the whole or any portion of the amount. It is to be noted that there are express provisions in the Contract Act for contribution in the cases of joint promisors and co-sureties. (Section 43, clause 2, and sections 143 and 147.) We are, therefore, inclined to hold that section 69 does not apply to a suit for contribution at all. The result is the appeal is dismissed with costs.

WALLIS, C. J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 135 OF 1914

August 11, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

NATHAR HUSSAIN MEERA LEVAI

ROWTHER AND ANOTHER—CLAIMANTS

—APPELLANTS

versus

THE DEPUTY COLLECTOR OF USILAMPATI—PETITIONER—RESPONDENT.

Land Acquisition Act (I of 1894), s. 23—Right of owner to compensation for injury done—Principle—Measure of damages.

Where land is acquired for public purposes, the owner thereof is entitled to be compensated for any injury done to his other lands even though the loss is more than counterbalanced by the advantages he gains by the execution of the project.

Engle v. Charing Cross Railway Co. (1867) 2 C. P. 638; 16 L. T. 593; 15 W. R. 1016; 36 L. J. C. P. 297, followed.

In such a case the owner is also entitled to damages for diminished facilities of communication and access to his other lands.

Appeal against the award of the District Court of Madura, in Original Petition No. 233 of 1913.

FACTS.—This is an appeal against an award of the District Court of Madura, disallowing certain items claimed by the appellant in a Land Acquisition case. There was a channel, and on the sides of the channel there were lands belonging to the claimant. The Government in order to widen the channel and to make a flood bank acquired certain lands belonging to the claimant on one side of it,

By this acquisition, the claimant had to cross over a great distance to go to his other lands for carrying manure, etc. Before the Deputy Collector, the claimant claimed compensation even for this. Both the Deputy Collector and the District Court disallowed his claim. Against that order, the present appeal is filed.

Messrs. T. R. Ramachandra Aiyar and K. S. Jayarama Aiyar, for the Appellants.

The Government Pleader, for the Respondent.

JUDGMENT.—There is uncontradicted evidence that the remaining lands of the claimants were injuriously affected by the construction of the channel and flood bank. They are entitled to be compensated for this injury, even if the loss was more than counterbalanced by the advantages they gained from the execution of the project. *Engle v. Charing Cross Railway Co.* (1). What we have to consider is, what would be the injury to the claimants if they were cultivating the lands themselves, as they might if so minded. It is not very easy to assess the damages for diminished facilities of communication and access. The figures and evidence of the claimants are altogether extravagant; but we think that in the absence of evidence to the contrary, Rs. 500 may fairly be allowed. As regards the garden land dealt with in paragraph 12 of the award, the District Judge himself says, the lands are probably as valuable as wet lands. We increase the award from Rs. 750 to Rs. 1,000 per acre. As regards the *punja* lands in paragraph 13, we think the award should be increased from Rs. 350 to Rs. 500 in view of the considerations mentioned by the Judge. As regards paragraph 14, we increase the award from Rs. 190 to Rs. 220, as one of the tamarind trees in 1185A was overlooked.

There will be no order as to costs.

Appeal partly allowed; Decree modified.

(1) (1867) 2 C. P. 638; 36 L. J. C. P. 297; 16 L. T. 593; 15 W. R. 1016.

SANKARAVELU PILLAI v. MUTHUSAMI PILLAI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1546 OF 1914

September 21, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Tyabji.

SANKARAVELU PILLAI, MINOR, BY HIS

ADOPTIVE MOTHER AND NEXT FRIEND,

KARUPPAYEE AMMAL—PLAINTIFF—

APPELLANT

versus

MUTHUSAMI PILLAI—DEFENDANT—

RESPONDENT

Registration Act (XVI of 1908), s. 17—Compromise incorporated in decree of Court, whether requires registration—Transfer of property by a Hindu in favour of a Hindu widow, effect of—Transfer of Property Act (IV of 1882), s. 8.

Section 17 of the Registration Act does not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the Court. [p. 261, col. 1.]

Where, therefore, a compromise arrived at by the parties to a case is incorporated in the terms of the decree of the Court, such compromise can be adduced in evidence in a subsequent suit notwithstanding that it has not been registered. [p. 261, col. 2.]

Bindesri Naik v. Ganga Saran Sahu, 20 A. 171; 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273; *Pranal Anni v. Lakshmi A. ni*, 2 M. 50; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147, followed.

Where, a claim by a Hindu widow to a certain property as absolute owner was compromised by giving to the claimant one-fourth of the property in dispute and it was admitted that this one-fourth was far in excess of what she would have been entitled to get if it were intended merely to take the place of her maintenance.

Held, that the presumption of Hindu Law that in a transfer by a Hindu male to a Hindu female only a limited estate is granted, did not apply and that the transfer was an absolute transfer governed by section 8 of the Transfer of Property Act. [p. 262, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madurai, in Appeal Suit No. 513 of 1913, preferred against that of the Court of the District Munsif of Satur, in Original Suit No. 269 of 1912.

FACTS of the case appear from the judgment.

Mr. K. V. Krishnaswami Aiyar, for the Appellant:—Exhibit II is merely a compromise and it is only under that document that the defendant claims. It is neither a decree nor an order within the meaning of section 17 of the Registration Act and does require registration.

In *Natesan Chetty v. Vengu Nachiar* (1) and *Ravula Parti Chelamanna v. Ravula Parti Rama Row* (2), it was held that only orders or decrees of Court do not require registration, while compromise petitions filed in the course of the suit do require it. No decree was passed upon Exhibit B and the suit was dismissed.

As regards the interest taken by the widow, the general presumption is, that a Hindu widow takes only a life-interest in the estate transferred to her by a male. The property is given to the widow for "food and clothing" and it means that only a life-interest is intended to be given to her.

Mr. T. M. Krishnaswami Aiyar, for the Respondent:—The document is admissible in evidence without registration, as it was referred to in the order disposing of the suit and was in fact acted upon. *Bindesri Naik v. Ganga Saran Sahu* (3), *Pranal Anni v. Lakshmi Anni* (4).

As regards the interest taken by the widow, the intention that might be ascribed to the transferor, must be in accordance with the intention that he may be presumed to have under section 8 of the Transfer of Property Act and section 82 of the Indian Succession Act. In this case the widow asserted an absolute right to the whole property, and she was given 1/4th of the property. The intention, therefore, was rather to give her an absolute interest than merely a life-interest.

JUDGMENT.

TYABJI, J.—Two main questions arise for decision in this appeal, in which the rights of the parties under Exhibit II have to be determined.

The first question is whether Exhibit II required registration, or whether it can be adduced in evidence and can affect immovable property notwithstanding that it has not been registered. This question depends primarily upon the effect of sections 17 and 49 of the Indian Registration Act. Section 17 provides in the first instance that the documents mentioned thereafter shall be registered if the property to which they relate

(1) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20.

(2) 12 Ind. Cas. 317; 36 M. 46; 10 M. L. T. 232; 21 M. L. J. 870; (1911) 2 M. W. N. 265.

(3) 20 A. 171; 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273.

(4) 22 M. 508; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147.

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is situate in certain districts. Then certain classes of documents are mentioned which are all such as operate to create, declare, assign, limit or extinguish any right, title or interest in immoveable property; and include gifts and leases. Then the second sub-section of section 17 excepts twelve kinds of documents which need not be registered, though it might otherwise have been considered that clauses (b) and (c) of sub-section (1) covered them, in other words, that they were documents of the classes mentioned above. Amongst the excepted class of documents is mentioned, "any decree or order of a Court or any award."

Section 49 provides *inter alia* that no document required by section 17 to be registered shall affect any immoveable property comprised therein unless it has been registered.

The first argument of the appellant is that Exhibit II is a non-testamentary instrument purporting to create an interest in real property and ought, therefore, to be registered under section 17, unless it is a decree or order of the Court, and that it is not a decree or order.

On this question there are two short *dicta* of the Privy Council to which it is necessary to refer. The first of them occurs in *Bindesri Naik v. Ganga Saran Sahu* (3). Their Lordships there state that "they are satisfied that the provisions of section 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court." Then in *Pranal Anni v. Lakshmi Anni* (4) they state: "the *vazinamah* was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration does not, in their Lordships' opinion, apply to its stipulations and provisions in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The *vazinamah*, in so far as it was submitted to and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal who gave their consent to it."

It seems to me that when these two passages in their Lordships' judgments are

read together,—and it is significant that Lord Watson delivered the opinion of the Privy Council in each case—the principle upon which their Lordships proceeded appears to be that, inasmuch as under the law as regards registration read together with the law relating to *res judicata*, orders and decrees of the Court do not require to be registered, all such other judicial proceedings also as are necessary to be referred to in order to determine what it is that has become *res judicata*—all such other judicial proceedings also are excepted from the provisions of the Indian Registration Act: unless this were the case, the law relating to *res judicata* would be subject to the proceedings of the Court being registered, which, it is clear, could not have been the intention of the Legislature.

There are two decisions of this Court bearing upon the point under consideration, apparently conflicting with each other, *Natesan Chetty v. Vengu Nuchiar* (1) and *Ravula Parti Chelamanna v. Ravula Parti Rama Row* (2). It seems to me that it is unnecessary for us in the present case to determine the question on which the conflict of opinion arises. For taking the view of the Privy Council to be as I understand it, in the present case, it seems to me that the composition between the parties must be taken to have been incorporated in the decree of the Court, Exhibit V, which refers in terms to the compromise, Exhibit II, and purports to sanction it on behalf of the minor. It is true that the ultimate, operative part of the decree purports to be merely that the suit shall be dismissed, yet read as a whole, it seems to me to be clear that the decree incorporates the terms of the compromise.

I feel, therefore, no hesitation in arriving at the conclusion that the lower Appellate Court was right in the conclusion at which it arrived, that Exhibit II can be adduced in evidence and can be read as part of the decree, Exhibit V, so as to affect the immoveable property compromised therein notwithstanding that it has not been registered.

I come to the second point which was argued before us, namely, that on the true construction of Exhibit II the 1st

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defendant therein referred to, acquired only a limited or a widow's estate in the property mentioned. We had recently to consider in Second Appeal No. 2-59 of 193 the effect of the decisions of the Privy Council and of the Courts of India which lay down that the ordinary intention of a Hindu in making a transfer of property to a Hindu woman ought to be taken into consideration when the deed of transfer is to be construed, and that the presumption, in the absence of something clear to show the contrary, is that only a limited estate is granted; the presumption may be rebutted by words showing that unrestricted power to alienate was given or that the estate was to be heritable by the heirs of the woman, and not to revert to the heirs of the grantor of the interest. I pointed out in that appeal that this rule must be taken to be an exception to the general law laid down in section 8 of the Transfer of Property Act and section 82 of the Indian Succession Act, and though I was myself inclined in that case to take the view that the full rights were given to the donee under the instrument, I felt pressed by the fact that both the lower Courts had decided to the contrary effect and that my learned brother agreed with the view taken by them. In the result I thought that it was not a case in which it was incumbent upon me to give effect to my own inclinations. I, therefore, agreed to the dismissal of that appeal.

In the present case, the circumstances seem to be materially different. We have the fact, first of all, that Exhibit II was a compromise in the course of a litigation brought about, as is clear from the facts mentioned to us, by the widow for the express purpose of asserting an absolute right to the property which was the subject-matter of Original Suit No. 429 of 190.; secondly, the plaintiff, it is stated in Exhibit II, has no right, interest or claim whatever in the property allotted to the widow; on the other hand, there is no doubt a reference to the fact that the absolute rights given under Exhibit II to the widow are "towards her food and clothing charges." Thirdly, the property that is given to the widow is only a fourth of what she claimed, and it is a part of the appellant's case that this one-

fourth would be far in excess of what she would have been entitled to get if it were intended merely to take the place of her maintenance. On these facts, it seems to me that it is section 8 of the Transfer of Property Act rather than the presumption of what a Hindu would ordinarily do when he purports to transfer, of his own free will property to a Hindu woman, that should govern the construction of this document. It seems to me that there is nothing to show that the dominant factor was the desire or the intention of the transferor to give only such an interest in the property as he would of his own free will like to give. The parties were at arm's length. A claim was put forward to the absolute title to the whole of the property and that claim was compromised by giving to the claimant one-fourth of the property. It seems to me, therefore, that there is no room for the presumption being drawn that that one-fourth of the property must have been given on the terms on which it would have been given had it been a free gift. It seems to me that as a consequence, Exhibit II must be given effect to as an absolute transfer of the property, in accordance with the decision under appeal.

I would, therefore, dismiss the appeal with costs.

AYLING, J.—I entirely concur with my learned brother in holding that the *razinama*, Exhibit II, does not require registration to render it admissible in evidence or operative as a transfer of the suit property to Minakshi.

As regards its correct interpretation, I am not free from doubt; but as my learned brother is clearly of opinion that the construction adopted by the lower Appellate Court is correct, I am not prepared to differ from him on this point.

The second appeal is dismissed with costs.

Appeal dismissed.

ANTONI JUAS PRABHU v. RAMAKRISHNAYYA.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 282 OF 1914.

September 24, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

ANTONI JUAS PRABHU—DEPENDANT

No. 1—APPELLANT

versus

RAMAKRISHNAYYA AND OTHERS—

PLAINTIFF AND DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 151, O. XLI,
r. 23—Appeal—New party, addition of—Remand to
lower Court—Procedure.*

Where an Appellate Court adds a new party, it has inherent power to reverse the decrees of the Court of first instance and remand the case for re-trial. This power has not been taken away by Order XLI, rule 23, Civil Procedure Code.

Appeal against the order of the District Court of South Canara, in Appeal Suit No. 279 of 1913, preferred against the decree of the Court of the District Munsif of Mangalore, in Original Suit No. 10 of 1912.

FACTS.—The suit was for a declaration that the plaintiff was entitled to take water to his field from a channel adjoining the field of the defendant and for an injunction to restrain the latter from interfering with the plaintiff's right. The Court of first instance decreed the suit. On appeal, the District Judge thought that the addition of a new party was necessary and so he added that party and remanded the suit for fresh disposal. Against the said order of remand, the present Civil Miscellaneous Appeal was filed.

Mr. K. Yegnanarayana Adiga, for the Appellant: The power to remand is only a power conferred by Statute. In this case the remand by the lower Appellate Court was entirely without jurisdiction. Order XLI, rule 23, Civil Procedure Code, has no application, as the Court of first instance did not dispose of the case on a preliminary point. So far as power to remand is concerned, there has been no change in the law. Though section 564 of the Code of 1882 has not been re-enacted in the Code of 1908, the power to remand under the new Code is the same as under the old Code *Nabin Chandra Tripati v. Pran Krishna Dey* (1). The procedure which ought to have been followed by

the Appellate Court was to have framed the necessary issues and heard the case itself or to have sent the case down under Order XLI, rule 25. *Ganesh Bhikaji v. Bhikaji Krishna* (2) and *Kelu Mulacheri Nayar v. Chindu* (3).

Mr. P. V. Parameswara Iyer for Mr. C. V. Anantakrishna Iyer and Mr. B. Sitarama Rao, for the Respondents, were not called upon.

JUDGMENT.

SADASIVA AIYAR, J.—I agree that the appeal should be dismissed with plaintiff's costs.

The Appellate Court has power to reverse and remand for re-trial in a case like the present where a new party is added in appeal. That power is inherent in the Court and has not been taken away by anything in Order XLI, rule 23 of the Code of Civil Procedure, especially as the prohibitory provision in section 564 of the old Code of Civil Procedure has not been reproduced in the new Code.

NAPIER, J.—I have held elsewhere that the power to remand is limited to cases where decisions on preliminary points are set aside by the Appellate Court. This view applies only, however, to cases where the construction of Order XLI, rules 23, 24, 25 is a deciding factor. In my opinion, where an Appellate Court has added a party, those rules are inapplicable and we have to seek the proper procedure in section 151, the Code not having made rules applicable to the position. We are not shown any reason why the procedure of the lower Appellate Court is unsustainable and I think that it is on the whole the most convenient. The appeal will be dismissed with costs of plaintiff.

Appeal dismissed.

(2) 10 B 398.
(3) 19 M. 157.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

GLANCY v. GLANCY.

LOWER BURMA CHIEF COURT.
FULL BENCH.CIVIL REVISION PETITION No. 9 OF 1914.
January 13, 1915.*Present:*— Justice Sir Charles Fox, Kt.,
Chief Judge, Justice Sir Henry Hartnoll, Kt.,
and Mr. Justice Parlett.BRIDGET THERESA MARY GLANCY—
PETITIONER

versus

JAMES GLANCY—RESPONDENT.

Divorce Act (IV of 1869), s. 13: Dissolution of marriage—Desertion—Adultery, admission of, when not sufficient—Delay in filing petition, effect of.

The petitioner and the respondent were married on the 12th August 1890. They lived together till May 1892 when the petitioner left the respondent owing to his intemperate habits. Since then, they never met. The respondent who was in the Indian army, left the army and went to England. In 1911 the petitioner obtained his address from the War Office and wrote to him. In reply to this, he wrote: "you ask me if I have ever misconducted myself with any woman since you and I parted. I have misconducted myself with several women since I parted with you, but I will not give you their names for obvious reasons". The petitioner thereupon sued for divorce on the ground of adultery coupled with desertion.

Held, (Fox, C. J., dissenting) that the admission in the letter was not sufficient proof of adultery. [p. 266, col. 2; p. 267, col. 1.]

Held, also, that under the circumstances, there was no abandonment against her wish. [p. 265, col. 2; p. 267, col. 1.]

Per Fox, C. J.—Disinclination from religious motives cannot be regarded as sufficient excuse for not taking action for obtaining the remedy which the law provides for an injured wife and for delaying presenting a petition. [p. 66, col. 1.]

Per Parlett, J.—A wife who seeks to prove desertion, must give evidence of conduct on her part showing unmistakably that such desertion was against her wish actively expressed. The husband must have wilfully absented himself from her in spite of her wish. [p. 266, col. 2.]

Subsequent conduct cannot transform what was a voluntary separation into desertion by the husband. [p. 67, col. 1.]

Mr. Ray, for the Applicant.

JUDGMENT.

Fox, C. J. In this case, the wife petitioned for divorce from her husband on the grounds of his desertion and adultery. The petition was presented on the 2nd December 1912. The parties had not co-habited since May 1892. The only evidence of the husband's adultery was admission of it by him in a letter dated the 18th November 1911 written in reply to a letter of the wife's to him. The husband has not defended the suit. The parties were married in Madras in 1890. The husband was at the time a Colour-

Sergeant in a British Regiment. They came with the regiment to Mandalay in January 1891, and lived there together until May 1892, when the wife returned to her parents' house in Madras. Her life during this period must have been a very unhappy one. Her husband was much addicted to drink and was twice tried for drunkenness whilst she was living with him. He frequently stopped away from their home late at night, and was often out the whole night, but evidently not on duty. He neglected her and did not give her sufficient money to get necessaries, and in consequence, she had to sell her jewellery and wedding presents and to obtain money from her parents. She admits that she suspected he had been guilty of adultery during the period, but she does not say that she ever taxed him with it at the time. They parted amicably when she went to Madras, he promising to send her money. She says, she did not leave him with the idea of parting with him altogether. Her reasons for going away from him were that she was very unhappy owing to his grossly intemperate habits and his neglect of her, but she hoped he would reform and have her back. Any hope of his reform she may have entertained, must soon have been dispelled, for he was tried again for drunkenness, and was then reduced to the ranks. He sent her no money, and she in 1893 commenced training for qualification as a nurse. She obtained qualifying certificates in 1895 and earned her livelihood as a nurse until 1906. Since then she has been managing an hotel. From Mandalay, her husband's regiment went to Lucknow, and he took his discharge from the army there. From Lucknow, he wrote to her a few letters which she describes as just ordinary letters, and she wrote to him. She says that he never asked her to re-join him. She does not say that she ever asked him to take her back and to provide her with a home. He wrote and told her he was going to England, and he left India in 1900 without giving her any address. She got his address through the War Office and wrote him two letters in 1902 and one in 1903, but received no replies to them: the last was returned through the Dead Letter Office. In 1908, she went to England in attendance on a lady, but did not see him. Her letter, which received a reply in his letter of the 18th November

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1911, was evidently inspired by some Lawyer. It must have been designed to obtain from him admissions of his having committed adultery since they parted. The reply was callous in the extreme, but I do not take it that he meant that he had seduced several respectable women. It goes to show that he had never reformed his life, and that he did not mean to do so.

The explanation the petitioner gives of her long delay in bringing the suit was, *firstly*, that she thought he would reform and re-join her, *secondly*, that her religion made her very reluctant to seek a divorce, and *thirdly*, that until she received his last letter she did not know his address.

Three questions arise in the case: the *first* being whether there was a desertion or abandonment of her against her wish, the *second*, whether his having committed adultery has been sufficiently proved, and the *third*, whether she has not unreasonably delayed taking proceedings.

Upon the question of abandonment of her against her wish, it appears to me that her evidence is very doubtful. It was by her own wish that she went back to her parents. It is difficult to believe that she could have hoped that he would reform his life when she was away from him. If he did not reform when she was with him, it must have occurred to her that he was less likely to reform if she left him. It strikes me that the real state of affairs must have been that she had made up her mind that she could not go on living with such a dissolute drunkard as he was. His stopping out so frequently at nights, could only have one meaning, and judging from his continued bad conduct, his treatment of her and his last letter, it is difficult to believe that if she had taxed him with adultery then, he would not have admitted it, or at any rate that she could not have found out from other non-commissioned officers in the regiment where her husband was reputed to spend so many nights, and have obtained evidence of his adultery then.

If life with him was beyond endurance at Mandalay, she could scarcely have entertained a wish to re-join him when she heard he had been reduced to the ranks for drunkenness. Her entering into training to become a nurse appears to indicate very plainly that

she made up her mind as far back as 1893 that she would have to make her own livelihood and that there was practically no likelihood of her ever living again with the drunkard she was tied to in matrimony. Her religion forbade her to think of the tie being cut. She must have made up her mind to face the situation, and she did this with courage.

The ordinary rule is that the abandonment must have been against the expressed wish of the party abandoned. I see no sufficient ground for departing from that rule in the present case. There is no evidence that she ever expressed a wish to return to co-habitation with her husband. Although he abandoned her, abandonment against her wish is not proved.

On the question of adultery of the husband, considering the picture the petitioner gives of him and his conduct towards her, I should be prepared to hold that his admission of it in his letter was sufficient proof.

Upon the question of delay in presenting the petition, although she may have had no evidence to prove the adultery until she received her husband's letter in 1911, it is difficult to believe that she could not have obtained evidence to substantiate it if she had made some effort to obtain it.

Probably such a man as he has been, a man who evidently wanted to get rid of his wife very soon after their marriage, would have admitted adultery at any time she taxed him with it. It is difficult to believe that she did not ask him for some explanation of where he had been spending the nights on which he was frequently absent from her in Mandalay, and that she could not have found out whether anything he told her was true or not. It may, no doubt, have been difficult for her to find out what sort of life he was leading after he left India, but he was in India for eight years after they parted and it can scarcely have been impossible for her to have gone to where he was at some time during those years to find out what sort of life he was leading.

It is not necessary to put her want of action down to indifference on her part as to what his life was. It is more likely to have been due to a conviction that he was beyond all hope of reform, and that she could do no good either to him or for herself by doing any-

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thing, especially in view of her belief at the time that divorce was not open to her. Disinclination from religious motives cannot be regarded as sufficient excuse for not taking action for obtaining the remedy which the law provides for an injured wife, and for delaying presenting a petition for probably over twenty years after the time when one might have been presented.

On this ground also I do not think the petitioner was entitled to a decree for divorce.

I would not confirm the decree of the District Court.

HARTNOLL, J.—The petitioner applies for and has been granted a decree for a dissolution of her marriage with the respondent on the ground of his adultery coupled with desertion. It is petitioner's case that she and respondent were married on the 12th August 1890, that they lived together till May 1892, when petitioner left respondent owing to his intemperate habits. Respondent was then stationed in Mandalay. Petitioner went to Madras to her parents. Since then, she and respondent have never met. Respondent left the army years ago when his time was up and returned to England. In 1911 petitioner who wished to obtain a divorce got into touch with respondent by obtaining his address from the War Office, and she says that she received the letter Exhibit B from him. Exhibit B contains the only evidence of adultery put forward. In it, respondent writes, and I see no reason to doubt that the letter comes from petitioner's husband: "You ask me if I have ever misconducted myself with any woman since you and I parted? I have misconducted myself with several women since I parted with you, but I will not give you their names for obvious reasons." Is this admission by itself sufficient to hold that adultery is proved? The rule of law as to the weight to be attached to an admission of this nature is laid down in the case of *Robinson v. Robinson and Lane* (1), and is to the effect that the admissions of a wife charged with adultery, unsupported by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce, provided the Court is satisfied that the evidence is trustworthy and

that it amounts to a clear, distinct and unequivocal admission of adultery. This rule was followed in the case of *Williams v. Williams and Padfield* (2), in which case, the Judge Ordinary said: "I entirely concur with the observations of the Lord Chief Justice as to the great danger of relying entirely upon such admissions. In each case the question will be whether all reasonable ground for suspicion is removed."

In the present case I think that it would be unsafe to act on respondent's admission. He is written to in England from India by his wife after many years of separation from her, when he knows that she is seeking a divorce. He never intends to meet her again in this world. What is easier than to assist her by admitting adultery, whether he has committed it or not. He finishes up: "I wish you well and hope you will do well for 'Auld lang syne.'" Again, the admission itself is not satisfactory. It would be more credible if it was an admission of visits to prostitutes: but it requires a stretch of the imagination to think that respondent has been in the habit of compromising several women. I cannot take the statement as sufficient proof of adultery. That being so, apart from the question of the delay in bringing the proceedings, I am of opinion that the petition must fail.

I would not, therefore, confirm the decree.

PARLET, J.—In my opinion it is by no means clear what act or conduct is relied upon as constituting the desertion of the petitioner and from what date it commenced.

A wife who seeks to prove desertion must give evidence of conduct on her part showing unmistakably that such desertion was against her wish actively expressed, *Fowle v. Fowle* (3). The husband must have wilfully absented himself from her in spite of her wish, *Thompson v. Thompson* (4).

The petition alleges that the petitioner left her husband in Mandalay in 1892, and went to her parents in Madras owing to the intemperate habits of her husband and his inability to support her. No doubt his intemperance and neglect to supply her with

(2) 1 P. & D. 29; 35 L. J. Mat. 8; 13 L. T. 610.

(3) 4 C. 260; 3 C. L. R. 484; 2 Shome L. R. 143.

(4) 27 L. J. Mat. 65; 1 Sw. & Tr. 231; 4 Jur. (N. S.) 717; 6 W. R. 867.

(1) 1 Sw. & Tr. 362; 27 L. J. Mat. 91; 5 Jur. (N. S.) 892.

SUBBANNA v. SECRETARY OF STATE.

funds led to their life together being very unhappy, but the petitioner's affidavit and evidence make it clear that she left him by mutual agreement and under the advice of his superior officer, hoping, she says, that he would mend his ways. Frequent and friendly correspondence, she says, passed between them until 1900. There has been no refusal by the respondent of a request by the petitioner to resume conjugal relations, nor, if there had been, would it have constituted the offence of desertion, *Fitzgerald v. Fitzgerald* (5). Such a request, however, might have been some evidence that the desertion was against her wish. I consider that this case differs widely from *Wood v. Wood* (6), where the wife was compelled at last by debts to separate from her husband, but she did all she could to prevent an entire separation and to make it practicable for them to live together again. In that case the rule was not questioned that, until the husband and wife have again co-habited, subsequent conduct cannot transform what was a voluntary separation into desertion by the husband. I consider, therefore, that the petitioner has failed to prove an abandonment against her wish. In view of the terms of the respondent's letter and the circumstances under which and the period at which it was written, I should hesitate to accept it by itself as a sufficient proof of adultery committed by him.

For these reasons, therefore, I agree that the decree should not be confirmed.

Decree not confirmed.

(5) 1 P. & D. 694; 38 L. J. Mat. 14; 19 L. T. 575; 17 W. R. 254.

(6) 3 C. 485; 1 C. L. R. 552.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1114 OF 1912.

September 14, 1915.

Present:—Mr. Justice Spencer and

Mr. Justice Tyabji.

A. SUBBANNA AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL, THROUGH THE COLLECTOR
OF NORTH ARCOT—DEFENDANT—

RESPONDENT.

Inam—Failure of inamdar to fulfil condition—

Order of resumption—Suit for declaration of inamdar's right to hold land free of assessment, when maintainable—Suit for cancellation of order of resumption—Limitation Act (IX of 1908), Sch. I, Arts. 14, 131.

Where the Collector resumed a *dasabandam inam* on account of the *inamdar's* failure to fulfil the conditions of the *inam* and the *inamdar* sued after 12 years for a declaration that he was entitled to hold the land free of assessment:

Held, (1) that the plaintiff was not entitled to obtain such a declaration without getting the Collector's order, resuming the *inam*, set aside; [p. 269, col. 1.]

(2) that the suit for cancellation of the order ought to have been brought within one year of the date of its passing under Article 14 of the Limitation Act. [p. 264, col. 1.]

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 261 of 1911, preferred against that of the Court of the District Munsif of Chittoor, in Original Suit No. 719 of 1909.

FACTS.—Plaintiff is the appellant. The defendant is the Government. Plaintiff is a *dasabandam inamdar*, i.e., owner of an *inam* granted for the upkeep of irrigation works. Under the *inam* title-deed he was bound to keep the irrigation works in repair, but subsequently, the Government placed the repair of these irrigation works under the minor irrigation system. They undertook to repair the irrigation works and plaintiff was asked to contribute Rs. 75 towards the cost of repairs. The plaintiff agreed to it but wanted time. A long time after the village official communicated to him that if the money was not paid within three months, the *inam* would be resumed he then applied for time and there was no reply. The Deputy Collector afterwards communicated to the plaintiff an order of the Collector resuming the *inam*. Plaintiff brought the present suit for a declaration that he was entitled to hold the land free of assessment. Both the lower Courts found that repairs to the irrigation works were necessary, that time had been given to the plaintiff to pay but he had not paid and that the *inam* had been rightly resumed and that suit not having been instituted within one year was barred by limitation under Article 14 of Schedule I of Limitation Act.

Mr. V. R. Ponnusawmy Aiyangar, for the Appellant: My propositions are—

(1) That the Government have no right to alter the conditions once fixed by

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the *inam* title-deed, by means of a general G. O. which was never communicated to me.

2. That if by my conduct I am estopped from raising that contention, the Collector in this case has never considered the question whether this *inam* should be resumed.

3. That both the lower Courts are wrong in supposing that the suit is barred by limitation.

As regards (1) the *inam* title-deed clearly casts the burden of keeping the tank in repair upon me and the Government have no right to alter those conditions by means of a general G. O. issued by them.

[SPENCER, J.—But you have accepted those alterations and agreed to pay the cost of repair.]

Mr. V. R. Ponnusawmy Aiyangar. Not that I willingly accepted it; it was forced upon me. I insisted that the tank was in good condition and required no repair.

[SPENCER, J.—But both the lower Courts find that against you.]

Mr. V. R. Ponnusawmy Aiyangar.—Then my next proposition is, if I accepted the liability to pay the cost of repair, no sufficient opportunity was given to me for payment. I demanded six months' time, but I was told that I was granted only three months' time. I got no order from the Collector providing that in case I did not pay within three months, my *inam* would be resumed. That order was never communicated to me.

[SPENCER, J.—But the Officer of Government told you of the order.]

Mr. V. R. Ponnusawmy Aiyangar.—Is that enough? Should not I get something from the Collector directly? Am I to regulate my conduct according to the oral information I receive from subordinate officials? The Statute casts the power to resume only upon the Collector, and should he not deal with me direct in writing?

[TYABJI, J.—Spencer, J. has pointed out that there was an oral communication.]

Mr. V. R. Ponnusawmy Aiyangar.—The order distinctly says that if the money is not paid within three months, the *inam* would be resumed. Does it not visit me with

penal consequences? Am I not entitled to get something in writing from Collector? The Standing Orders of the Board of Revenue require notice before resumption. Where is that notice in this case? In the case of ordinary landlords and tenants notice in writing is essential to put an end to the tenancy, and why should it be less so in the case of an *inamdar*? He can claim equal rights with Government. His rights are defined to him under the *inam* title-deed and if they are infringed, your Lordships are here to enforce his rights.

[SPENCER, J.—In this case, the Collector has resumed the *inam*.]

Mr. V. R. Ponnusawmy Aiyangar.—Your Lordships have to see whether the resumption was reasonable under the circumstances. In this case, there was neither a notice to me, nor did the Collector consider the question whether this *inam* should be resumed or not. He put an end to valuable rights by dealing with the *inam* in a routine manner. He never applied his mind to the question of resumption.

[SPENCER, J.—Then what do you say as to limitation?]

Mr. V. R. Ponnusawmy Aiyangar.—I say that the lower Courts are wrong in supposing that Article 14 applies. The Article applicable is Article 131. It is a suit to establish a periodically recurring right. Every time the Collector asks me to pay the assessment, I can say that your order of resumption is wrong, and I need not pay assessment. Unless the Collector has issued a notice in writing that this *inam* would be resumed if the sum is not paid within three months, the Collector has no jurisdiction to resume the *inam*, and Article 14 applies only to cases where the officer has jurisdiction to act. I can ignore altogether the order of resumption. This right to hold the land on payment of quit rent is in the nature of an "interest in immovable property," which I can transmit to my heirs and is within the scope of Article 131, Schedule I, of the Limitation Act. *Hem-Chandra Chowdhury v. Atul Chandra Chakravarti* (1).

Dr. S. Swaminadhan, for the Respondent:—In this case the *inam* has been given time

(1) 21 Ind. Cas. 179 at p. 181 19 C. L. J. 118; 19 C. W. N. 386.

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to pay and he has not paid. A distinction is drawn between an order which is a mere nullity and one bad for irregularity. In this case the Collector has acted with irregularity and not that he has no jurisdiction, *Parbati Nath Dutt v. Rajmohun Dutt* (2) and *Raghunath Prasad v. Kaniz Rasul* (3).

As to limitation, Article 14 of the Act clearly applies. This is not a periodically recurring right. Article 131 of Schedule I has no application.

Mr. P. R. Ponnusawmy Aiyangar, in reply:—A right to question the order of resumption arises to me every time the Collector comes and demands payment of assessment and it is a periodically recurring right. What is there in this proceeding to show that the Collector has considered that this *inam* should be resumed. His order of resumption is *ultra vires*, and utterly void. I can ignore it altogether.

JUDGMENT.—The main relief asked for in the plaint was a declaration that the plaintiff was entitled to hold the land free of assessment. The other relief which was to recover the assessment collected by the Government for one year, was merely consequential upon the establishment of the right asserted by the plaintiff. It is argued that the suit was in effect one to establish a periodically recurring right for which the limitation period is 12 years under Article 131, Limitation Act.

But it is clear that the plaintiff is not entitled to obtain such a declaration without getting the Collector's order resuming the *dasabandam inam* set aside, [see *Parbati Nath Dutt v. Rajmohun Dutt* (2) and *Raghunath Prasad v. Kaniz Rasul* (3)] and for this purpose he was under Article 14 of the Limitation Act bound to bring his suit within one year of the passing of that order. The present suit having been filed in 1909, twelve years after the order, is clearly time-barred. We are asked to treat the Collector's order as a nullity, but it is clearly not so.

The second appeal fails and is dismissed with costs.

Appeal dismissed.

(2) 29 C. 367; 6 C. W. N. 92.

(3) 24 A. 467; A. W. N. (1902) 116.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 16 OF 1911.

August 26, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VEERARAGHAVA THATHACHARIAR

AND OTHERS—DEPENDANTS—APPELLANTS

versus

KRISHNASWAMI THATHACHARIAR

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Res judicata—*Erroneous decision on point of law, if res judicata.*

An erroneous decision on a question of law in a previous suit is no bar to a subsequent suit between the same parties, but the findings of facts and the relief given in a previous suit may operate as *res judicata*. [p. 270, col. 2.]

Sri Krishna Tata Chariar v. Singara Chariar, 4 M. 219; *Rish Behari v. Mahendra Nath Ghose*, 21 Ind. Cas. 979; 19 C. L. J. 34; *Mangalathammal v. Narayanaswami Aiyar*, 30 M. 461; 17 M. L. J. 250; *Bommidu Bayyala Naidu v. Bommidu Sreenarayana*, 17 Ind. Cas. 445; 12 M. L. T. 500; (93) M. W. N. 1; 23 M. L. J. 543 (F. B.); 37 M. 70, followed.

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 309 of 1908, preferred against that of the Court of the District Munsif of Conjeevaram, in Original Suit No. 7 of 1906.

Mr. T. R. Ramachandra Aiyar, for the Appellants.

Mr. C. Narasimhachariar, for the Respondents.

JUDGMENT.

SADASIIVA AIYAR, J.—This suit was brought for the recovery of emoluments amounting to Rs. 167-1-11. It was decreed by the District Munsif for the appreciably lesser amount of Rs. 127-4. That decree was confirmed by the District Court against whose decision this second appeal has been preferred, valuing it at Rs. 127-4. But the eight grounds mentioned in the memorandum of second appeal are concerned only with that portion of the plaintiffs' claim which relates to the emoluments due to other temple servants (other than the plaintiff) working during the annual festival of the Sri Manavala Mahamuni shrine, which is a minor shrine situated in the famous Conjeevaram Varadaraja swami temple. The emoluments thus in question in this second appeal amount to the rather paltry sum of Rs. 5-1-0 (at the rate of Re. 0-13-6 per year for the six years before suit).

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This litigation is now nearly 10 years' old, the plaint having been filed on the 2nd January 1906. This second appeal which really relates (as above said) to this sum of Rs. 5-1-0, is itself now nearly five years' old and has been heard by three different Benches of this Court.

It is well known that this famous temple intended for gods' worship has been in a large degree converted into a field for the sowing of a crop of continual litigation, both civil and criminal, (such litigation being mostly of a childish and trivial, though of a very intricate and ingenious, character) between the Vadagalais and the Tungalais during more than 60 years past. The time of the Courts in dealing with this mass of litigation, cannot be said to be wholly wasted, as the legal learning and acumen of both Bench and Bar have been sharpened and improved and numerous valuable decisions on questions of law have found their way into the authorised and other reports.

The small claim connected with the present litigation seems to have been first started so long ago as in 1852, and that claim is whether this sum of Re. 0-13-6 due (in the shape of cooked rice, uncooked rice or money) to other temple servants is to be distributed among them by the big Dharma-karthas of the Varadarajaswami temple who are Vadagalais, or by the Archakapari-charakas of the Manavala Mahamuni shrine who is a Tungalai saint beloved of the Tungalai Vaishnavite community to which sect the Archakapari-charakas belong.

I do not think it necessary to deal in detail with the 300 pages and more of printed matter referred to in the course of the argument in this case (the Exhibits beginning in 1890 and coming down to the time of the suit). The point to be decided is short and simple enough after once the labour of sifting and understanding the mass accumulated by the litigious nature of the parties round that single point, has been accomplished. I am satisfied, after a careful consideration of the plaint in the suit of 1852, the judgment of the Principal Sudder Amin in that suit, of the decision in *Sri Krishna Tata Chariar v. Singara Chariar* (1) which deals

with the interpretation of the decree in that suit of 1852, of the execution applications in that decree, of the schedule to the plaint in Original Suit No. 291 of 1894 and of the other documents not necessary to be referred to in detail that—

(a) the decree in the suit of 1852 declared the plaintiffs' predecessors' right to get this Re. 0-13-6 a year from the trustees for the distribution to the other temple servants [I arrive at this conclusion, not on the ground that the construction of that decree is *res judicata* by the decision in *Sri Krishna Tata Chariar v. Singara Chariar* (1) as a precedent which is entitled to great respect. I do not say that it is *res judicata*, but only that I do not wish to decide the question whether it is *res judicata* or not as it is unnecessary. See, however, *Rash Behari v. Mahendra Nath Ghose* (2) which seems not to go so far as the decision of this Court in *Ma-galathammal v. Narayanaswami Aiyar* (3), which laid down very generally that an erroneous decision on a question of law in a previous suit was no bar in a subsequent suit between the same parties. It is also unnecessary to consider whether the decisions in the suits to which records F to O relate are or are not *res judicata* in plaintiff's favour];

(b) from long before 1852, the custom or *mamool* of the temple has been that the Archakapari-charakas are to receive this Re. 0-13-6 from the trustees for distribution through them (the plaintiffs and their predecessors) to the other servants;

(c) that there is a finding also of fact in the judgment in the suit of 1852 that such is a *mamool* or custom in this temple.

The findings of fact in the suit of 1852 are clearly also *res judicata* between the parties. [See *Bommidi Bayyan Naidu v. Bommidi Suryanarayana* (4)]. The declaratory relief given in that suit is also *res judicata*, even holding that the finding that the Archakapari-charakas are entitled to receive Re. 0-13-6 from the trustees is a finding on a pure question of law and is wrong. [See the observations in *Mangalathammal v. Narayanaswami Aiyar* (3) itself which is relied on for the appellants.] It follows that

(2) 21 Ind. Cas. 979; 19 C. L. J. 34.

(3) 30 M. 481; 17 M. L. J. 250.

(4) 17 Ind. Cas. 445; 23 M. L. J. 543 (F. B.); 12 M. L. T. 500 (1913) M. W. N. 1; 37 M. 70.

O. A. M. K. CHETTY FIRM v. K. P. CHETTY FIRM.

the lower Courts' decision in plaintiffs' favour in this case was right.

It was, however, argued that a earlier decision of this Court, dated 23rd January 1906, in Second Appeals Nos. 137, 138 and 269 of 1902 between the same parties, has negatived the right of the plaintiffs to recover this Re. 0-13-6 from the defendants. I have carefully gone through that judgment and through the records of the suits out of which those second appeals arose so far as they have been made evidence in this case; and it is clear to me that as ultimately decided the judgment in these second appeals decided only the two following points:—

(1) That the trustees are entitled to make all arrangements for the putting up and taking down of *pandals* in connection with the festivals in the Manavala Mahamuni shrine on all occasions and the Archakaparicharakas are not entitled to act independently of the trustees in the matter of putting up and taking down of such *pandals*.

(2) That the trustees of the bigger temple are also trustees of the Manavala Mahamuni shrine and hence the defendants have a general right of superintendence over the acts of the Archakaparicharakas. I think it is impossible to hold that the right declared (in the suit of 1852) to exist in the Archakaparicharakas of obtaining this Re. 0-13-6 a year from the trustees was negatived by the decree of this Court in the above second appeals relating to the putting up of *pandals* and to the right of trustees as such to exercise general superintendence over the whole management of the worship in the Manavala Mahamuni shrine.

In the result I would dismiss this second appeal with costs.

I fear there is no use in hoping that (what Mr. Justice Moore has characterized in his judgment in the second appeals of 1900 as) "these unfortunate and foolish disputes which have worked so much injury to the temple for many years past" will terminate with this case, which is only a very minor episode in the never-ending drama of the Conjeevaram Temple litigation.

NAPIER, J.—I concur.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
CIVIL MISCELLANEOUS PETITION No. 178
OF 1914.

February 22, 1915.

Present:—Mr. Justice Ormond.

O. A. M. K. CHETTY FIRM—
PETITIONER

versus

K. P. CHETTY FIRM—RESPONDENTS.

Hindu Law—Joint family property—Joint family business—Assets—Minor partners, liability of, extent of.

In the case of a Hindu joint family, the joint family property is not necessarily part of the assets of the joint family firm and the minor partners of a joint family business are only liable for the debts of the business to the extent of their share in the property of the firm.

Mr. Chari, for the Petitioner.

Mr. Brown, for Respondents Nos. 2 to 6.

JUDGMENT.—Plaintiff obtained a decree against the K. P. Chetty firm, which was a joint Hindu family business belonging to the defendants. First respondent is an adult and was the manager, the other defendants are minors.

Mr. Chari, for plaintiff, applies under Order XXI, rule 50, for leave to execute his decree against the shares of the minors in the joint family property. The joint family property is not necessarily part of the assets of the joint family firm, and I know of no authority which makes an exception in the case of a Hindu joint family firm so as to render a minor's property which does not form part of the partnership property liable for the partnership debts. On the other hand, the cases of *Joykisto Cowar v. Nittyanund Nundy* (1), *Samalbai Nathubhai v. Someshwar* (2) and *Sakrabhai Nathubhai v. Maganlal Mulchand* (3) are authorities to show that minor partners of a Hindu joint family business are only liable for the debts of the business to the extent of their share in the property of the firm. Leave is, therefore, granted to plaintiff to execute his decree against the minors to the extent of their property in the firm and plaintiff is at liberty to execute his decree against 1st respondent free from such restriction.

Petition partly granted.

(1) 3 C. 738; 2 C. L. R. 440; 3 Ind. Jur. 117.

(2) 5 B. 38.

(3) 26 B. 206; 3 Bom. L. R. 738.

VIKRAMA DEO GARU V. MAHARAJA OF JEYPORE.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 2406
OF 1915.

October 13, 1915.

Present:—Justice Sir William Ayling, Kt., and
Mr. Justice Phillips.Sri Sri Sri VIKRAMA DEO GARU—
PETITIONER

versus

Sri Sri Sri VIKRAMA DEO MAHA-
RAJULANGARU, MAHARAJA OF
JEYPORE, AND ANOTHER—RESPONDENTS.*Privy Council—Leave to appeal—Appellate Court—
Petitioner entitled to benefit of doubt—Civil Procedure
Code (Act V of 1908), s. 110.*

The petitioner claimed maintenance and Rs. 15,000 for residence. The Agent to the Governor before whom the suit was brought allowed maintenance at a certain rate and disallowed entirely the claim for residence. In appeal this claim was allowed, but the value of the claim was fixed at Rs. 5,000. The respondents' application for leave to appeal to His Majesty in Council was allowed and the petitioner then applied for leave to appeal to His Majesty in Council for the amount disallowed.

Held, that in view of the fact that an appeal had already been allowed to be filed by the other party, the leave prayed for should be granted.

Per Ayling, J.—In dealing with an application for leave to appeal, the petitioner should have the benefit of any doubt in the order granting certificate.

Raja Sree Nath Roy v. Secretary of State, 8 C. W. N. 294, referred to.

Petition presented under rules 3 and 5 of Order XLV of the Code of Civil Procedure, praying that in the circumstances stated therein the High Court will be pleased to grant a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of this Court in Appeal No. 115 of 1910, preferred against the decree of the Court of the Agent to the Governor at Vizagapatam, in Original Suit No. 1 of 1909.

Mr. V. Ramesam, for the Petitioner.

Mr. B. N. Sarma, for the Respondents.

ORDER.

AYLING, J.—I am by no means clear that the decree of this Court in so far as petitioner wishes to appeal from it, should not be regarded as one confirming the decree of the Agent [*Vide Raja Sree Nath Roy v. Secretary of State* (1)], and there appears to be no substantial question of law involved in this appeal. As, however,

(1) 8 C. W. N. 294.

JAWALA SINGH V. LADHA.

my learned brother is clearly of opinion that the appeal lies, and as an appeal has already been admitted by the opposite party against other portions of the decree I do not feel called upon to differ. I, therefore, agree, the more so as I think in dealing with an application for leave to appeal, the petitioner should have the benefit of any doubt in the order granting certificate.

PHILLIPS, J.—Objection is taken to this application for permission to appeal to the Privy Council on the ground that although the subject-matter of the appeal is Rs. 10,000 in value, the decree of this Court is an affirming decree in so far as the rate of the maintenance claimed is concerned, the addition of Rs. 5,000 for residence being treated merely as an addition to the lower Court's decree. [*Vide Raja Sree Nath Roy v. Secretary of State* (1).] Petitioner claimed Rs. 15,000 for a residence, but this claim was entirely disallowed by the Agent to the Governor. In appeal this claim was allowed, but the value of the claim was fixed at Rs. 5,000 only. So far as this claim is concerned, I do not think that the decree of this Court can be said to affirm the decree of the Agent, for in that Court that claim was entirely negatived, but in this Court it was allowed partially. Even in respect of this claim the value of the subject-matter of the appeal is Rs. 10,000 and, therefore, I would grant permission to appeal, the more so as an appeal has already been allowed to be filed by the opposing party.

Leave granted.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2029
OF 1913.

May 13, 1913.

Present:—Sir Donald Johnstone, Kt., Chief
Judge.JAWALA SINGH AND OTHERS—
DEPENDANTS—APPELLANTS
versusLADHA AND OTHERS—PLAINTIFFS AND
ANOTHER—DEPENDANT—RESPONDENTS.*Punjab Pre-emption Act (II of 1905), s. 12—Pre-emption—Pre-emptor co-sharer in shamilat land.*

SANKARALINGA MOOPANAR v. SUBRAMANIA PILLAI.

In applying section 12 of the Pre-emption Act only the proprietary land and not the *shamilat* land of the pre-emptor is to be considered, as for purposes like this *shamilat* is a mere appendage of the proprietary land.

Miscellaneous second appeal from the order of the Divisional Judge of Gujranwala, at Lahore, dated the 12th May 1913, reversing that of the District Judge, Gujranwala, dated the 16th October 1912, dismissing the claim.

Lala Dharm Das Suri, for the Appellant.

JUDGMENT.—In this case, the plaintiff sued for pre-emption of a share in three *khata*s Nos. 178, 181 and 182 sold by his near relative, Wasakhi, to the vendees who are also relatives of Wasakhi, but not so near. The first Court dismissed the suit. The lower Appellate Court noticed that plaintiff was a co-sharer in *khata*s Nos. 181 and 182 but not in *khata* No. 178, while the vendees were co-sharers in all the three *khata*s. It nevertheless held plaintiff entitled to pre-emption, on the ground that he was more nearly related to the vendor than the vendees. His appeal was accordingly accepted and the case remanded for disposal on the other issues.

The vendees come up here in second appeal and point out that the lower Appellate Court has overlooked the fact that *khata*s Nos. 181 and 182 in which both parties have shares are *shamilat* and that *khata* No. 178 in which vendees alone have shares is proprietary land. This case is, therefore, exactly on all fours with Civil Appeal No. 141 of 1911, published as *Khair Din v. Ghulam Mohi-ud-Din* (1), and following that ruling, I am bound to hold that the plaintiff has no right of pre-emption at all. The *ratio decidendi* in that case was, that for purposes like this, *shamilat* is a mere appendage of the proprietary land and that in applying section 12 of the Pre-emption Act, only the proprietary land must be considered.

For these reasons I accept the appeal, set aside the order of the lower Appellate Court and restore the judgment and decree of the first Court.

Before me, the plaintiff-respondent attempts to argue that he is a co-sharer in *khata* No. 178, but this is negatived by the *farid* which he himself filed with his plaint, by (1) 22 Ind. Cas. 401; 52 P. L. R. 1914; 43 P. R. 1914; 142 P. W. R. 1914.

the evidence of the *patwari* and by the findings of the lower Courts.

Plaintiff to pay the vendees' costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2523 OF 1913 AND 290 OF 1914.

August 3, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

IN S. A. No. 2523 OF 1913

SANKARALINGA MOOPANAR AND OTHERS
—DEFENDANTS NOS. 3, 4 AND 5—APPELLANTS
versus

T. V. SUBRAMANIA PILLAI AND ANOTHER
—PLAINTIFFS—RESPONDENTS.

IN S. A. No. 290 OF 1914

T. V. SUBRAMANIA PILLAI AND
ANOTHER—PLAINTIFFS—APPELLANTS
versus

RAMASWAMI MOOPANAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (1 of 1908), ss. 151, 152
—Tenant committing act of waste on holding rendering it unfit for agricultural purposes—Liability to pay compensation—Relationship of landlord and tenant, whether subtenant—Suit for ejectment.

Under the Estates Land Act, it is open to the Courts to award compensation in lieu of ejectment in all cases of waste; but the payment of compensation does not put an end to the relationship of landlord and tenant existing between the parties. [p. 275, col. 1; p. 277, col. 1.]

Where in a suit for ejectment by the trustees of a temple, on the ground that the defendants had erected a building on a portion of the holding and had thereby committed an act of waste, it was found that the holding as a whole had been materially impaired for agricultural purposes and rendered substantially unfit for such purposes:

Held, that the defendants could not be evicted but that they must pay compensation to the plaintiffs for the injury to the holding and continue to hold the land and the building thereon subject to the payment of the rent originally agreed upon. [p. 275, col. 1; p. 277, col. 1.]

Ramanadham v. Zemindar of Ramnad, 16 M. 407; 3 M. L. J. 185; *Orr v. Mcithyunjaya Gurukkal*, 24 M. 65, referred to.

Per Seshagiri Aiyar, J.—The damage to which a tenant renders himself liable is not for the value of the right which the landlord has in the holding, but for the wrongful act which the tenant has committed on the property. [p. 275, cols. 1, 2.]

Second appeals against the decree and judgment, dated 18th September 1913, of the District Court of Tinnevely, in Appeal Suit No. 236 of 1912, preferred against the decree

SANKARALINGA MOOPANAR v. SUBRAMANIA PILLAI.

of the Court of the Revenue Divisional Officer, Koilpatti, in Summary Suit No. 120 of 1911.

Mr. C. S. Venkatachariar, for the Defendants-Appellants.

Mr. N. Rajagopalachariar, for the Plaintiffs-Respondents.

JUDGMENT.

SESHAGIRI AIVAR, J.—The plaintiffs as trustees of a temple sue to eject the defendants. The allegation in the plaint is that the defendants erected a house upon a portion of the holding and are, therefore, liable to be evicted. The Suit Collector dismissed the suit. In appeal, the District Judge came to the conclusion that the erection of the building by the tenants impaired the value of the land and rendered it substantially unfit for agricultural purposes; but instead of passing decree in ejectment he directed compensation to be paid to the landlords under section 152 of the Estates Land Act. Both the tenants and the landlords have appealed to this Court.

In the appeal by the tenants, it is argued that as the building was erected only on a small portion of the holding, the finding that the whole land has been rendered unfit for agricultural purposes is unsustainable. As was pointed out by the Judicial Committee in the case *Hari Mohan Misser v. Surendra Narayan Singh* (1), it is the Court which has jurisdiction to weigh evidence, that must find whether the land has been rendered unfit for agricultural purposes. As the Court of second Appeal, we are bound by that finding. We, therefore, accept the conclusion of the District Judge, which is unambiguous. Moreover, there is no issue as to on what portion of the holding, the building was erected and whether that erection prejudiced cultivation in other portions of it. Another objection taken by Mr. Venkatachariar is, that the holding is held in severalties by the brothers and that the act of waste committed by one of them should not entail liability to ejectment on the others. There is no finding that this division of the holding was assented to by the landlords or that they received separate rents from each of the individual tenants in respect of the portion in his occupation. Unless these conditions are satisfied section 145 of the

Estates Land Act cannot be invoked in favour of the tenants. We must overrule this contention also.

On the question of the compensation which has been awarded, both parties have raised objections. In the view I am disposed to take of this case, that question will have to be remanded for further consideration to the lower Appellate Court.

In the appeal by the landlords, the trustees, it was first argued by Mr. Rajagopalachariar that the alternative remedy of compensation is not available to the tenants, as a permanent house was constructed by them. Reliance was placed upon two decisions of this Court in *Ramanadhan v. Zemindar of Ramnad* (2) and *Orr v. Mrithyunjaya Gurukkal* (3) for this proposition. In the first of these cases, which was a suit for injunction restraining the tenant from further proceeding with the contemplated erection of the building, the learned Judges held that the landlord was entitled to that relief. The observation in the judgment that "there is also no definite standard by which the compensation that ought to be awarded for prospective injury, can be measured," should not be construed as meaning that in all cases where a building has been erected, damages will not afford adequate relief in lieu of ejectment. In the second case, the learned Judges came to the conclusion that the injury was incapable of being compensated. That was arrived at with reference to the facts of that case. The learned Judges do not lay down that in all cases where a building is erected on agricultural land, the only remedy open to the landlord is to evict the tenant. Whatever may have been the view prior to the passing of the Estates Land Act, sections 151 and 152 of that Act put the matter beyond controversy. Under section 152, if the Court is satisfied that the tenant can be relieved from liability to ejectment by awarding against him some pecuniary compensation, the Court should adopt the latter course. There is no differentiation between the erection of a building and any other act of waste. I am clearly of opinion that under the Estates Land Act, it is

(2) 16 M. 407; 3 M. L. J. 185.

(3) 24 M. 65.

(1) 34 C. 718; 17 M. L. J. 361; 11 C. W. N. 704; 4 A. L. J. 497; 9 Bom. L. R. 750; 6 C. L. J. 19; 34 I. A. 133 (P. C.); 2 M. L. T. 399.

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open to the Courts to award compensation in lieu of ejectment in all cases of waste. The more serious question is this. Whether the compensation mentioned in section 152 is to be regarded as putting an end to the relationship of landlord and tenant, so that the money value paid by the tenant renders the building and the site on which it stands, the absolute property of the tenant? The compensation awarded in this case proceeds on the footing that from the date of its payment, the tenant is to have absolute right to the property. I do not think that the act contemplates the severance of the relationship of landlord and tenant by the grant of compensation. It would amount to the compulsory purchasing out of the landlord, if he is asked to accept a money payment in this way. The words of section 152 which relate to this question are: "The decree shall provide that, if within one month from the date thereof, or such further time as the Collector for reasons to be recorded may allow, the *ryot* does not repair the damage or pay as compensation a sum which shall be fixed by the Collector and specified in the decree, he shall be ejected." Now, the repairing of the damage at the expense of the tenant would still continue the relationship of landlord and tenant, and why should the award of compensation terminate such relationship? The use of the two clauses in the same context, shows that in both cases the relationship is to subsist. The intention of the Legislature is to give an indulgence to the tenant to remain on the property, notwithstanding the act of waste he has committed, and for this purpose he is to be directed to pay compensation for the injury he has done to the property. The compensation should be fixed on the basis that a tortious act was committed by the tenant upon the holding, and not as if the landlord is to be purchased out of his right by the award of compensation. There is no indication anywhere, either in section 151 or 152, to suggest that a severance of relationship was in the contemplation of the Legislature. It seems to me that the defendants must continue to hold the land and the building thereon as tenants subject to the payment of the rent originally agreed upon. The damage to which they have rendered

themselves liable is not for the value of the right which the landlords have in the holding, but for the wrongful act which the tenants have committed on the property. In this view, it is necessary that the award of compensation should be revised. The District Judge and the Revenue Divisional Officer have assessed the amount on the ground that the landlord will lose all his rights in the property. The lower Appellate Court must be asked to assess the damage in the light of the above observations. The finding will be returned in six weeks and seven days will be allowed for objections.

NAPIER, J.—These are two second appeals by the parties in Appeal No. 236 of 1912 in the District Court of Tinnevely. Summary Suit No. 120 of 1911 in the Court of the Deputy Collector of Koilpatti Division was by the Dharmakarthas of the Koilpatti temple under section 151 of the Madras Estates Land Act asking for the ejectment of the defendants, the *pattadars* No. 223 of the suit lands. The Appellate Court reversing the decree of the first Court, directed the defendants to pay the sum of Rs. 1,210 and in default of such payment to be ejected. In Second Appeal No. 2523 of 1913, the defendants Nos. 3, 4 and 5 claim that no decree should be passed against them, as they had with the consent of the landholders, divided their lands and had not constructed any building or otherwise materially impaired the value of their portion of the holding for agricultural purposes. That contention is founded on section 145, but the sub-section provides that no landholder should be bound to recognise the sub-division of any irrigated field into plots less than five acres in extent. It is urged that the landholder had given his consent, but no issue was taken on this point and the point was evidently not urged in the lower Appellate Court. Both Courts have found that the holding as a whole has been materially impaired for agricultural purposes and rendered substantially unfit for such purposes and we cannot interfere with that finding in second appeal.

The Court has not thought it necessary to order the buildings to be removed though that was considered the proper remedy in *Ramanadhan v. Zemindar of Ram-rad* (2), the

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leading case before the Act, and in *Orr v. Mrithyunjaya Gurukkal* (3), which followed it, but has granted compensation.

The amount of compensation fixed by the first Court was 10 per cent. of the market value of the land covered by the buildings objected to by the landholders and the question of the propriety of this assessment can only be raised in connection with the point taken by the landholders, appellants in Second Appeal No. 290 of 1914. The important point in that appeal is their claim that the decree should declare that the relation of landholders and *ryots* still subsists and that the *ryots* are still liable to pay the rent due on the *patta*. The defendants claim *contra* that the tenure has ceased. This is a very important question, which is raised now for the first time in this Court. It is, in my opinion, somewhat unfortunate that the Act does not differentiate between such alterations of the character of the holding as to improve the value of the land but make it unfit for agricultural purposes, and such variations as lower the value of the land for all purposes. The Act gives for the first time, a right to sue to eject for such acts, it having been held in the cases above referred to that such acts do not create a forfeiture and the Legislature might well have made some special provision for acts that really improve the value of the land. An injunction results in a waste of money, while ejectment leaves the position as it stood before. We have, however, to construe the section as it stands and decide what is the effect of awarding compensation and flowing from that, what is the basis of compensation. At first sight, it seems incongruous that a plot which cannot be cultivated, should continue to be held on an agricultural lease, but I am satisfied that it is contemplated by the Act. Section 151 of the Estates Land Act presumes that the landholder will institute a suit in ejectment. It provides that he may also ask for compensation in addition to ejectment. In such a case, obviously the land would retain its character and on ejectment, the landholder would secure another *ryot*, with or without compensation from the old *ryot*. An alternative right is given to the landholder to sue for an injunction with or without compensation. In such a case, the *ryot* would be restrained from continuing the

injury to the land but would remain a tenant, with or without having to pay compensation. In the third case, the landlord can sue for the repair of the damage or waste. In such a case, a mandatory injunction would go to the tenant compelling him to make such necessary improvements in the land as would restore it to its former value and there would remain still the relation of landlord and tenant. So far for section 151.

We now come to section 152 of the Estates Land Act. "If in any suit under the preceding section," that is, a suit in ejectment or for an injunction or for repair of damage, "an occupancy *ryot* is found liable to ejectment," but it appears that it is not necessary to eject the tenant, the Court might make a certain order. The object of the section is not to leave it to the will of the landholder to exact whatever remedy he wishes but to provide that whatever the relief the landholder asks for, the Court shall have a discretion to give such relief as it thinks fit, that is to say, it specifically reserves to the Court the powers which existed prior to the Act. So the section provides that where it appears that the "damage to the holding admits of being repaired, or that pecuniary compensation would afford adequate relief, the decree shall provide that, if within a certain period, the *ryot* does not repair the damage or pay the sum fixed by the Collector for compensation he shall be ejected", and this is the order made in this case. Assuming, therefore, that whatever the relief sought for by the landlord might be, the Court has declined to decree ejectment, it can make a conditional order for ejectment giving the *ryot* a short time to do one or two things, either to repair the damage or pay compensation. If he does not take advantage of the time given to him, he is ejected and the landholder procures a new *ryot* and the relation of landholder and *ryot* continues. If he does repair the damage, it is equally clear that the land is restored to its proper condition, the *ryot* remains in his holding and the relation continues.

We now come to the last case, namely, where a *ryot* takes advantage of the conditional order, and within the time given by the Collector pays compensation. It seems to me impossible to construe these words as making an exception to the results arrived at in

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the other cases and involving the destruction of the existing relation. If it had been intended to produce a different result, it would have been so provided in the Act and that not having been done I can only construe the words in conformity with the previous conclusions. The *ryot* must continue to hold the land but pay compensation for the injury to the holding. A difficulty arises, however, to the measure of the damages. This was noted in *Ramanadhan v. Zemindar of Ramnad* (2), where it was pointed out that there was no definite standard by which prospective injury could be measured. In cases where the fitness of the land for cultivation has been let down, the damages are easily estimated and must be such sum of money as would enable the landholder to restore it to its former condition, that is, to do what the *ryot* might himself have done "to repair the damage," it would cover such expenses as renewing water channels, removing weed or sand or other deleterious matter. But in cases like the present where the land has in fact become more valuable, though less fit for agricultural purposes, it is certainly difficult to fix compensation. It is impossible to say that no compensation should be given, because such a construction would permit *ryots* to convert agricultural land into town plots taking the whole increased value to themselves and depriving the landholder of his share in what is known in English Law as "betterment." Where *ryoti* land is taken by the State under the powers of land acquisition the landholder is entitled to his share of the premium paid for the compulsory purchase. Where the landholder seeks to avail himself of the provisions of section 186 of the Estates Land Act and acquire the holding, the *ryot* is entitled to full compensation, and it seems to me to follow that the *ryot* cannot claim to improve the value of the land for his own benefit without paying any compensation to the landholder. Further, in certain circumstances a landholder is entitled to sue for enhancement. Such circumstances are set out in section 30 of the Estates Land Act. They include improvement of the land by agencies outside the landholder or the *ryot* and the improvement of the land effected by the landholder. Now, clearly the conversion of an agricultural land into buildings deprives the landholder of his right to effect an improvement himself and of his right to share in the

result of other improvements not made by the *ryot*, and this was also pointed out in *Ramanadhan v. Zemindar of Ramnad* (2). It is difficult to value the loss of these prospective rights which must vary considerably with the location of the land, but an attempt must be made to do so. Compensation fixed, as has been done in this case, by awarding 10 per cent. of the improvements to the landholder is to my mind not ascertained in the proper manner. I would call for a finding from the lower Appellate Court as to the amount of compensation due to the landholders on the basis of the foregoing observations.

Suit remanded.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 19 OF 1914.

April 9, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

THE SECRETARY OF STATE FOR INDIA
DEFENDANT—APPELLANT

versus

BAPUJI MAHADEV GOVAIKAR AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 10, Sch. I, Arts. 14, 120—*Deposit in Government Treasury—Limitation.*

From the year 1836 to 1859, the accounts of the Satara Treasury showed the sum now claimed by the plaintiffs as payable to C, the plaintiffs' ancestor. In 1848 the Satara Principality became a part of the Bombay Presidency. In 1857 the Collector of Satara issued a notice to C's eldest son, S, calling upon him to withdraw the amount. In 1859, S applied for the money. Before, however, the money could be paid, S's younger brother objected to payment to S and asked for the distribution of the amount among C's all heirs. In 1860 the Assistant Collector ordered that the sons and heirs of C should produce a certificate of heirship and then arrangement would be made to pay them the money.

Held, that the order of 1860 as also the notice to S in 1857 was a sufficient declaration of trust and that the money was certainly vested in the Government when it took over the Satara Treasury in 1848 and the purpose of the credit in the name of C was certainly specific and that, therefore, section 10 of the Limitation Act did not apply to the case: [p. 278, col. 2.]

Held, also, that the plaintiffs' claim did not fall within Article 14 of the Limitation Act and would be within time if it fell within Article 120, but that the case was one to which the bar of limitation could not be pleaded. [p. 278, col. 1.]

First appeal from the decision of the District Judge of Satara, in Civil Suit No. 1 of 1912.

SECRETARY OF STATE P. PAPUJI MAHADEV.

Mr. Ramdatt, for the Appellant.

Mr. Jayakar, (with him Mr. Ghorpure), for the Respondent.

JUDGMENT.—It is unnecessary to re-state the facts, which are not disputed and are very clearly stated by the learned District Judge. He has allowed the plaintiffs' claim for Rs. 1,793, which came into the hands of the East India Company in 1848 when the Satara Principality, on the death of the Maharajah Shahaji, became part of the Bombay Presidency. The only issues raised in the lower Court were issues of limitation based upon Articles 14 and 120 and section 10 of the Indian Limitation Act. The learned Judge, being of opinion that the money was at most held by the defendant on an implied trust, held that section 10 of the Indian Limitation Act did not apply to the case and that the plaintiffs' claim could only be decreed on the ground that it was within time under Article 120 of the Indian Limitation Act.

In our opinion, the plaintiffs are entitled to succeed on the ground not only that their claim did not fall within Article 14 and would be within time if it fell within Article 120, but that it is one to which the bar of limitation cannot be pleaded. It is, we think, correct, as stated by Pigot, J., in *Secretary of State for India in Council v. Gurn Proshad Dhur* (1), that the East India Company could be, and often was, a trustee. It could be expressly a trustee as in the case of the Clive Fund [see *Walsh v. Secretary of State for India* (2)], and could be a party to a breach of trust and, therefore, subject to the law of trusts: see *East India Company v. Robertson* (3). That it could incur fiduciary obligations, is expressly recognised by the Government of India Act, 1858 (21 and 22 Vic. c. 106), which by section 71 enacts that the Company shall not, after the passing of the Act, be liable in respect of any claim which has arisen out of any fiduciary obligation made before the Act, and by section 42, that all sums of money payable in respect of liabilities then existing shall

(1) 20 C. 51.

(2) (1863) 10 H. L. Cas. 367; 32 L. J. Ch. 585; 9 Jur. (N. S.) 757; 11 W. R. 823; 2 N. R. 339.

(3) 7 M. I. A. 361; 12 Moore, P. C. 460; 4 W. R. (P. C.) 10; 1 Suth. P. C. J. 332; 1 Sar. P. C. J. 652; 19 E. R. 345; 14 E. R. 963; 124 R. R. 111.

be charged upon the revenues of India if such liabilities were lawfully incurred by the Company. By section 65 all persons may have the same remedies, legal and equitable, against the Secretary of State as they could have had against the Company.

From the year 1836 to 1859, the accounts of the Satara Treasury showed the sum now claimed by the plaintiffs as payable to Chinto Mahipat Govaikar, the plaintiffs' ancestor. In 1857 it is found by the learned Judge, and is not disputed, that the Collector of Satara issued a notice to Chinto's eldest son, Sadashiv, calling upon him to withdraw the amount. In June 1859, Sadashiv petitioned the Collector asking that the money should be paid to him. The sum claimed had, in the previous April, been transferred from the suspense to the profit and loss account. The Collector, however, having referred the matter to Government received a reply sanctioning the payment to Sadashiv. Before it was paid, however, Sadashiv's younger brother objected to payment to Sadashiv and asked that it should be distributed among all Chinto's sons. On the 4th of February 1860, the Assistant Collector ordered that the sons and heirs of Chinto in whose names the money had been credited, should produce a certificate of heirship and then arrangement would be made to pay them the money. The authority of the Assistant Collector to pass such an order is not disputed.

This order as also the notice to Sadashiv in 1857 was, upon the authority of *Scott v. Bentley* (4), a sufficient declaration of trust. The money was certainly vested in the Government when it took over the Satara Treasury in 1848 and the purpose of the credit in the name of Chinto was certainly specific.

If the money claimed had been realised in execution proceedings in the Supreme Court and subsequently after many years credited to Government, the liability of the Government to repay it could not have been disputed: see Act XXV of 1866 and Act V of 1870. In our opinion the fact that the liability charged is not specifically recognis-

(4) (1855) 1 K. & J. 281; 24 L. J. Ch. 244; 1 Jur. (N. S.) 394; 3 Eq. R. 428; 3 W. R. 280; 69 E. R. 464; 103 R. R. 82.

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ed by Statute as in the Acts just referred to, does not justify Government in resisting it, for the moneys mentioned in those Acts required special treatment as they were held by the Queen's and not the Company's Courts.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 528 OF 1914.

September 15, 1915.

Present:—Mr. Justice Tyabji.

ANNAMALAI CHETTY AND ANOTHER—

PLAINTIFFS—PETITIONERS

versus

POOSARI SUPPIA THEVAN—DEFENDANT

—RESPONDENT.

Registration Act (XVI of 1908), ss. 17, 49—Unregistered lease, terms of, whether admissible for proving fair rent for use and occupation.

A lease of immovable property which is compulsorily registrable and not registered, cannot be looked at for the purpose of determining the fair amount of occupation rent payable in respect of the property which formed the subject of that demise. [p. 279, col. 2; p. 280, col. 1.]

Narayanan Chetty v. Muthiah Serrai, 8 Ind. Cas. 520; 35 M. 63, 9 M. L. T. 142; 21 M. L. J. 44, followed.

Amir Ali v. Aykup Ali Khan Sandagor, 25 Ind. Cas. 509; 41 C. 347; 19 C. L. J. 428, referred to.

Sheo Karan Singh v. Maharaja Parbhu Narain Singh, 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347, distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree and judgment of the Court of the District Munsif of Melur, in Small Cause Suit No. 23 of 1914.

FACTS.—The facts of the case appear sufficiently from the judgment.

Mr. K. Rajah Aiyar, for the Petitioners:—The District Munsif erred in preferring the defendant's evidence to the Commissioner's report. The lower Court ought to have given some damages for use and occupation of the land, based on the amount of rent agreed upon in the lease. For such a purpose the lease is receivable in evidence. *Amir Ali v. Aykup Ali Khan Sandagor* (1), and

Sheo Karan Singh v. Maharaja Parbhu Narain Singh (2).

Mr. N. S. Rangaswami Iyengar, for the Respondent, argued *contra*, and relied upon *Narayanan Chetty v. Muthiah Serrai* (3).

JUDGMENT.—An application is made to me to allow time to have the plaint translated and printed. I refuse the application. On the merits, the first point taken before me is that the District Munsif ought not to have considered the Commissioner's report to be unsatisfactory. I think the District Munsif was entitled to prefer the defendant's evidence to the report of the Commissioner. I have, however, looked at the Commissioner's report, which is printed by Mr. Rajah Aiyar and the evidence given by the Commissioner in Court was read to me. The District Munsif was, in my opinion, justified in taking the view he did. It was next argued before me that the defendant ought to have been ordered to give some damages, because he was in use and occupation of the land. The answer to it is that the suit may be considered in two ways, (1) as based on a breach of the contract to cultivate the land and (2) as for fair compensation for use and occupation of land.

As to the *first* aspect of the case, there is no contract that can be proved in the Court, the lease being unregistered.

With regard to the *second* head, it seems to me there are two answers:—

(a) that the defendant did not use or occupy the land;

(b) that the land was of so little value that the defendant was not bound to pay anything in respect of its use and occupation, assuming that he did occupy it.

On the *last* point several cases were cited to me in support of the contention that an unregistered lease [though it falls under section 17 (d) of the Registration Act and it ought to have been registered] may be looked at for the purpose of determining what would be fair rent for the use and occupation of the land. In the case *Amir Ali v. Aykup Ali Khan Sandagor* (1), however, the Court did not admit the lease in evidence, but admitted other oral evidence with

(2) 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347.

(3) 8 Ind. Cas. 520; 35 M. 63; 9 M. L. T. 142; 21 M. L. J. 44.

(1) 25 Ind. Cas. 509; 41 C. 347; 19 C. L. J. 428.

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reference to the rent. In the case *Sheo Karan Singh v. Maharaja Parbhu Narain Singh* (2), the Court did apparently consider the *kabuliyat* for the purpose, but the *kabuliyat* was registered though void as a lease. As the parties had acted upon the *kabuliyat* for some time, the payment of rent by the lessees would have been evidence showing what could be fair occupation rent. The real point decided in the case was that occupation rent could be demanded, and not as to what would be fair occupation rent. It seems to me on the other hand that the case in *Narayanan Chetty v. Muthiah Servai* (3) is strong authority against the admissibility of such a lease as is under consideration for the purpose of proving that the petitioners had agreed to a certain amount of rent for the property.

For these reasons, it seems to me that the suit was rightly dismissed and the petition is dismissed with costs.

Petition dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 111 OF 1914.

June 22, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

PARVATIBAI SHANKAR—DEFENDANT—
APPELLANT

versus

BHAGWANT PANDHARINATH
PATHAK—PLAINTIFF—RESPONDENT.

Hindu Law—Will—Legacy to be paid out of property not disposable, validity of.

A Hindu testator has no power to direct legacies to be paid out of property which he has no power to dispose of by Will. [p. 281; col. 2.]

Second appeal from the decision of the District Judge of Poona, in Appeal No. 90 of 1913, confirming the decree passed by the Subordinate Judge at Junnar, in Civil Suit No. 278 of 1912.

Mr. Dhurandhar, (with him Mr. K. H. Kelkar), for the Appellant.

Mr. G. S. Rao, for the Respondent.

JUDGMENT.—The first question which arises in this case is whether there has been a valid disposition by way of legacy in favour of certain female relations of the

testator, Pandharinath, for if that point is decided in favour of the appellant, it will dispose of the whole case. The learned Judges both in the Subordinate Court and in the District Court have taken as the fundamental proposition upon which the case must be decided, that whatever property is so completely under the control of the testator that he may give it away in specie during his life-time, he may also devise by Will. That is the form in which the proposition is adopted by the Subordinate Judge. In the District Court the proposition is stated as follows: "A Hindu who is of sound mind, and not a minor, can by gift dispose of all property in which he has an absolute interest and can, by Will, dispose of all property which he may give away in his lifetime;" and it is said that because the author of the *Mitakshara* states that "it is a settled point that although property in the paternal or ancestral estate is by birth, the father has independent power in the disposal of effects, other than immoveables, for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth," the testator here had power by way of affection to make legacies in favour of his female relations out of what was admittedly ancestral property. There is, so far as we are aware, no decided case in which it has been held that the power of a Hindu father stated in pl. 27, Chapter I, section 1 of the *Mitakshara*, above referred to, enables him for the purposes therein mentioned to dispose of ancestral property, even though not immoveable, by Will. On the other hand, it has been decided by the Madras High Court, one of the Judges being Mr. Justice Muttusami Ayyar, that a legacy cannot be treated as an executory gift made for religious uses: see *Rathnam v. Sivasubramania* (1), and that was based upon an earlier decision in *Vitla Butten v. Yamenamma* (2), where it was held that a member of an undivided family cannot bequeath even his own share of the joint property, because at the moment of death

(1) 16 M. 353; 3 M. L. J. 139

(2) 8 M. H. C. R. 6

SULFALLA SAHIB v. VAJIHUDDIN SAHIB.

the right by survivorship is in conflict with the right by bequest, and the title by survivorship, being the prior title, takes precedence to the exclusion of that by bequest. This point was considered by the Privy Council in *Lakshman Dada Naik v. Ramchandra Dada Naik* (3), where it was said: "It has been ingeniously argued that partial effect ought to be given to the Will by treating it as a disposition of the one-third undivided share in the property to which the father was entitled in his life-time... the learned Counsel for the appellant have insisted that it follows as a necessary consequence (from the power of alienation by gift *inter vivos*) that such a share may be disposed of by Will, because the authorities which engrafted the testamentary power upon the Hindu Law have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos*, he may give by Will." Reference is then made to the case of *Vitla Bulten v. Yamenamma* (2), above referred to, the reason of that decision being stated to be that "the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the Will can operate." Their Lordships conclude the discussion of the question in these terms: "The question, therefore, is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence. Their Lordships do not think it necessary to decide between the conflicting authorities of the Bombay and the Madras High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the Madras Court has decided against the power of alienation by Will are sound, and sufficient to support that decision."

It is admitted by the learned Pleader for the respondent that none of the cases

referred to by the learned Judge as instances of gifts falling within the power stated in pl. 27, Chap. I, section 1, of the Mitakshara are cases of testamentary disposition. In *Haumantapa v. Jivubai* (4), which was referred to by the same learned Pleader, the disposition was by gift in *inter vivos* and the decision in *Bachoo v. Mankorebai* (5), affirmed in appeal by the Privy Council in *Bachoo Harkisonulais v. Mankorebai* (6), was a case in which the gift had been made before the death of the testator. We are, therefore, of opinion that the decision of the lower Appellate Court cannot be supported. The legacies were directed to be paid by the testator out of property which he had no power to dispose of by Will. We, therefore, reverse the decree of the lower Appellate Court and dismiss the suit. We think that under the circumstances the parties should bear their own costs.

Suit dismissed.

- (4) 2 Bom. L. R. 478; 24 B. 547.
 (5) 6 Bom. L. R. 268; 29 B. 51.
 (6) 9 Bom. L. R. 646; 31 B. 373; 11 C. W. N. 769;
 2 M. L. T. 295; 17 M. L. J. 343; 6 C. L. J. 1; 34 I. A. 107.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 12 OF 1913.

September 10, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
 Mr. Justice Napier.

Shamsul Ulama Moulvi Hafiz MAHAMMAD
 SULFALLA SAHIB—PLAINTIFF—

APPELLANT

versus

VAJIHUDDIN SAHIB AND OTHERS—

DEFENDANTS—RESPONDENTS.

Muhammadian Law—Gift—Possession—Mutation,
 effect of.

Delivery of possession is essential to make a gift valid under Muhammadian Law. [p. 262, col. 1.]

Where there is only an execution of a deed of gift and the donor, retaining the gift-deed himself, continues to exercise rights of ownership over the property for his own benefit and does not profess to hold it either as trustee or agent of the donee, there is no such delivery of possession as is contemplated by the Muhammadian Law, and the gift is invalid. The mere change in the Collector's certificate does not prove, by itself, change of possession. [p. 284, cols. 1 & 2.]

Vahazullah Sahib v. Boyapati Nagayya, 30 M. 519;
 17 M. L. J. 562; Chaudhri Mehdi Hasan v. Muhammad

(3) 7 I. A. 181 at p. 193; 5 B. 48; 7 C. L. R. 320.

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Hasan, 28 A. 439; 10 C. W. N. 706; 3 A. L. J. 405; 8 Bom. L. R. 387; 4 C. L. J. 295; 33 I. A. 68 (P. C.); 9 O. C. 106; 1 M. L. T. 106, followed.

Appeal against the decree of the City Civil Court, at Madras, in Original Suit No. 132 of 1911.

FACTS.—The facts of the case sufficiently appear from the judgment.

This appeal was first heard on 23rd March 1915.

Mr. M. D. Devadoss (with him Mr. Venkatasubramiah), for the Appellant:—The document in question is a deed of gift and as such is invalid for want of delivery of possession. Vide *Vahazullah Sahib v. Boyapati Nagayya* (1), and *Chandhri Mehdi Hasan v. Muhammad Hasan* (2). The plaintiff having been in possession all along is entitled to succeed.

Mr. A. Saugappa, for the Respondents, argued *contra*.

JUDGMENT.—It is not denied by the defendants that Exhibit A is really a transaction of gift. It must be held that the plaintiff did not, in his plaint or at the time of the issues, put forward the alternative contention that if it was intended to be a gift in the form of a sale (and not a mere nominal transfer by sale), it was invalid under the Muhammadan Law for want of delivery of possession. [See *Vahazullah Sahib v. Boyapati Nagayya* (1) and *Chandhri Mehdi Hasan v. Muhammad Hasan* (2).] But he alleged possession in himself in the plaint and there was an issue as to the fact of possession. The alleged continuity of the plaintiff's title notwithstanding the execution of Exhibit A is the basis of the suit and if the gift is invalid under the Muhammadan Law, the title of the plaintiff continues and the relief prayed for can be granted.

We, therefore, think that this appeal cannot be finally decided without a finding on the following issue:—

"Was the gift made under Exhibit A validated by the delivery of possession of the gifted property to the donee as required by the Muhammadan Law?"

The finding will be submitted within two

months and ten days will be allowed for filing objections. The defendants will be at liberty to adduce evidence on the question of possession and the plaintiff to adduce rebutting evidence so far as is allowed by the Evidence Act.

In compliance with the order contained in the above judgment of this Court, the City Civil Judge, Madras, submitted the following:

FINDING.—The issue on which I have to submit my finding runs as follows:—

Was the gift made under Exhibit A validated by the delivery of possession of the gifted properties to the donee, as required by Muhammadan Law?

2. The defendants did not appear on the day on which the suit was posted for the trial of this issue. No further evidence was adduced on behalf of the plaintiff. The question has, therefore, to be decided upon the evidence taken at the former trial. The donee (1st defendant) under Exhibit A was the son of the donor (plaintiff). At the date of the gift, he was living with his father as a member of his family. It does not appear clearly from the evidence whether the donee had actually attained majority, that is to say, completed his 18th year. According to the evidence of Sakhavat Hussain (P. W. No. 3), a son of the plaintiff by his 2nd wife, the 1st defendant was 21 years old when the said witness gave his evidence in this Court, *i. e.*, in January 1913. If so, 1st defendant was apparently not a major when Exhibit A was executed, which was on 1st April 1909. But the 1st defendant himself in an affidavit, dated 18th November 1911, stated he was then about 24 years. If so, he was about 21 at the date of the gift. Under Exhibit A, the properties gifted to 1st defendant were a two-storied house together with two tiled and substantial-built houses adjoining it, bearing Nos. 2/2 and 3, Karimuddin Sahib Street. The donor and the donee were both living in No. 2/2. No. 3 was let to tenants. In the document the donee is described as "my son, Wajihuddin Sahib, a student, residing in house No. 2/2, Karimuddin Sahib Street." According to the evidence, the 1st defendant (donee) was at the date of the document absent at Bellary, where his brother, Abdul Kadir Sahib, was employed

(1) 17 M. L. J. 562; 30 M. 519.

(2) 10 C. W. N. 706; 28 A. 439; 3 A. L. J. 405; 8 Bom. L. R. 387; 4 C. L. J. 295; 33 I. A. 68 (P. C.); 9 O. C. 106; 1 M. L. T. 106.

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as Sub-Assistant Inspector of Schools. He returned to Madras about two months after and lived with his father in No. 2/2 for a few months. During this period the father effected a transfer of the Collector's certificate for the two properties in the name of the son. The plaintiff, in his evidence, says that he himself applied to the Collector for the transfer of the certificate in his son, the 1st defendant's name. The plaintiff also says that at his instance, the 1st defendant obtained from the Collector's office the certificate which was issued in his (1st defendant's) name, and gave it over to the father. The 1st defendant continued to live with his father in No. 2/2 for some little time after this, and then left the house owing to quarrels between him and his father. As regards house No. 3, the evidence is that from before the date of Exhibit A, it was in the possession of tenants who have been paying the rents to the plaintiff. It does not appear that the 1st defendant collected the rents himself or that the plaintiff collected the rent of the said house on behalf of the 1st defendant. In Exhibit A, however, the donor says:—

"I have put the aforesaid son in occupation and proprietary possession of the house and have also delivered all its vouchers to him. I declare that in future there will be no claim of any kind in respect of the house sold either for me or for any of my heirs against the purchaser and his heirs. Should I or my heirs or any other person, or executor claim against the said purchaser or his heirs, it will be false and not maintainable. I shall be responsible for accounting for claimants." These statements certainly amount to an unequivocal declaration on the part of the donor that he had put the donee in possession of the properties and that he will hold himself responsible if any claims are preferred to the property by third parties. The fact that the plaintiff applied or got the 1st defendant to apply for the issue of a Collector's certificate in the 1st defendant's name, also amounts to an admission on plaintiff's part that the latter was not only the transferee of the property but was also in actual possession thereof. The Collector's certificate as well as the title-deeds have been produced by the plaintiff

himself. In addition to the immoveable properties given under Exhibit A, the plaintiff also gave some moneys to the 1st defendant and with these moneys, the latter opened accounts in his name in the Bank of Madras as well as in the Post Office (see Exhibit F and F1). The issue relates only to the immoveable properties dealt with by Exhibit A, and the question for determination is whether upon the facts set forth above there was sufficient delivery of possession of the said properties to the donee, as required by Muhammadan Law. I am of opinion that this question should be answered in the affirmative having regard to the principles laid down in the following cases, viz., *Shaik Iblezan v. Shaik Saleman* (3), *Humera Bibi v. Najm-un-Nissa Bibi* (4), *Fibi Khawar Sultan v. Bibi Rukhsia Sultan* (5) and *Kandath Veettil Bano v. Musaliam Veettil Pakrakutti* (6). The donor was the father of the donee and the latter was at the date of the gift quite a young man living under his father's protection. He was then a student and unmarried. The circumstance that he was then temporarily absent from his father's house does not, in my opinion, affect the matter. In spite of such temporary absence, his domicile and residence were with his father as a dependent member of the latter's family and that was the view taken by the father himself as will be seen from his describing the son as a student residing in No. 2/2, Karimuddin Sahib Street, in which house the father himself lived. The said house (No. 2/2), along with the adjacent property, house No. 3, was the subject of gift under Exhibit A. In the instrument of gift the father not only stated that he had made the gift, but also that he had put his son in occupation and proprietary possession of the house and delivered all its vouchers to him. He also stated that he held himself accountable to his son in reference to the property. In addition to this, he himself got the Collector's certificate for the property

(3) 9 B. 146.

(4) 28 A. 147; 2 A. L. J. 778; A. W. N. (1905) 222.

(5) 29 B. 468; 7 Bom. L. R. 443.

(6) 30 M. 305; 2 M. L. T. 180.

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transferred to his son's name, which also amounted to clear admission on his part that the son was in possession of the property. The plaintiff's case was that the whole thing was a nominal transaction and not a real one. On that question I held against the plaintiff and found that the plaintiff really intended to benefit his son, the 1st defendant. The question which I have now to consider is, whether that intention was validly effectuated by delivery of possession of the immoveable properties gifted under Exhibit A. The question appears to be one of mixed law and fact. The present case is on the facts very similar to the cases cited above. Applying the principles laid down in those cases, I am of opinion that there was sufficient delivery of possession by the donor to the donee in this case to validate the gift according to Muhammadan Law.

The appeal was finally heard after the return of finding of the lower Court on 10th September 1915.

Mr. N. D. Devadoss, for the Appellant, argued that the finding ought not be accepted as no delivery of possession had been given and relied on the possession of the deed of gift and the title-deeds by the plaintiff as well as his collection of rents of one of the items conveyed and his living with the members of his family in the other house.

Mr. A. Sangappa, for the Respondents, argued that the finding was correct and relied on the admission of the plaintiff in the plaint and his conduct in connection with the proceedings for the transfer of Collector's certificate.

JUDGMENT.—We are unable to accept the finding of the learned City Civil Judge that possession was given by the plaintiff to his donee (1st defendant) of the properties mentioned in Exhibit A.

The admission in the deed A and the admission or conduct in connection with the Collector's certificate proceedings are, no doubt, strong items of evidence against the plaintiff's contention that no possession passed, but on the other hand there are the following facts (proved by clear and uncontradicted evidence)

(a) that the rents of house No. 3 were received by the plaintiff even after the date of the gift-deed for his own benefit;

(b) that neither the gift-deed (Exhibit A) nor any of the title-deeds (Exhibits B and C series), was given to the 1st defendant; and

(c) that the plaintiff continued to live in the house No. 2/2 with all the obedient members of his family (including, no doubt, the 1st defendant so long as he was obedient).

These facts seem to us to indicate that the plaintiff continued to exercise rights of ownership over the properties for his own benefit, and he cannot be treated as having divested himself of his possession of the properties in any degree. He could, of course, by making himself a trustee or agent of the donee, or as his guardian (if the donee was a minor), or expressing an intention to treat his own possession as the donee's possession, unequivocally transfer legally effectual possession to the donee while himself remaining in actual possession, but there is no evidence of any such intention on plaintiff's part to treat his own possession as possession on behalf of 1st defendant, the defendants having let in no evidence whatever to contradict the evidence on the plaintiff's side.

The gift under Exhibit A being thus invalid under Muhammadan Law for want of delivery of possession [see *Vahazullah Sahib v. Boyapati Nagayya* (1) and *Chaudhri Mehdi Hasan v. Muhammad Hasan* (2)], we reverse the judgment of the lower Court and give the plaintiff a decree declaring his title as prayed for in the plaint. The parties will bear their respective costs in both Courts, as it was the plaintiff's own fault in executing the deed, Exhibit A, which led to the 1st defendant's creditor's attempts to proceed against the properties covered by the deed.

Appeal allowed.

RAMAN CHETTY v. NAGAPPA CHETTY.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 279 OF 1914.

September 16, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Phillips.

RAMAN CHETTY—PLAINTIFF—

APPELLANT

versus

NAGAPPA CHETTY—DEFENDANT—

RESPONDENT.

Stamp Act (II of 1899), s. 44, scope of—Stamp duty and penalty—Joint-executants—Contribution.

Section 44 of the Indian Stamp Act is only intended to give a right to an innocent party, not guilty of any default in the matter of the proper stamping of a document, to recover the duty and penalty he is obliged to pay from the person or persons guilty of default and is not intended to enable one of several persons, who were under a common duty to pay the proper stamp duty on a document in proportionate shares, to claim from the others contribution in respect of the amount of the stamp duty and penalty which he has been compelled to pay in full owing to their common default.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Ayling, in Civil Revision Petition No. 535 of 1912, preferred against that of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Small Cause Suit No. 129 of 1911.

FACTS.—In Original Suit No. 50 of 1908 on the file of the East Sub-Court, Madura, the plaintiff produced a *cadjan* document purporting to be a partition deed executed between him and the defendant. Having had to pay stamp duty and penalty on the said document, he filed the present suit more than three years after he paid the stamp duty and penalty for contribution against the defendant. The Subordinate Judge dismissed the suit, holding that the defendant was not bound to contribute as the plaintiff made the payment to suit his own purposes and that the suit was barred by limitation under Article 61, Limitation Act. The plaintiff then preferred Civil Revision Petition No. 535 of 1912 to the High Court, which was dismissed by Ayling, J. He then preferred this appeal under the Letters Patent.

Mr. V. Purushottama Iyer, for Mr. T. R. Venkatrama Sastriar, for the Appellant:—The Subordinate Judge erred in holding that the defendant was not liable to contribute. Both the parties have to bear the stamp duty in respect of the document,

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and as in this case one party alone had to pay the full stamp duty and penalty on account of their joint default, the defendant was liable to contribute. Vide *Secretary of State v. Guru Proshad Dhur* (1). The suit is not barred as it falls under Article 120. Vide *Unichaman v. Ahmed Kutti Kayi* (2).

Mr. S. Gopalaswami Iyengar, for the Respondent, argued *contra*.

JUDGMENT.—We think that section 44 of the Stamp Act was intended to give a right to an innocent party, who himself was not guilty of any default in the matter of the proper stamping of a document, to recover the duty or penalty he was obliged to pay, from the person or persons guilty of the default and that it was not intended to enable one of several persons, who were under a common duty to pay the proper stamp in proportionate shares, to claim recovery of the proportionate amount of the duty or penalty the whole of which he was afterwards obliged to pay owing to the common default. In this view, it is unnecessary to consider the question of limitation, and we dismiss the Letters Patent Appeal with costs.

Appeal dismissed.

(1) 20 C. 51 (F. B.)

(2) 21 M. 242; 8 M. L. J. 81.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 13 OF 1914.

March 30, 1915.

Present:—Sir Henry Drake-Brockman, Kt.,
J. C.

LAHANU BAI—JUDGMENT-DEBTOR—

APPELLANT

versus

HARAKCHAND—DECREE-HOLDER—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of, to receive rents and profits—Simple money decree, execution of—Property not attachable—Execution, how effected.

Under Order XL, rule 1, of the Civil Procedure Code, a Receiver can be appointed to receive the rents and profits of an estate which cannot itself be attached and consequently a simple decree for money may be executed by appointing a Receiver. [p. 286, col. 2; p. 287, col. 1.]

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Where the interests of both the decree-holder and the judgment-debtor can be safeguarded and where there is no other way than the appointment of a Receiver in which the decree-holder can hope to recover any appreciable part of his claim, the appointment of a Receiver is neither unjust nor inconvenient. [p. 287, col. 2.]

Miscellaneous appeal against the order of the District Judge, Wardha, dated the 2nd February 1914, reversing that of the Junior Munsif, Hinganghat, dated the 29th August 1913.

Mr. W. V. Ghurpure, for the Appellant.

Mr. R. B. D. N. Khare, for the Respondent.

JUDGMENT.—The respondent in this Court holds a decree for money against the appellant, who is a Hindu widow possessing certain *sir* lands assigned to her in lieu of maintenance by her adopted son. In due course, the respondent on the 26th March 1913 applied to the Court of the junior Munsif, Wardha, for appointment of a Receiver of the said fields. The Munsif, overruling the judgment-debtor's objection that a Receiver cannot be appointed in execution of a simple money decree, nevertheless dismissed the application on the ground that it would be unjust to deprive her of her only source of maintenance. In appeal the District Judge, after setting out the history of previous execution proceedings, held that without making the appointment applied for, justice could not be done to the decree-holder, reversed the Munsif's order and directed that unless the judgment-debtor showed further ground for regarding such an appointment as neither just nor convenient, the application should be granted.

The main question raised in the present appeal from the District Judge's order of remand is whether a Receiver can legally be appointed where the decree to be executed is one for money only. The argument for the appellant is this. Section 51, Civil Procedure Code, provides that "subject to such conditions and limitations as may be prescribed", the Court may on the decree-holder's application, order execution of the decree by appointing a Receiver. But rule 30, Order XXI, in the 1st Schedule to the Code, provides only the following modes of executing a decree for payment of money:—

(i) detention of the judgment debtor in the civil prison,

(ii) attachment and sale of his property,
(iii) both the foregoing processes.

This rule, it is said, constitutes a limitation upon the general right conferred by section 51. To accept this contention, involves extending the limitation to the very generally expressed first rule in Order XL, which opens thus:—

"Where it appears to the Court to be just and convenient, the Court may by order appoint a Receiver of any property, whether before or after decree."

On the other hand, it may be rejected without in any way departing from a literal and grammatical interpretation of rule 30 in Order XXI. That Order nowhere, except in rule 49 (2) authorises appointment of a Receiver, and the excepted provision is a new one reproduced from the English Partnership Act, 1890, apparently without special regard to its congruity with the general scheme of the Civil Procedure Code. The correct inference seems to me to be that the matter of appointing a Receiver was left by the Legislature to be dealt with in a separate Order (XL) to which we should look for any "conditions and limitations" contemplated by section 51.

There are numerous cases in the reports which show that the practice under the Code of 1882 and earlier, was to appoint a Receiver where necessary in executing a decree for money no less than in respect of other decrees. I may refer here to two, namely, *Toolsa Goolal v. John Antone* (1) and *Uday Kumari Chatwalin v. Hari Ram Shaha* (2). The Legislature must have been aware of this practice, and yet in the Code of 1908 it has not only added an express power to execute a decree by appointing a Receiver, but has appreciably extended the old power of appointment contained in section 503 of the 1882 Code by omitting the words "the subject of a suit or under attachment." A Receiver may, therefore, be appointed to receive the rents and profits of an estate which cannot itself be attached: see *Keshabati Koeri v. Mohon Chandra Mondal* (3). At the same time, there is no difference of importance for present purposes between rule 30 of Order

(1) 11 B. 448.

(2) 28 C. 483.

(3) 14 Ind. Cas. 227; 39 C. 1040; 1 C. N. 802.

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XXI and the corresponding provision (section 254) in the 1882 Code.

I think, then, that even a simple decree for money may be executed by appointing a Receiver.

It is further contended on the judgment-debtor's behalf that a general order appointing a Receiver amounts to attachment of future rents and, therefore, offends against the prohibition in proviso (n) to section 60, Civil Procedure Code. There is, however, a clear distinction between attaching future rents and profits and appointing a Receiver to collect them as they fall due from time to time, as will appear from two of the cases above cited, namely, *Uday Kumari Chatwalin v. Hari Ram Shaha* (2) and *Keshabati Koeri v. Mchou Chandra Mondal* (3). Moreover, under the lower Appellate Court's order, the Munsif has still to decide the extent of the Receiver's authority, even if the judgment-debtor fails to show further cause against the proposed appointment.

I do not consider it necessary to decide here whether the appellant is proprietor or ordinary tenant of the *sir* assigned for her maintenance. In the Courts below, her position was assumed to be that of a proprietor. All that is urged here in favour of her being a tenant is, that by the terms of her grant she must pay the rental assessed on the land by the Settlement Officer. There is at present no question of attaching the fields assigned to her, and section 70 (2) of the Central Provinces Tenancy Act, 1898, does no more than protect the right of an ordinary tenant from sale in execution of a decree. It is suggested that *Singai Parmanandsao v. Baji Rao* (4) was wrongly decided. In that case land granted by way of maintenance was held liable to attachment and sale in execution of a money decree obtained against the grantee notwithstanding that the grant contained a prohibition against alienation. For the reason just stated I am not required to deal with this point. I may, however, observe that no later authority than that cited, has been put before me and that on the principle of *stare decisis* alone I would be prepared to follow the

decision of Ismay, J. C. I would add that the appellant's grant confers only a life-interest, but does not expressly prohibit alienation.

There remains the question whether it is "just and convenient" to appoint a Receiver. In this connection we are concerned solely with the Munsif's view that it is not just to deprive the judgment-debtor of her sole source of maintenance and that the decree-holder has not shown how the appointment he desires, would be convenient. As to this the District Judge has well pointed out that the interests of both parties can be safeguarded if the appointment is made and that in no other way can the decree-holder hope to recover any appreciable part of his claim. The latter view seems to me clearly correct. The appellant lets out her land yearly and secures her rents in lump. She is no less bound than any other recipient of income to live within her means, and to permit her to enjoy the whole regardless of her just debts is a course not sanctioned by either law or morality.

This appeal accordingly fails and is dismissed with costs. I allow Rs. 15 as Legal Practitioner's fee in this Court.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 384 OF 1911.

March 12, 1915.

Present:—Mr. Justice Johnstone
and Mr. Justice Shah Din.

BUDHA KHAN AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

MOHAMMAD AND OTHERS—DEFENDANTS—
—RESPONDENTS.

Shamilat—Entry in two successive Settlements that all members of certain tribe are entitled to share in shamilat—Contrary entry in third Settlement—Declaratory suit—Cause of action.

In the Settlement of 1863, it was entered that the *shamilat* of the village belonged to all the members of a certain tribe and this entry was repeated in the Settlement of 1887, but in the Settlement of 1900 it was provided that it belonged to only one section of the tribe:

(4) 14 C. P. L. R. 114.

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Held, that the last entry was unauthorised and was not of much evidential value as there was nothing on the record to show why the entries of the two previous Settlements were changed and the new entry substituted in the place. [p. 289, col. 2.]

Where defendants have done no overt act amounting to an invasion of plaintiffs' right, the mere allegation in the plaint that the defendants consider themselves co-sharers and openly deny the plaintiffs' exclusive proprietary rights in the land, cannot furnish the plaintiffs a definite cause of action so as to enable them to seek declaration of their title. [p. 289, col. 1.]

First appeal from the decree of the District Judge Attock, at Campbellpur dismissing the suit.

Dr. Muhammad Iqbal, for the Appellants.

Mr. N. C. Mehra and Mr. Noor-ul-Din, for the Respondents.

JUDGMENT.—The plaintiffs, who are *Awans Hajtal* by caste, brought the present suit against the defendants, who belong to four other sections of *Awans* known as *Awans Jafra*, *Khilan*, *Jaswal* and *Jamal*, for a declaration that the plaintiffs together with *pro forma* defendants Nos. 52 to 59 were exclusively entitled to proprietary rights in 24,476 kanals of *shamilat* land known as *Chak Nakka*, situate in village Danda Shah Balwal, and that the defendants other than the *pro forma* defendants Nos. 52 to 59 possessed no rights in the said *shamilat* area. A plot of 706 kanals 2 marlas which at one time formed part of the *shamilat*, was alleged to have been in possession of the defendants for a long time and was excepted from the claim. According to the plaintiffs, they and defendants Nos. 1 to 16 were descendants respectively of Shahadat and Jafar, who were sons of Hayat; the plaintiffs were known as *Awans Hajtal* and the said defendants Nos. 1 to 16 as *Awans Jafra*; the *Chak Nakka* in dispute was acquired by plaintiffs' ancestor, Shahadat, who paid Rs. 1,200 by way of fine to a Sikh nobleman, called Sardar Attar Singh, in Sikh times, and ever since the date of the acquisition Shahadat's descendants had been in possession of the said *chak*. Jafar, brother of Shahadat, had not paid any part of the fine of Rs. 1,200 and he and his descendants had, therefore, acquired no proprietary rights in *Chak Nakka*. In support of this origin of their exclusive title to the *chak* in dispute, the plaintiffs have relied on a judgment of Sayyad Faiz-ul-Hussan, Extra Assistant Commissioner, dated the 25th

August 1862, by which the claim of the *Jafra*s, ancestors of defendants Nos. 1 to 16, sharers in *Chak Nakka* along with the descendants of Shahadat was dismissed. The plaintiffs have further relied upon another judgment of Sayyad Faiz-ul-Hussan, dated the 22nd August 1863, which, however, does not seem to bear directly on the question of proprietary rights in *Chak Naka*.

In the Regular Settlement of 1863 the land of *Chak Nakka* (though the name *Chak Nakka* does not appear in the Revenue Record) was entered as the village *shamilat* belonging to all proprietors of the *Awan* tribe without any distinction, and in the Revised Settlement of 1887 the same entry was repeated. In the Settlement Record of 1900, however, it is entered as the *shamilat* of the proprietors belonging to the *Hajtal* section of *Awans* (see evidence of Ghulam Jafar, Naib Sadar Kanungo, at p. 47 of the paper-book). The plaintiffs claim that as they and defendants Nos. 52 to 59 alone are members of the *Awan Hajtal* section, the rest of the *Awans* being known as *Jafra*s, *Jaswals*, *Khilans* and *Jamals*, the whole of the *shamilat* area in dispute belongs exclusively to them and defendants Nos. 52 to 59, and they ask for a declaration to that effect.

The District Judge, after referring to and discussing the entries in the record of the three Settlements of 1863, 1887 and 1900 and also to the entry in the *wajib-ul-arz* of the village, has held that, although the village land in suit was originally acquired by Shahadat, the ancestors of the defendants have held possession of it along with Shahadat's descendants, that the defendants are co-sharers in the land with the plaintiffs, and that plaintiffs' suit is barred by limitation; on these findings he has dismissed the plaintiffs' suit.

In support of the appeal the learned Counsel for the appellants has relied upon the history of the village (page 24 of the paper-book), the judgment of Sayyad Faiz-ul-Hussan, dated the 25th August 1863, which is not printed but a copy of which is on the record, and the report of the Local Commissioner, Amir Chand, dated the 17th November 1910, (pages 57—66). On the other hand the Counsel for the respondents has called our attention to the mutation proceedings of March 1903 relating to the sale of a part of the land in suit by Allah

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Yar, son of Misri Jafzal (pages 28—35, to the deposition of the Naib Sadar Kanungo at paragraph 47 and to certain portions of the report of the Local Commissioner referred to above.

In the history of the village we can find nothing which would support the claim of the plaintiffs that they alone, together with the *pro forma* defendants Nos. 52 to 59, from among the descendants of Hayat are entitled to be called *Awans Hajtal*, the descendants of Jafar being known as *Awans Jafzal*. This distinction is no doubt drawn in the judgment of Sayyad Faiz-ul-Hussan, dated the 25th August 1863, but it does not seem to have been adhered to later.

In the mutation proceedings of March 1909, above referred to, it would seem that the Revenue Authorities considered all the descendants of Hayat, including the descendants of Hayat's son Jafar, as *Awans Hajtal*, and that this appellation was not restricted to the descendants of Shabadat. The entry in the Settlement Record of 1900, according to which the land in suit belongs to *Awans Hajtal*, therefore, supports the claim of defendants Nos. 1 to 16 to share in the *shamilat* along with the plaintiffs; and the mere fact that the said defendants have not actually cultivated any part of the *shamilat* land in dispute is not sufficient to deprive them of their proprietary rights therein.

Besides, it is not at all clear what cause of action the plaintiffs had against these defendants so as to be able to seek a declaration of title against them. The allegation in the plaint that these defendants considered themselves co-sharers in the land in question, and that the other defendants openly denied the plaintiffs' exclusive proprietary rights in the land two months before suit, cannot furnish the plaintiffs with a definite cause of action in which a suit like the present can be based. The defendants have done no overt act amounting to an invasion of the plaintiffs' rights and the suit is, therefore, of a speculative character. It is said by the plaintiffs' Counsel that the sale of a part of the *shamilat* by defendant No. 40, Nur Mohammad, *Awan Jamal*, five years before suit (see deposition of Megh Raj Patwari at page 25) and the sale of another part of the *shamilat* by Allah Yar, son of Misri Jafzal, (defendant No. 7), furnish the plaintiffs with a cause of action for the present suit. It is

clear, however, that by reason of these two sales no cause of action accrued to the plaintiffs as against all the defendants, except against the above-named Nur Mohammad and Allah Yar.

Assuming, however, that the plaintiffs had a valid cause of action against all the defendants, it seems to us that the entries in the Settlement Records of 1863 and 1887, showing that the *shamilat* land in question was owned by the *Awan* proprietors of the village, coupled with the fact that the defendants who belong to the *Khilans*, *Jaswals* and *Jamals* sections of the *Awans* have been in possession of portions of the *shamilat* and have built their *dhoks* on the portions in their possession, tell strongly against the plaintiffs' claim to exclusive proprietary rights in the *shamilat*. In the Settlement Record of 1900 the entry is, no doubt, in favour of *Awans Hajtal*, but this description, as we have seen above, applies to the *Jafzals* as well, who cannot, therefore, be excluded from a share in the *shamilat*.

As regards the other defendants, *i. e.*, *Khilans*, *Jaswals*, and *Jamals*, there is nothing whatever on the record to show why the entries of the two previous Settlements of 1863 and 1887 were changed and the new entry substituted in their place in 1900. This entry appears to have been unauthorized and to have been made without the knowledge of the section of the *Awans* just mentioned, and in face of their actual possession of portions of the *shamilat*, it cannot be considered as of much evidential value.

On the whole, therefore, our conclusion is that the plaintiffs have failed to establish that they are entitled to be declared exclusive owners of the *shamilat* area in suit as against the *Jafzals*, the *Khilans*, the *Jaswals* and the *Jamals*, and we accordingly maintain the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

KASHIRAO V. UKARUA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 255-B OF 1914.

March 15, 1915.

Present:—Mr. Stanyon, A. J. C.

KASHIRAO AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

UKARUA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Hindu Widows' Re-marriage Act (XV of 1856), s. 2, applicability of—Forfeiture of estate—Existing estate—Future rights, if forfeited—Limitation Act (XV of 1877), Sec. II, Art. 141—Reversioner's suit—Starting of limitation.

Under the Hindu Widows' Re-marriage Act, 1856, a widow re-marrying forfeits not only the estate inherited from her deceased husband but all existing rights at the date of the marriage, though, after and notwithstanding re-marriage, she may inherit future interest in the family of her former husband; *e. g.*, she may succeed as heir to the estate of her son by a first marriage who has died after her second marriage. [p. 290, col. 2.]

The Hindu Widows' Remarriage Act, 1856, applies also to widows whose caste customs permit second marriages. [p. 290, col. 2; p. 291, col. 1.]

In a case governed by Article 141 of Schedule II to the Limitation Act, 1877, under no circumstances can time run against a Hindu reversionary heir until the reversion vests by the death of the female holding the intervening estate. [p. 292, col. 1.]

Appeal against the decree of the Additional District Judge, West Berar, dated the 7th May 1914, reversing that of the Munsif, Khamgaon, dated the 24th September 1912.

Mr. J. Mitra, for the Appellant.

Mr. G. V. Deshmukh, for the Respondents.

JUDGMENT.—The following genealogical tree is relevant:—

Ramji=Mt. Janki Bai (died 1899).

Yedoo=Manjai (re-married 1897).

d. 1895

<p>Mt. Soni (plaintiffs' vendor on 13-1-09).</p>	<p>Pandharinath b. 8-12-95 (posthumous.) d. 10-4-96.</p>
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The field in dispute was admittedly the property of Yedoo. On his death, Pandharinath being then unborn, it devolved on Yedoo's widow Manjai. But in fact Musammatt Janki Bai, with whom Manjai lived, took possession of it, or at least dominated the control of it. On the 29th October 1895, Janki Bai sold the field to the defendants, allegedly for legal necessity,

and the defendants have been in possession ever since. Meanwhile, after the sale, on the 8th December 1895, Pandharinath was born, and divested his mother of the title to the field. When he died, on the 10th April 1896, the field reverted to Manjai. But Manjai re-married in 1897, and went away from the family. Under the Hindu Widows' Re-marriage Act, 1856, by such re-marriage she forfeited her estate in the field. She held the title to that estate, not as the widow of Yedoo, but as the mother of Pandharinath; but the lower Appellate Court is wrong in thinking that, under the enactment, a widow re-marrying forfeits only the estate inherited from her deceased husband. The Statute applies to "all rights and interests which any widow may have * * by inheritance to her husband or to his lineal successors." No doubt it has been held that, after and notwithstanding re marriage, she may inherit future interests in the family of her former husband; *e. g.*, she may succeed as heir to the estate of her son by a first marriage, who has died after her second marriage: *Akora Suth v. Boreani* (1), *Chamar Haru v. Kashi* (2), *Basappa v. Rayna* (3), *Lakshmana v. Siva Sasamallayani* (4), *Sammar v. Musammatt Bhago* (5). But that is because the enactment only operates as a forfeiture of existing rights at the date of the marriage. Here Manjai, on the date of her second marriage, held the title to the field by inheritance from Pandharinath, who was a lineal successor of her husband, and, therefore, the Statute deprived her of it on re-marriage and let in Janki Bai.

The doubt whether the enactment applies to widows whose caste customs permit second marriages, created by the Allahabad High Court rulings in *Har Saran Das v. Nandi* (6), *Ranjit v. Radha Rani* (7), *Khuddo v. Durga Prasad* (8), *Gajadhar v. Musammatt Kansilla* (9), and *Mula v. Partab* (10), may be taken to be set at rest, at least outside

- (1) 2 B. L. R. (A. C. J.) 199; 11 W. B. 82.
- (2) 26 B. 388; 4 Bom. L. R. 73.
- (3) 22 B. 91; 6 Bom. L. R. 779.
- (4) 28 M. 425; 15 M. L. J. 245.
- (5) 5 C. P. L. R. 85.
- (6) 11 A. 320; A. W. N. (1889) 77.
- (7) 20 A. 476; A. W. N. (1898) 121.
- (8) 29 A. 122; A. W. N. (1908) 299; 3 A. L. J. 729.
- (9) 1 Ind. Cas. 761; 31 A. 161; 6 A. L. J. 107.
- (10) 6 Ind. Cas. 116; 32 A. 489; 7 A. L. J. 417.

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the United Provinces, by the Full Bench decision in *Vithu v. Govinda* (11), following *Rasul Jehan Begum v. Ram Surun Singh* (12). Even the Allahabad Judges, in the latest of the above cases, had some hesitation in accepting the earlier rulings as a sound interpretation of the law, but felt bound, by the existence of a consistent *curius curie*, to apply the maxim *stare decisis*. In this Court the point was avoided in *Musammatt Rupa v. Mohanlal* (13), but the Bombay decision was clearly followed in *Sadhu v. Musammatt Patungo* (14), which decision was taken in *Larman v. Gundaji* (15) to represent the view of this Court as to the operation of section 2 of Act XV of 1856.

The present suit was lodged on the 15th May 1909. Therefore, it was filed within 12 years of the death of *Musammatt Janki Bai*, when the estate of *Pandharinath* devolved by inheritance on his sister, *Soni*. The plaintiffs obtained a conveyance from *Soni* of her right, title and interest in the field on the 13th January 1909, and filed the suit on the 15th May 1909. The first Court gave them a decree for possession. The lower Appellate Court reversed that decree and dismissed the suit. The reason for dismissal is thus stated:—

"The lower Court has held that the possession of defendants has not been adverse against *Soni*. I think that view of the law is not correct. I think the facts of the case in *Babu v. Bhikaji* (16) are similar to the facts of this case. In this case *Janki Bai* remained in possession when the widow of *Yedoo* and his posthumous son were entitled to it. I think the possession of the defendants has been adverse as against *Soni* and plaintiffs. Other rulings reported on by the respondent are:—*Tika Ram v. Shama Charan* (17), *Lachhan Kunwar v. Manorath Ram* (18),

Amrita Lal Bagchi v. Jotindra Nath Chowdhury (19). I allow the appeal and reverse the decree of the lower Court and dismiss the plaintiffs' suit."

I am unable to give any intelligible meaning to the passage beginning "Other rulings reported," but it is manifest that the decision rests upon a hurried analogy drawn from the case of *Babu v. Bhikaji* (16). If the Additional District Judge had read that case more carefully, he would have found that it followed earlier rulings made under Act XIV of 1859, because the prescriptive period had been completed before the Limitation Act of 1871 came into force and rendered all those rulings obsolete by the introduction of the provisions contained in the 142nd Article of its second Schedule—provisions which were repeated in Article 141 of the 1877 Schedule by which the present case is governed. *Lachhan Kunwar v. Manorath Ram* (18) was another case to which Act IX of 1871 did not apply, because the prescriptive period in that case was found by their Lordships to be twelve years from 1859 or at any rate 1861, and, therefore, it was outside the operation of Act IX of 1871, Article 142. The case was otherwise distinguished from such cases as the present in *Amrit Dhar v. Bindesri Prasad* (20), while the same distinction as I have made, was demonstrated in *Venkataramayya v. Venkatalakshamma* (21). The Allahabad Court correctly found the law under the Act of 1871 in their Full Bench decision in *Ram Kali v. Kedar Nath* (22). Curiously enough a Division Bench of the same Court held, in *Tika Ram v. Shama Charan* (17), that the above Privy Council decision had overruled the Full Bench case, following an expression of opinion to that effect by one of the Judges in *Hanuman Prasad Singh v. Bhagauti Prasad* (23). This error was corrected in *Amrit Dhar v. Bindesri Prasad* (20) and again in *Jhanman Kunwar v. Tiloki* (24). But the

(11) 22 B. 321.

(12) 22 C. 589.

(13) 9 C. P. L. R. 47.

(14) 16 C. P. L. R. 92.

(15) 7 Ind. Cas. 543; 6 N. L. R. 103.

(16) 14 B. 317.

(17) 20 A. 42; A. W. N. (1897) 195.

(18) 22 C. 445; 22 I. A. 25.

(19) 32 C. 165.

(20) 23 A. 448; A. W. N. (1901) 133.

(21) 20 M. 493; 7 M. L. J. 204.

(22) 14 A. 156; A. W. N. (1892) 12.

(23) 19 A. 357; A. W. N. (1897) 80.

(24) 25 A. 435; A. W. N. (1903) 93.

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learned Judges do not seem to have noticed that the Privy Council were dealing with a case in which the twelve years of adverse possession had probably been completed before the change in the law was introduced. Even if the period was not quite complete, section 6 of Act IX of 1871 would exclude the application of that enactment to prevent or prolong the completion. However that may be, the Privy Council decision in *Ranchordas v. Parvatibai* (25) makes it clear that, in a case governed by Article 141 of the 1877 Schedule, under no circumstances can time run against a Hindu reversionary heir until the reversion vests by the death of the female holding the intervening estate.

That is enough to dispose of this case. But I think the further contention is sound that Janki Bai is not shown to have claimed more than a limited interest in the estate. It is not proved that she excluded Manjai at all until she sold the field a few months after her husband's death, and she then purported to sell it for legal necessity. The terms of the sale-deed make it clear that both parties dealt with the property as that of a Hindu widow who could sell only for legal necessity. In that case, the only estate which Janki Bai and her transferees, the defendants, could acquire by prescription would be that of a Hindu widow, unless legal necessity were proved: *Sheo Lal v. Musammam Sheorajia* (26), following my unreported decision in *Rampasud v. Dayaram* (27)—see page 37. It is found in this case that there was no legal necessity. Therefore the defendants' interest under the sale ended with Janki Bai's death in 1899. Thereafter, their possession became directly adverse to the reversioner. They cannot tack that on to their possession under the deed which became a valid transfer, *qua* Janki Bai's interest, when the estate devolved upon her on the re-marriage of Manjai in 1897. The present suit is, therefore, clearly within time, and, in face of the finding that no legal necessity for the sale has been proved, Soni's right to succeed, and, therefore, the claim of the plaintiffs who are her transferees, cannot be resisted.

An attempt was made before me to defeat the suit at the last moment on a plea of non-joinder. The learned Counsel for the respondents put in a certified copy of a registered deed of sale purporting to be a reconveyance by the plaintiffs, on the 27th March 1909, of the field in dispute, which they had bought from her on the 13th January 1909. This document is accompanied by an affidavit in explanation of the failure to raise the plea earlier, and it is urged that plaintiffs have now no *locus standi* in the suit. If Soni were now joined, it is clear that her claim would be time-barred. I decline to allow the plea at this stage. The copy of the deed was obtained by the defendants on the 29th November 1912. The suit was first decided on the 28th February 1911. On the 14th September 1911 it was remanded by the lower Appellate Court, and a fresh decision was made by the first Court on the 24th September 1912. The defendants appealed from that decision on the 30th January 1913. They were then in possession of the copy of the reconveyance now set up. But in their memorandum of first appeal, they did not raise any plea of non-joinder: nor was a word said about it at the hearing. The plea comes much too late now, and must be taken to have been waived. If the reconveyance really took place, the plaintiffs in this case are trustees for Musammam Soni. They have sued as *benamidars*, and a suit by a *benamidar* is not, *ipso facto*, bad. It is difficult to understand why plaintiffs should buy in January 1909, re-sell in March 1909, and then sue under the cancelled assignment in May 1909: but eccentricity of this kind in regard to documents and litigation is a common feature among the inhabitants of Berar. At any rate I decline to go into the matter at this stage of the present case.

The appeal is allowed: the decree of the lower Appellate Court is reversed, and the decree of the first Court is restored. But as the defendants had reasonable grounds, owing to the neglect of Manjai and Soni, for asserting their rights to defend the suit, I direct that each party do bear his own costs in the first Court. The defendants must, however, pay and bear the costs in the two Appellate Courts.

Appeal allowed.

(25) 33 B. 725 (P. C.); 26 I. A. 71.

(26) 23 Ind. Cas. 719; 10 N. L. R. 35.

(27) S. A. No. 365 of 1911.

PERIAKARUPPAN CHETTIAR v. MANICKA VACHAGA DESIKA.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 108 of 1914.

September 25, 1915.

Present:—Mr. Justice Napier.

A. A. V. PERIAKARUPPAN CHETTIAR

—ASSIGNEE DECREE-HOLDER—PETITIONER

versus

MANICKA VACHAGA DESIKA

GNANA SAMBANDA PANDARA

SANNADHI AND OTHERS—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, cc. 23, 57—Execution—Notice, issue of—Attachment—Default on part of decree-holder—Dismissal of application—Order for execution, whether *res judicata*.

The dismissal of an execution application under Order XXI, rule 57, Civil Procedure Code, has the effect of vacating a prior order passed under Order XXI, rule 23, ordering execution to proceed.

Mungul Pershad Dichit v. Grija Kant Lahiri, 11 C. L. R. 113; 8 I. A. 123; 8 C. 51; 4 Sar. P. C. J. 249 referred to.

Lakshmanan Chetti v. Kuttayan Chetti, 24 M. 669.

Sheoraj Singh v. Kameshar Nath, 24 A. 282; A. W. N. (1902) 63, dissented from.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram, in Execution Petition No. 1021 of 1913, in Small Cause Suit No. 396 of 1905, on the file of the Subordinate Judge at Kumbakonam.

FACTS.—This petition arose out of proceedings in execution of a decree, dated 18th September 1905. The first application to execute the decree was made on 8th September 1908. Notice was ordered and served on the judgment-debtor and an order for attachment was made on 3rd October 1908, but as the decree-holder failed to pay the *batta* for attachment, the petition was dismissed. The next application to execute the decree was made on 18th September 1911. On this also notice to the judgment-debtor was issued and served and attachment was also ordered, but the petition was again dismissed for non-payment of *batta* for attachment. The decree-holder then assigned his decree on 11th August 1913 and the assignee filed the present petition on 25th August 1913 for the recognition of his assignment, and for the realisation of the decree amount by attachment and sale of the 1st defendant's moveables. The latter contended that the applications of 25th August 1913 and 18th September 1911 were barred by limitation. The plaintiff

replied that the order of the 3rd October 1908 gave a fresh starting point and that in any event the matter was *res judicata* owing to previous orders. The Subordinate Judge of Kumbakonam held that the petition was barred. The assignee decree-holder then preferred this civil revision petition.

Mr. R. Kuppaswamy Aiyar, for the Petitioner:—Notwithstanding the dismissal of the execution petition, the prior order under Order XXI, rule 23, that executions do proceed stands and is *res judicata*. *Sheoraj Singh v. Kameshar Nath* (1).

Mr. T. Narasimha Aiyangar, for the Respondents:—The execution petition having been dismissed owing to the decree-holder's default, the prior order to execute is also vacated. *Mungul Pershad Dichit v. Grija Kant Lahiri* (2) and *Lakshmanan Chetti v. Kuttayan Chetti* (3). Further, the defendants had no notice of the prior application. They must now be allowed an opportunity to prove the same, as they were prevented from doing so previously owing to the dismissal of the execution petition.

JUDGMENT.—It is argued that even though the petition was dismissed under Order XXI, rule 57, of the Code of Civil Procedure, the decision that the decree shall be executed under Order XXI, rule 23, is *res judicata*. I cannot accept this argument. In my opinion, the order is vacated by the subsequent dismissal. The language of the Privy Council in *Mungul Pershad Dichit v. Grija Kant Lahiri* (2) points to the order being still in force and that is the *ratio decidendi* in *Lakshmanan Chetti v. Kuttayan Chetti* (3). If *Sheoraj Singh v. Kameshar Nath* (1) decides anything different, I cannot follow it. I, therefore, do not decide on Mr. Narasimha Aiyangar's other contention that he must be allowed to show now that he had no notice of the prior application, he not having been able to do so at the time owing to the application having been dismissed.

The petition is dismissed with costs.

Petition dismissed.

(1) 24 A. 282; A. W. N. (1902) 63.

(2) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249.

(3) 24 M. 669.

HARI T. WANU.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 273 OF 1914.

April 7, 1915.

Present:—Mr. Drake-Brockman, J. C.

HARI—PLAINTIFF—APPELLANT

versus

WANU AND OTHERS—DEFENDANTS—

RESPONDENTS.

Central Provinces Tenancy Act (X of 1859), s. 2 (5)
 —Village tank let for fishing and growing water-nuts,
 if land let for agricultural purposes.

A village tank over which the landlord gives a right to fish and grow water-nuts is not "land let or occupied for agricultural purposes or for purposes subservient to agriculture" for purposes of Act X of 1859.

Appeal against the decree of the District Judge, Bhandara, dated the 7th February 1914, confirming that of the Munsif, Bhandara, dated the 28th August 1913.

Mr. J. Mitra, for the Appellant.

Dr. H. S. Gour and Messrs. G. V. Kukday and V. M. Jakatdar, for the Respondents.

JUDGMENT.—The only question which need be determined in this appeal is whether a village tank over which the landlord gives a right to fish and grow water-nuts (*singhara*) is "land let or occupied for agricultural purposes or for purposes subservient to agriculture" within the meaning of that phrase as used in section 2 (5) of the Central Provinces Tenancy Act, 1859. This has been exhaustively discussed by Stanyon, A. J. C., in *Battoo v. Narain Prasad* (1) and his judgment will shortly be published. I concur generally in the view taken by my learned brother, and to the cases decided under Act X of 1859 which he has cited, would add *Sham Narain Chowdhry v. Court of Wards* (2), where it was held that exercise for more than 12 years of fishing rights over the *jalkar* not connected with a holding, did not confer occupancy right in the *jalkar*.

On behalf of the respondents the decision of Pearson and Turner, J.J., in *Moolchand v. Chutree* (3) is pressed upon me. The judgment in that case, which was apparently not brought to the notice of Stanyon, A. J. C., is so brief that it may well be reproduced here in *extenso*:—

"From the evidence submitted by the lower Court, it appears that the land in suit produces

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water-nuts, which do not grow spontaneously, but are the result of sowing or planting. It further appears that the plaintiff's lease was a lease of the land which comprises specific fields bearing distinct numbers in the *khusrak*, and not of the produce of any portion of the tank. This being so, we are of opinion, on reconsideration, that a right of occupancy could be acquired, as it has been deemed to be acquired by the tenant in the holding, and we, therefore, affirm the decision of the lower Appellate Court, and dismiss the appeal with costs and interest at 6 per cent."

The report contains no detailed statement of the facts, nor does it set out the arguments addressed to the High Court. The earlier decisions of the High Court at Calcutta cited by Stanyon, A. J. C., though not relating to tanks used for growing produce of the soil forming the bed, are authorities for the proposition that the bed of a tank should not be regarded as land for the purposes of Act X of 1859, and it is unlikely that they were overlooked by the Legislature when the Central Provinces Tenancy Act of 1883 was on the anvil.

Inasmuch as the decree of the lower Appellate Court is based on the erroneous view that a tank is land for the purposes of the Tenancy Act, 1898, it is hereby set aside and the case is remanded to that Court for a fresh decision. There will be a refund of the Court-fee paid on the memorandum of second appeal; all other costs will abide the event.

Decree set aside; Case remanded.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 24 OF 1912.

October 11, 1915.

Present:—Mr. Justice Scott-Smith and

Mr. Justice Shadi Lal.

LELU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM CHAND AND OTHERS—DEFENDANTS—

RESPONDENTS.

Custom—Reversioners, suit by—Exclusion of daughters—Land not proved to be ancestral—Burden of proof—Riwaj-i-am, entry in, effect of.

In a suit by reversioners against widows and daughters of a deceased collateral for declaration

(1) 28 Ind. Cas. 869; 11 N. L. R. 49.

(2) 23 W. R. 432.

(3) 1 N. W. P. H. C. R. 254.

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their claim to the estate of the deceased in exclusion of daughters if the land is not proved to be ancestral *qua* reversioners, the onus lies very heavily upon them to show that they would exclude the daughters. [p. 295, col. 2.]

Atar Singh v. Thakar Singh, 6 Ind. Cas. 721; 12 C. W. N. 1049; 8 C. L. J. 359; 18 M. L. J. 379; 35 C. 1039; 15 I. A. 206; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790; 42 P. R. 1910, referred to.

The *riwaj-i-am*, in the absence of any clear statement to the contrary, is considered to apply to ancestral and not self-acquired property. Hence an entry in the *riwaj-i-am* to the effect that daughters are excluded by collaterals is useless in a case where the property in dispute has not been proved to be ancestral. [p. 295, col. 2; p. 296, col. 1.]

First appeal from the order of the Additional District Judge of Hoshiarpur, dated the 28th November 1911, dismissing the suit.

Messrs. Kirkpatrick and Sundar Das, for the Appellants.

Mr Amar Singh and Bakhshi Tek Chand, for Respondent No. 1.

Sheikh Umar Bakhsh, for Respondents Nos. 2 and 3.

JUDGMENT.—In the suit out of which this appeal has arisen, the plaintiffs claimed that as reversioners of Khushala Ram, deceased, sole proprietor of Abbeipur, they were entitled to his land after the death of his widow, defendants Nos. 2 and 3, to the exclusion of his daughters.

Defendants denied the *locus standi* of plaintiffs, saying that they were not the reversioners of Khushala Ram and that the land was not their ancestral property.

The lower Court in an exhaustive judgment held that plaintiffs were no doubt distant collaterals of the deceased proprietor, though the exact degree of relationship alleged by them had not been established, but that the land was not plaintiffs' ancestral property and, therefore, they had no *locus standi* in the presence of daughters. It, therefore, dismissed the suit and plaintiffs' appeal.

Mr. Kirkpatrick argued the appeal on behalf of the appellants, but we were so little impressed with his arguments that we did not find it necessary to hear Counsel for respondents.

We have no hesitation in holding that plaintiffs, on whom the *onus* lay, *Atar Singh v. Thakar Singh* (1), have not proved (1) 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 8 C. L. J. 359; 18 M. L. J. 379; 35 C. 1039; 35 I. A. 206; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790.

that the land in dispute is their ancestral property.

The only evidence of any importance in appellants' favour is an entry in the *nikasi* papers of Sambat 1904 (A. D. 1847), which shows the following persons as proprietors of small plots of land in the village of Abbeipur:—

	ghs.	ks.
Ganga Ram	...	3 0
Ishar	...	5 6½
Jaxala	...	4 4½
Charta	...	0 7

Ganga Ram was father of Khushala Ram. The other three persons are, according to plaintiffs-appellants, descendants of Kanhya. Even if they were proprietors in 1847, (they subsequently lost their proprietary rights and were recorded as occupancy tenants of the land in their possession) it does not follow that the land was ancestral of themselves and Ganga Ram. As members of the same brotherhood they may very well have been given small portions of the village to cultivate. We can make no assumption on the very slender evidence of this entry as to the land being ancestral *qua* the plaintiffs.

The land not having been proved to be ancestral *qua* plaintiffs, the *onus* lay very heavily upon them to show that they would exclude daughters. Mr. Kirkpatrick points out that the defendants could very easily have proved by instances that daughters succeeded to self-acquired property in the presence of collaterals and that they have not adduced a single instance. It is quite possible that in this village the question of succession of daughters in presence of collaterals may never have come up. No doubt in neighbouring villages there may be instances in point, but the *onus* was upon the plaintiffs and it was hardly necessary for the defendants to produce instances in support of their contention when none had been adduced on the other side.

The entry in the *riwaj-i-am* to the effect that daughters are excluded by collaterals, is valueless for the purposes of this case. The *riwaj-i-am*, in the absence of any clear statement to the contrary, is considered to apply to ancestral and not self-acquired

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property. No instances are cited in the *riwaj-i-am* relied upon of cases where daughters have been excluded from non-ancestral property by collaterals.

We must adopt the general rule of custom in the absence of evidence to the contrary.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 1682
OF 1915.

September 7, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Srinivasa Aiyangar.

A. V. SUBRAMANIA AIYAR—DEFENDANT

—PETITIONER

versus

SELLAMMAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 109, 110.—Value of subject-matter in Court of first instance less than Rs. 10,000—Value of subject-matter in dispute on appeal to His Majesty in Council more than Rs. 10,000—Certificate, if can be granted—Involve 'directly or indirectly, some claim or question to, or respecting property of like amount or value', meaning of.

To entitle a person to a certificate for appealing to His Majesty in Council, it is not enough that the decree or final order in the case involves, directly or indirectly some claim or question to or respecting property worth Rs. 10,000 or upwards; the value of the subject-matter of the suit in the Court of first instance must also be Rs. 10,000 or upwards. [p. 297, col. 2; p. 298, col. 2.]

Where, therefore, the value of the subject-matter of the suit in the Court of first instance was less than Rs. 10,000 but the value of the subject-matter in dispute on appeal to His Majesty in Council exceeded that amount owing to the claim for mesne profits for the period between the institution of the suit and the petition for the certificate:

Held, that the case did not satisfy the provisions of sections 109 and 110, Civil Procedure Code, and that the petitioner was not entitled to a certificate. [p. 297, col. 2; p. 301, col. 2.]

Moti Chand v. Ganga Prasad Singh, 29 I. A. 40; 24 A. 174; 4 Bom. L. R. 156; 6 C. W. N. 362, followed.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to grant leave to appeal to His Majesty in Council from the decree of the High Court, in Appeal Suit No. 284 of 1912, preferred against that of the Court of the Subordinate Judge of Madura, in Original Suit No. 93 of 1910,

FACTS.—The plaintiff, alleging that the suit house was purchased in her name with her funds and that the defendant, her husband's brother was allowed to reside in a portion of it since 1895, as he was practising as a Pleader at Madura, sued to recover that portion of the house from the defendant together with mesne profits. The contention of the defendant was that the purchase in plaintiff's name was *benami*, that it was done under the advice of the plaintiff's husband, who occupied a position of superiority and confidence as his elder brother and that the plaintiff had not the means to buy the house. The Subordinate Judge of Madura dismissed the plaintiff's suit. On appeal, the High Court reversed that decision and granted a decree to the plaintiff as prayed for. The defendant thereupon applied for the issue of a certificate that the case was fit for appeal to His Majesty in Council.

Messrs. T. R. Ramachandra Iyer and G. S. Ramachandra Iyer, for the Petitioner:—It is not necessary that the value of the suit in the Court of first instance must be Rs. 10,000 or upwards in the classes of cases falling under paragraph 2 of section 110, Civil Procedure Code. In those cases, it is enough if the decree or final order involves directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000 or upwards. In this case, though the value of the suit in the Court of first instance was below Rs. 10,000, the value of the appeal to the Privy Council is over that amount as it involves a claim to property over the appealable value. Mesne profits which have accrued due have to be added in arriving at the amount. *Vide Dalgleish v. Damodar Narain Chudhry* (1), *Mohideen Hadjar v. Pitchay* (2), *Basanta Kumar Roy v. Secretary of State for India in Council* (3).

Mr. R. Kuppuswami Iyer, for the Respondent:—The value of the suit in the Court of first instance being below Rs. 10,000, the petitioner is not entitled to a certificate. The former part of section 110, Civil Procedure Code, ought to be read distributively. The provision that the value in the first Court must be Rs. 10,000 or upwards, was introduced for the first time into the Civil

(1) 33 C. 1286; 8 C. L. J. 533.

(2) (1893) A. C. 193; 62 L. J. P. C. 96.

(3) 6 Ind. Cas 792; 14 C. W. N. 872.

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Procedure Code by Act VI of 1874. See also clause 39 of the Letters Patent and Wheeler's Privy Council Practice, page 694. See also *Moti Chand v. Ganga Prasad Singh* (4) for a case where the Privy Council upheld this contention. The case of *Dalgleish v. Damodar Narain Chowdhry* (1) followed *Mohideen Hadjar v. Pitchay* (2), a case under the Ceylon Ordinance I of 1889 where the provision in question does not find a place. The construction sought to be placed on the section by the other side will render the first clause of section 110, Civil Procedure Code, nugatory.

JUDGMENT.

WALLIS, C. J.—In this case the amount or value of the subject-matter of the suit in the Court of first instance was less than Rs. 10,000, but the amount or value of the subject-matter in dispute on appeal to His Majesty in Council exceeds that sum owing to the claim for mesne profits for the period between the institution of the suit and the petition for a certificate. It is clear that the case does not satisfy the provisions of the first paragraph of section 110, Civil Procedure Code, but we are asked to grant the certificate on the ground that, in the circumstances, the decree of the High Court involves "directly or indirectly, some claim or question to or respecting property of like amount or value" within the meaning of the second paragraph. If this contention be accepted, a certificate must be granted in any case in which the amount or value of the subject-matter in dispute on appeal to his Majesty in Council is not less than Rs. 10,000, whether or not the amount or value of the subject-matter of the suit in the Court of first instance fell below Rs. 10,000, and this provision becomes wholly nugatory. In a case where the value of the subject-matter was less than Rs. 10,000 in the Court of first instance, but the value of the subject-matter on appeal to the Privy Council exceeded that sum owing to the accrual of interest in the meantime, their Lordships held that the appellants had not brought themselves within the section: *Moti Chand v. Ganga Prasad Singh* (4); and I do not think it can make any difference whether the original deficiency in value is subsequently made up by the accrual

of interest, or by a claim for mesne profits for the intervening period or by costs. The decision in *Dalgleish v. Damodar Narain Chowdhry* (1) proceeded on the authority of *Mohideen Hadjar v. Pitchay* (2), a case under the Ceylon Ordinance No. 1 of 1889, which does not impose any condition as to the amount or value of the subject-matter of the suit in the Court of first instance. This condition was first imposed in India by the Privy Council Appeals Act (VI of 1874). The order of 10th April 1885 had prescribed that the amount or value of the subject-matter in dispute in appeal to His Majesty in Council must be Rs. 10,000 or upwards. The alternative which now forms the second paragraph of section 110, Civil Procedure Code, was introduced in clause 39 of the Letters Patent, which contained a proviso "that the sum or matter at issue is of the amount or value of not less than Rs. 10,000 or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than Rs. 10,000." So far the amount or value of the subject-matter of the suit in the Court of first instance did not in any way effect the right of appeal, but it is clear to my mind that in 1874, the Legislature intended to alter this and by the new provision inserted on the section to impose an additional restriction with reference to the amount or value of the suit when filed. It is of course necessary to read the whole section together and to give effect to every part of it, and when doing so, it becomes necessary, in my opinion, in order to give effect to the new provision in the first paragraph, to put a restrictive construction on the general words of the second paragraph which are reproduced from section 39 of the Letters Patent, and to read them in their present collocation as applying only to cases which involve some claim or question to or respecting property additional to the actual subject-matter in dispute in the appeal and to be taken into account therewith in making up the appealable value. Something might be said for this construction of the alternative provision as it stood in clause 39 of the Letters Patent, and I think that it is imperatively required in the present section 110, Civil Procedure Code, which first appeared as section 5 of the Act of 1874, if the provi-

(4) 29 I. A. 40; 24 A. 174; 4 Bom. L. R. 156; 6 C. W. N. 362.

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son in the earlier part of the section is not to be rendered nugatory. Some difficulty is no doubt occasioned by the retention in the second paragraph of the words "involve directly," but I think my learned brother, in his judgment which I have had the advantage of reading, has shown how effect may be given to the word "directly" consistently with this construction; and in any case I think that in the section as it now stands, the words, "involve directly," cannot be read as including cases which involve nothing but the actual subject-matter in dispute in the appeal. Cases which involve nothing else are, in my opinion, governed exclusively by the first paragraph. The petition is dismissed with costs.

SRINIVASA AIVANGAR, J.—This is an application for leave to appeal to His Majesty in Council. The original suit was to recover possession of a portion of a house with mesne profits from the defendant. Though the plaintiff claims the whole house, she does not sue for the remaining portion as she is in possession of it. It is, however, admitted that the market value of the whole house, together with the amount claimed for mesne profits up to the date of the institution of the suit, is much less than ten thousand rupees. It is stated that the value of the whole house, together with mesne profits as claimed by the plaintiff up to the date of the decree in appeal, would amount to over ten thousand rupees. Two points are taken for the petitioner, *first*, that the value of the subject-matter of the suit in the Court of first instance should be taken to be above ten thousand rupees, *second*, that whether the subject-matter of the suit in the Court of the first instance was above ten thousand rupees or not, the final decree of this Court involves a claim to property of over ten thousand rupees in value. As regards the first point, petitioner contends that the subject-matter of the suit in the Court of first instance includes mesne profits subsequent to the date of the suit. If this contention is right, mesne profits subsequent to the date of the institution of the suit up to the date of the final determination by the Judicial Committee, or even beyond, till the delivery of possession of the property, or three years after the date of the final decree, whichever event first occurs, would be the subject-matter of the suit, and its value would vary with the

length of time during which the suit may be pending in the Courts. This construction renders the enactment of this portion of the clause perfectly useless; for there can be no case in which the matter in dispute on appeal to His Majesty in Council would be of the appealable value in which the subject-matter of the suit would not at least be of the same value. Prior to Act VI of 1874, it was well settled that interest on money claims and mesne profits of immoveable property subsequent to the date of the institution of the suit, actually awarded by the decree appealed against, may be added in computing the value of the matter in dispute in appeal to His Majesty in Council, but not interest accruing subsequent to the decree, and if that amount was Rs. 10,000 or over, a party was entitled to appeal; though the value of the subject-matter of the suit in the Court of first instance was less. *Gooroo-shah Khoond v. Juggutchunder* (5), *Durga Dass Choudry v. Ramananth Choudry* (6), *Gooroo Dass Roy v. Gholam Mozlah* (7); see also *Bank of New South Wales v. Owston* (8). Act VI of 1874 for the first time enacted that the value of the subject-matter of the suit in the Court of first instance should also be ten thousand rupees or upwards and imposed an additional restriction on the right of appeal. I think except in British India and Straits Settlements, no such restriction is to be found in the laws of the other Colonies or British possessions. In *Motichand v. Ganga Prasad Singh* (4), the Judicial Committee expressly decided that when the amount claimed in the suit was less than ten thousand rupees, no appeal lay to His Majesty in Council, though the amount of the matter in dispute in appeal by the addition of interest subsequent to the institution of the suit came to ten thousand rupees or upwards. This decision is conclusive on the question, and I am unable to draw any distinction between interest and mesne profits in this respect. The petitioner relied on *Dalyleish v.*

(5) 8 M. L. A. 166 at p. 168; 3 W. R. 14 (P. C.); 13 Moo. P. C. 472; 1 Suth. P. C. J. 399; 1 Sar. P. C. J. 742; 19 E. R. 493; 15 E. R. 117; 132 R. R. 150.

(6) 8 M. L. A. 262 at p. 264; 19 E. R. 530; 1 Sar. P. C. J. 772.

(7) Marshall's Reports, 24; 1 Hay. 103.

(8) 4 App. Cas. 270 at p. 274; 48 J. P. C. 25; 40 L. T. 500; 14 Cox. C. C. 267.

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Damodar Narain Chowdhry (1) and *Basanta Kumar Roy v. Secretary of State for India in Council* (3) in support of his contention. In the first of the above cases, it seems to have been assumed that future mesne profits formed part of the subject-matter of the suit, and reliance was placed on the judgment of the Judicial Committee in *Mohideen Hadjar v. Pitchay* (2). That was a case from Ceylon and the attention of the learned Judges of the Calcutta High Court was apparently not drawn to the provisions of the Ceylon Ordinance, which contains no clause similar to the first portion of clause 1 of section 110 of the Code of Civil Procedure. Though the case of *Moti Chand v. Ganga Prasad Singh* (4) was cited in the argument, there is no reference to it in the judgment. In the second case, it is said that "as the Court could provide in the decree for the payment of mesne profits in respect of the property from the institution of the suit until the delivery of possession or until the expiration of three years from the date of the decree with interest such mesne profits and interest can, I think, be legitimately regarded as part of the subject-matter of the suit." So also can the Court award interest from the date of the institution of the suit up to the date of payment or realization. There is no reference in the judgment to the case of *Moti Chand v. Ganga Prasad Singh* (4). In the case of future mesne profits, the cause of action, it must be remembered, does not accrue even at the date of the institution of the suit. With the greatest respect to the learned Judges, I am unable to follow these decisions. I, therefore, disallow the first contention.

As to the second point, petitioner contends that inasmuch as the decree of this Court directs him to surrender possession of the house and pay mesne profits, the decree necessarily involved a claim to property of over the appealable value. This construction renders the whole of the first clause nugatory. It must be remembered that provisions similar to these are to be found in the laws of a large majority of the Colonies (See the table in *Burge's Colonial Laws*, Volume I, page 362, *et seq.*) and it is impossible to construe the second clause of section 110 of the Code of Civil Procedure so as to render the first perfectly

useless. If the second clause stood by itself (See *Wheeler's Privy Council Practice*, page 694) it would be legitimate to construe it in the manner suggested, as the word "involves" is sufficiently wide to cover direct adjudications in respect of the subject-matter in dispute. In this case, we have to take both the clauses together so as to give a meaning to both. In my judgment, the first clause applies to cases where the decree awards a particular sum, or property of a particular value, or refuses that relief, (*i. e.*), to cases where the object-matter in dispute is of a particular value. In fact, the words "objects in dispute" are used in the provisions relating to appeals from Guernsey. If the operation of the decision is confined only to the particular object-matter, clause 2 does not apply, and unless the case satisfies the conditions in clause 1, there is no right of appeal. If the decision beyond awarding relief in respect of the particular object-matter of the suit affects right in other properties, clause 2 would apply; also if the matter in dispute is one which is incapable of valuation as in the case of easements, clause 2 may apply. A few illustrations from the decided cases would make the matter plain. In *Sree Mutty Rance Sumanoyee v. Maharajah Sattreschander Roy* (9), the plaintiff sued to establish his right to enhance the rent of a holding in the possession of the defendant, which the defendant claimed to hold at a fixed rent of Rs. 65. The plaintiff obtained a decree establishing his right to enhance the rent to Rs. 800 or thereabouts. The question was raised whether the value of the subject-matter in appeal to the Privy Council was the capitalised value of this Rs. 800, which would be the amount by which the value of the defendant's estate would be diminished. Their Lordships found it difficult to bring the case within the words of the Order in Council of April 10, 1838, but gave special leave to appeal on the ground that the decision involved a claim to property of more than ten thousand rupees in value. I may draw attention to the fact that this decision was given in the year 1860 and the present second clause was introduced into the Letters Patent in the year 1862.

(9) 8 M. L. A. 165; 3 W. R. 14 (P. C.); 1 Sath. P. C. J. 309; 1 Sar. P. C. J. 742; 19 E. R. 492.

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In *Amar Chandra Khyala v. Shashi Bhushan Roy* (10), the plaintiff, a tenant in-common, sued for a mandatory injunction directing the defendant, another tenant-in-common, to demolish buildings erected by him on a plot of common land. The subject-matter of the suit was for purposes of Court fees valued at Rs. 1,500. The plaintiff obtained a decree in the High Court, the result of which was to oblige the defendant to remove buildings worth more than ten thousand rupees. Leave to appeal to the Privy Council was applied for and granted. In a similar case in Madras, *Sreemuth Devasigamani Pandarasunadhi v. Palaniappa Chettiar* (11), the plaintiff obtained in the High Court a decree for possession of a piece of land worth at the most Rs. 2,000; the defendant had built on the land and the buildings were valued at over Rs. 20,000, and he had to remove them. Leave to appeal to the Privy Council was applied for by the defendant and granted.

In *Mutsaers v. Jaguera Yettapu Naiker v. Venkataswara Yettia* (12), a decree was passed by the Civil Court of Tinnevely in appeal, awarding Rs. 2,500 a year for maintenance, that being the highest sum which the first Court had jurisdiction to give and this decree was confirmed by the High Court. An application for special leave was made to Her Majesty in Council. In discussing the question whether the application should not have been made to the High Court first, their Lordships came to the conclusion that it could not have been made there on the ground that the matter in dispute was below Rs. 10,000. It must, however, be noted that the facts of that case were peculiar.

In *Sauvageon v. Gauthier* (13), A, who had obtained an assignment of certain choses in action from B, sued one of the debtors, O, to recover the debt due to him. The assignor had become an insolvent and his assignee in bankruptcy intervened in the suit and claimed the sum as against A, the private assignee, contending that the

assignment was void as against him. His contention was disallowed and he applied for leave to appeal to the Privy Council. The Privy Council declined to give leave; but they said that if he had instituted a suit against the private assignee for a declaration that that assignment was bad, the subject-matter of the suit would have been over the appealable value, but inasmuch as his claim was limited to only one of the debts, he was not entitled to leave; they declined to grant special leave on the ground that that decision need not necessarily affect the title to the other debts.

In *Ajuas Koor v. Musammat Lateefa* (14), where the suit was to establish the plaintiff's rights to take water from a channel to irrigate his land, Markby, J., held that the value of the subject-matter in dispute was the amount by which the value of the land would be diminished if the right to take the water was not granted. The learned Judge drew a distinction "between the value of the relief" and "the value of the subject-matter."

In *Macfarlane v. Leclaire* (15), the plaintiff sued for a sum of money, being the debt due to him from X. He applied for attachment before judgment and attached certain properties in the hands of Y, on the ground that Y was holding those properties on behalf of X. Y claimed the properties as his own under a conveyance from one P, who himself obtained the properties from X. Plaintiff replied that the conveyance from X to P and from P to Y were fraudulent as against the creditors of X. The plaintiff succeeded. The amount of debt due to him for which he obtained a decree was less than the appealable value, but as the adjudication was also that the purchase by Y was not valid as against the creditors of X, the decision involved a question of title to the property of over the appealable value. The Privy Council, in the absence of a clause like the second clause, were obliged to bring it within the words "matters in dispute in appeal to the Privy Council."

(10) 31 C. 305; 31 L. A. 24; 8 C. W. N. 225.

(11) 9 Ind. Cas. 281; 34 M. 535; 20 M. L. J. 964; 9 M. L. T. 83; (1-11) 2 M. W. N. 154.

(12) 10 M. L. A. 313; 1 Ind. Jur. (N. S.) 205; 2 Sar. P. C. J. 131; 19 E. R. 991.

(13) 5 P. C. 494 at p. 498; 30 L. T. 510; 22 W. R. 667.

(14) 18 W. R. 21.
(15) 15 Moo. P. C. 181; 8 Jur. (N. S.) 237; 10 W. R. 324; 15 E. R. 462; 137 R. R. 24.

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The above cases, except the cases reported as *Amar Chandra Kundu v. Shoshi Bhushan Roy* (10) and *Sreemuth Devosigkamani Pandarasannadhi v. Palaniappa Chettiar* (11), were decided when the Order in Council, dated 10th April 1838 or provisions similar thereto were in force. They afford instances of cases in which the subject-matter of the suit was incapable of a real or accurate valuation, or where the value of the subject-matter of the suit was below the appealable value, but the decision directly involved a claim or question respecting property of over ten thousand rupees in value. Even if the words "subject-matter of the suit" or "matter in dispute in appeal" do not mean the object-matter, but connote the jural relationship between the parties [see *Ramaswami Aiyar v. Vythinatha Aiyar* (16), also *Kaveri Ammal v. Sastri Ramier* (17)], the present case would clearly come within the first clause and the second clause would have no application whatsoever. In some cases, it may be difficult to determine under which clause a particular case falls [See *Ram Kirpal Shukul v. Rup Kuar* (18) and *Bhagwat Sahai v. Pashupati Nath Bose* (19)]; but I do not think that this would in any way affect the decision, as I think that in all cases in which the final decision involves a claim or question to property of a particular value, the decision of the first Court also would necessarily involve a claim or question in respect of property of the same value.

The following cases are instances in which the decision involves indirectly a claim or question to or in respect of property of the appealable value. *Baboo Gopal Lall Thakoor v. Teluk Chunder Rai* (20); *Ko Khine v. Snadden* (21); *Joogulkishore v. Jotendro Mohun Tagore* (22). In the matter of the petition of *Khawaja Muhammad Yusuf* (23); *Sri Kishan Lal v. Kashmira* (24). I am supported in the construction which I have adopted by the decision in *De Silva v. De Silva* (25) and a case from the Colonies,

Gardiner v. Miculloch (26), cited in *Wheeler's Privy Council Practice*, 694. In *Dalglish v. Damodar Narain Chowdhry* (1), already cited, a different view was taken, but no reasons were given for the conclusion. I am unable to follow it. On the other hand in *Moti Chand v. Ganga Prasad Singh* (4) already referred to, the Judicial Committee proceed on the assumption that the second clause was inapplicable to cases of this sort. I would, therefore, disallow this contention also.

Certificate refused.

(26) (1876) 2 V. L. R. 128.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 278 OF 1914.

August 20, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

RAMKRISHNA TRIMBAK NADKARNI
AND OTHERS—DEFENDANTS NOS. 12 TO 14—

APPELLANTS

versus

NARAYAN SHIVRAO ARAS—

DEFENDANT NO. 1—RESPONDENT.

Contract Act (IX of 1872), s. 23—Government Servants' Conduct Rules, rule 14—Debt contracted by father for trading purposes, whether lawful—Hindu Law—Liability of sons for father's debt.

The plaintiff sued to enforce a mortgage effected in his favour by defendant No. 1. The mortgage security consisted of a piece of land, the property of the 1st defendant, and of land which was the property of the family of the 5th defendant and his sons, which was ostensibly burdened with a mortgage-debt created by the 5th defendant in respect of certain payments made or liability incurred by the 1st defendant at the 5th defendant's request in respect of dealings in a trade in fish instituted by the 5th defendant and carried on largely under the management of the 1st defendant. The 5th defendant's sons contended *inter alia* that they were not liable to pay the debts of their father contracted for illegal and immoral purposes in contravention of Government Servants' Conduct Rule No. 14.

Held, (1) that the rule was not based upon any statutory prohibition, but was merely a rule of conduct; [p. 303, col. 1.]

(2) that the debts contracted by the father could not be said to be attributable either to his failings, follies or caprices and a disregard of the Government injunctions did not taint his trade dealings with immorality or impropriety as between himself and those with whom he traded; [p. 303, col. 2.]

(3) that the sons were, therefore, liable to pay their father's debts. [p. 303, col. 2.]

Durbar Khachar v. Khachar Harsur, 32 B. 348; 10 Bom. L. R. 297, distinguished.

(16) 26 M. 760 at p. 763; 13 M. L. J. 448.

(17) 26 M. 104 at p. 109; 13 M. L. J. 58.

(18) 3 A. 633; A. W. N. (1881) 32.

(19) 3 C. L. J. 257; 10 C. W. N. 564.

(20) 7 M. I. A. 548; 1 Sar. P. C. J. 737; 19 E. R. 415.

(21) L. R. 2 P. C. 50; 37 L. J. P. C. 112; 5 Moore P. C. (N. S.) 76.

(22) 8 C. 210; 6 Ind. Jur. 356.

(23) 18 A. 196; A. W. N. (1896) 39.

(24) 21 Ind. Cas. 617; 35 A. 445; 11 A. L. J. 654.

(25) 6 Bom. L. R. 403.

RAMKRISHNA TRIMEAK V. NAKAYAN SHIVRAO ARAS.

Second appeal from the decision of the District Judge of Kanara, in Appeal No. 19 of 1913, modifying the decree passed by the Additional Subordinate Judge at Karwar, in Civil Suit No. 192 of 1908.

Messrs. G. S. Rao and Y. N. Nadkarni, for the Appellants.

Mr. Nilkanth Atmaram, for the Respondent.

JUDGMENT.—The plaintiff sues to enforce a mortgage effected in his favour by the 1st defendant. The mortgage security consisted of a piece of land, the property of the 1st defendant, and of land which was the property of the family of the 5th defendant and his sons, the present appellants, which was ostensibly burdened with a mortgage-debt, created by the 5th defendant in respect of certain payments made or liabilities incurred by the 1st defendant at the 5th defendant's request in respect of dealings in a trade in fish instituted by the 5th defendant and carried on largely under the management of the 1st defendant.

The present appellants pleaded that they were not liable for their father's debt; that they did not admit the *bona fides* of the mortgage bonds of their father; that they were passed for debts incurred for immoral and illegal purposes; that their father was given to profligate habits and was fond of gambling in speculative transactions recklessly; that they derived no benefit from the transactions; and that they were not liable under the Hindu Law to pay off debts incurred by their father so imprudently.

When the case came to trial, issues were raised upon the pleadings. The 2nd issue was whether defendant No. 5 contracted the above debt for illegal or immoral purposes as alleged by defendants Nos. 12 to 14. But during the hearing a further issue was raised in these terms:—Is the mortgage transaction of defendant No. 5 with defendant No. 1 null and void by reason of its having been entered into in violation of the Government Servants' Conduct Rules as prescribed by Government? The point then made was that having been entered into in contravention of Government Servants'

Conduct Rules, the transactions which resulted in the mortgage debt were null and void under section 23 of the Contract Act, as being agreements forbidden by law or opposed to public policy. The learned Judge held that the transactions were not void under section 23, but he decided the 2nd issue in favour of the present appellants. It was suggested to him that the whole scheme of business was *aryavahar*, and, therefore, such as could not give rise to a liability in the sons to pay their father's debts, and upon the authority of *Durbar Khachar v. Khachar Harsur* (1) he decided that the debts in suit came under that class of debts which it is not the bounden duty of the sons to pay as being illegal in the sense in which the Hindu Law texts so consider them. Accordingly a decree was passed for the amount claimed, and on default, for sale of the father's interest alone in the family properties, and for sale of the property belonging to the first defendant.

The 1st defendant who was made personally liable under the decree for any deficiency that might arise on the sale appealed to the District Judge, and again the same arguments were put forward on behalf of the present appellants. The Government Servants' Conduct Rules were only made use of for the purpose of contending that the contract was void as being contrary to public policy under section 23. The learned Judge held that defendants Nos. 12 to 14, the present appellants, failed to prove that their father's conduct was *aryavahar*, and accordingly modified the decree so as to make the interest of defendants Nos. 12 to 14 in the mortgaged property liable as well as the interest of defendant No. 5.

From that decree defendants Nos. 12 to 14 have appealed, joining as respondent only defendant No. 1, although they seek to reduce the mortgage security available for payment of the plaintiff's debt according to the decree of the District Court. It is clear, we think, that they cannot get a decree in the absence of the plaintiff. But it is desirable that we should express our

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opinion upon the points which have been thoroughly argued by the Pleaders on both sides. Section 23 of the Contract Act is no longer appealed to. The contention that the transactions were void as being contrary to public policy is abandoned, but the Government Servants' Conduct Rules are now used in aid of the argument that the father's conduct was *aryavahar*. The only authority which can be relied upon in support of that contention is the case of *Durbar Khachar v. Khachar Harsur* (1). That case has not met with acceptance in any of the other High Courts in India; see *Chakouri Makton v. Ganga Proshad* (2); *Venugopal Naidu v. Ramanadhan Chetty* (3) and *Sumer Singh v. Liladhar* (4). But assuming for the purpose of argument that it was correctly decided, it only decides this, that a civil penalty imposed by way of damages upon the father for a civil wrong committed by him does not give rise to any moral obligation on the son to discharge that liability.

Now the Government Servants' Conduct Rule which is referred to in this case is as follows:—

"A Government servant may not, without the previous sanction of the Local Government, engage in any trade or undertake any employment, other than his public duties.

A Government servant may undertake occasional work of a literary or artistic character, provided that his public duties do not suffer thereby; but the Government may, in its discretion, at any time forbid him to undertake or require him to abandon any employment which in its opinion is undesirable."

That is a rule which is not based upon any statutory prohibition, but is, as it is expressed to be, merely a rule of conduct. The 5th defendant who is alleged to have violated that rule was a Post Master at Akola on a small salary, and in order to supplement his income he engaged in a fish trade, a very common occupation on the west coast of India. The work in connection with the trade, as appears from the evidence,

was done almost entirely by the 1st defendant.

The question then is, whether applying the test laid down in *Durbar Khachar v. Khachar Harsur* (1) as the highest point at which the appellants' case can be put, such conduct on the part of the 5th defendant could be treated as conduct which the father "as a decent and respectable man" ought not to have engaged in; and whether the debts of the fish trade were debts "attributable to his failings, follies or caprices". We have no doubt that such debts cannot be said to be attributable either to his failings, follies or caprices, nor do we think that it can be said that his conduct in embarking in such fish trade is conduct of which no decent and respectable man would be guilty. As was put by Mr. Nilkanth on behalf of the 1st defendant, if the restriction or the prohibition against embarking in trade occurred in a contract with a large employer of labour other than Government in which the clause was that the servant might not engage in a trade, it cannot be contended that a disregard of such an injunction would taint his trade dealings with immorality or impropriety as between himself and those with whom he traded.

We, therefore, affirm the decree and dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 387 OF 1913.

April 26, 1915.

Present:—Mr. Batten, A. J. C.

SAHASRAM—PLAINTIFF—APPELLANT
versus

SHEONATH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Landlord and tenant—Trespasser, whether can set up rights of real tenant against landlord.

A person who is neither an agent of, nor a transferee from a tenant, but is a pure trespasser, cannot set up against the landlord the plea of non-abandonment of the holding by the tenant. [p. 304, col. 1.]

Appeal against the decree of the District Judge, Bilaspur, dated the 16th April 1913,

(2) 12 Ind. Cas. 609; 39 C. 862; 15 C. L. J. 228 16 C. W. N. 519.

(3) 14 Ind. Cas. 705; 37 M. 458; 11 M. L. T. 427; 23 M. L. J. 61.

(4) 9 Ind. Cas. 624; 33 A. 472; 8 A. L. J. 306.

THIRUVANNAMALAI SERVAI K. VARADARAJULU NAIDU.

confirming that of the Munsif, Bilaspur, dated the 29th January 1913.

Mr. J. C. Ghosh, for the Appellant.

Mr. M. R. Bobde, for the Respondents.

JUDGMENT—In this case the defendants have, since the death of *Musammam Manglawat*, both out of Court and in this suit, asserted a title adverse to her daughter, *Musammam Bisahin*. Out of Court they successfully asserted the adverse title by getting the *Settlement parcha* issued in their name. They, therefore, cannot be allowed to succeed on an alternative and false plea that they have been holding for her, when by their own pleas and conduct they have been holding against her. That until her marriage she lived with them, does, not affect the fact that they have in fact been holding adversely to her. They have no title and are pure trespassers, since the transfer, which as another alternative they pleaded, has not been proved. The case they are really now setting up is that they are her agents, though throughout they have acted against her and not for her. It is argued that the landlord cannot eject even a pure trespasser, unless he proves that the tenant has abandoned the holding or that the tenancy has otherwise come to an end. Reliance is placed on the remarks in *Thamman Singh v. Manjoo* (1), but that as well as the case of *Kabil Sardar v. Chunder Nath Nag Chowdhry* (2) therein quoted, and all the cases in which similar remarks have been made, was the case of a transfer by the tenant. Not a single case has been shown me where a pure trespasser, not a transferee, authorized or unauthorized, from the tenant, has been allowed to set up against the landlord the rights of the real tenant. Even if such a plea could be taken, the defendants have themselves in this case asserted and proved as between themselves and the landlord the abandonment of the holding by the tenant, by proving the issue of a *Settlement parcha* in their own name. The real tenant is not a party to this suit and may be left to look after her own interests. The defendants, having succeeded in proving as against the landlord the abandonment by the tenant, cannot be allowed to succeed on the mere supposition that they represent a tenant whose rights are still

subsisting. The decrees of the lower Courts will be set aside and the plaintiff will be granted a decree for possession as prayed for, with costs in all Courts.

Decree set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 639 AND 742 OF 1913.

September 24, 1915.

Present:—Mr. Justice Srinivasa Aiyangar.
THIRUVANNAMALAI SERVAI AND
OTHERS—PLAINTIFFS—PETITIONERS

versus

VARADARAJULU NAIDU AND OTHERS—
DEFENDANTS—RESPONDENTS.

Tender—Interest—Bond payable by instalments—Tender of payment of overdue instalments without interest, whether proper.

Where the money due on a bond was payable by instalments, one of the conditions being that if three instalments remained in arrears, the whole money would become payable at once and where after three instalments had fallen due, the debtor tendered payment of the principal money of those instalments without the addition of the interest:

Held, that there was not a proper tender and the plaintiff was entitled to recover the interest on the overdue instalments.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Subordinate Judge of Ramnad, in Small Cause Suits Nos. 77 and 73 of 1913.

JUDGMENT.—The lower Court is obviously in error in thinking that the tender made was a proper tender. Admittedly the tender was made after three instalments had fallen due and the amount that was tendered was only the principalsums of the three instalments without the addition of the interest as it should have been. The plaintiffs were entitled to interest on the 31st to 33rd instalments. Owing to the non-payment and non-tender of those instalments, the whole money had become due; and the subsequent instalments, even if they were tendered on the dates fixed in the bond, were not properly tendered. The plaintiffs are entitled to a decree as asked for. I modify the decrees of the lower Court and give a decree in favour of the plaintiffs for the sum sued for in both the suits. The petitioners are entitled to their costs throughout.

Petition allowed; Decrees modified.

(1) 11 C. P. L. R. 22.

(2) 20 C. 590.

SOBHANADRI APPA ROW V. GOVINDARAJU SEETARAMIAH.

MAHADEV RAGHUNATH V. RAMA TUKARAM.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 700 OF 1912

September 14, 1915.

Present:—Justice Sir William Ayling, Kt., and
Mr. Justice Kumaraswami Sastri.

Sree Raja SOBHANADRI APPA ROW
BAHADUR ZAMINDAR GARU—

DEFENDANT NO. 1—APPELLANT

versus

GOVINDARAJU SEETARAMIAH AND
OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2

TO 5—RESPONDENTS.

Execution—Sale—Purchase by decree-holder—Decree
ex parte, subsequently set aside—Sale, how affected.

The purchase by a decree-holder of immovable
property belonging to the judgment-debtor in execution
of an *ex parte* decree becomes *ipso facto* void,
when the *ex parte* decree is afterwards set aside.

Set *Umedmal v. Srinath Ray*, 27 C. 810; 4 C. W. N. 692, followed.

Second appeal against the decree of the
District Court of Kistna, in Appeal Suit No.
390 of 1910, preferred against that of
the Court of the District Munsif of Gudivada,
in Original Suit No. 31 of 1909.

FACTS.—The defendant obtained an *ex parte* money decree for rent against the undivided brother's sons of the present plaintiff. In execution of that decree, he brought the suit properties to sale, purchased them himself and got delivery. In the meanwhile, the guardian of the defendants in that suit put in a petition for setting aside the *ex parte* decree, but before the order was actually passed setting aside the decree, the sale had taken place. No subsequent proceedings were taken to set aside the sale. In a family partition, however, which took place between the present plaintiff and the defendants in that suit subsequent to the said sale, the suit properties fell to the share of the present plaintiff and he, thereupon, filed the present suit for possession of the said properties. The 1st defendant, (the decree-holder purchaser and the real contesting defendant) contended that the suit was not maintainable as the sale had not been set aside. The Court of first instance dismissed the suit, but the lower Appellate Court, relying on *Set Umedmal v. Srinath Ray* (1), reversed that decision and decreed the suit. The 1st defendant appealed to the High Court.

(1) 27 C. 810; 4 C. W. N. 692.

Mr. P. Somasundaram, for Mr. N. S. Narasimhachariar, for the Appellant:—The decree of the lower Appellate Court cannot be supported. Though the *ex parte* decree is set aside, the sale is not affected thereby. It remains valid unless and until it is actually set aside. It is only voidable and not void. Vide *Paresh Nath Mallik v. Hari Charan Dey* (2).

Mr. V. Ramesam, for the Respondents, was not called upon.

JUDGMENT.—We are of opinion that when a decree-holder purchases property in execution of an *ex parte* decree which is set aside, the sale becomes *ipso facto* void. Set *Umedmal v. Srinath Ray* (1). The decree-holder was the party having the conduct of the suit, and it is difficult to see what equities can arise in his favour in cases where he obtains an *ex parte* decree which is set aside on the ground that the defendants were not served. Cases where strangers have purchased in execution are distinguishable, as also where the purchaser is a defendant. It is unnecessary to consider whether in cases of purchase by defendant, the sale is voidable or absolutely void. In the view we take, the decision of the lower Appellate Court is right. We dismiss this second appeal with costs.

Appeal dismissed.

(2) 10 Ind. Cas. 361; 38 C. 624; 15 C. W. N. 875; 14 C. L. J. 300.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 50 OF 1915

September 1, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

MAHADEV RAGHUNATH GODBOLE
PLAINTIFF—APPELLANT

versus

RAMA TUKARAM DEVKOTE

AND ANOTHER—DEFENDANTS—RESPONDENTS.
Dekkan Agriculturists' Relief Act (XVII of 1879).

MAHADEV RAGHUNATH P. RAMA TUKARAM.

s. 21, scope of.—Immunity of agriculturists' house from sale, extent of.

The true construction of section 22 of the Dekkhan Agriculturists' Relief Act is, *first*, a general provision that immoveable property belonging to an agriculturist shall be immune from sale, and *secondly*, a proviso directing that this immunity is subject to exception where the two following conditions are both satisfied, that is to say, (a) where the decree or order in question relates to the re-payment of a debt, and (b) where the agriculturist's property has been specifically mortgaged for the re-payment of that debt. The limiting words in the section referring to a debt occur only in the proviso and cannot be imported into the main rule so as to restrict its express generality. [p. 306, col. 2.]

Second appeal from the decision of the District Judge of Sholapur, in Appeal No. 32 of 1913, confirming the order passed by the first Class Subordinate Judge at Sholapur, in *Darkhast* No. 822 of 1912.

Mr. P. V. Kane, for the Appellant.

Mr. P. D. Bhile, for the Respondents.

JUDGMENT.—The appellant before us was the original plaintiff, who in 1901 brought a suit in ejectment against the defendants. It was found, however, that the plaintiff was a purchaser from a mere mortgagee, and the Court consequently gave the defendants a decree for redemption. The sum to be re-paid was Rs. 960, of which Rs. 550 were to be paid on 25th March 1909. The balance was payable by yearly instalments of Rs. 100. The defendants paid in all a sum of Rs. 660. In the meanwhile, however, they had lodged an appeal, and the lower Appellate Court reversed and remanded the original Court's decree. Therefore, on the 3rd August 1912 the defendants applied under section 144 of the Civil Procedure Code asking for restitution in respect of the payments which they had made, and for interest at twelve per cent. There was an added prayer that in the event of the plaintiff failing to pay, his house should be attached and sold.

The lower Courts have ordered the sale of the plaintiff's house.

The plaintiff complains that since he is an agriculturist, his house is immune from sale under section 22 of the Dekkhan Agriculturists' Relief Act. If that contention is justified, then it would follow that the plaintiff must have an opportunity of proving that he is an agriculturist, such opportunity not yet having been afforded to him.

The question, therefore, is whether assuming that the plaintiff is an agriculturist, his house is not liable to sale under section 22 of the Dekkhan Agriculturists' Relief Act. That section, in so far as it is now material, runs as follows:—"Immoveable property belonging to an agriculturist shall not be attached or sold in execution of any decree or order unless it has been specifically mortgaged for the re-payment of the debt to which such decree or order relates." The learned District Judge reads this section as pre-supposing the existence of a contractual debt in all cases, and he, therefore, decides that, since no such debt was in existence here, the section is inapplicable. The phraseology of the section does perhaps lend some colour to the District Judge's view, but it appears to us that the true reading of the section is that for which the plaintiff contends. The learned Judge's construction is only to be arrived at if we read into the main general clause the restrictive words implying the existence of a debt, and those restrictive words do not occur in the main general clause; but occur only in the limiting proviso. We cannot, therefore, but think that the true construction of the section is, *first*, a general provision that immoveable property belonging to an agriculturist shall always be immune from sale, and, *secondly*, a proviso directing that this immunity is subject to exception where the two following conditions are both satisfied, that is to say, (a) where the decree or order in question relates to the re-payment of a debt, and (b) where the agriculturist's property has been specifically mortgaged for the re-payment of that debt. The provision would have been clearer if it had been expressed at greater length, but it seems that the draftsman preferred terseness and concision. Nevertheless the limiting words referring to a debt occur only in the proviso and cannot, we think, be imported into the main rule so as to restrict its express generality. This view seems to derive support both from the general character of the Dekkhan Agriculturists' Relief Act itself and from the wideness of the preceding sections 20 and 21.

We, therefore, think that the lower Court's decree must be reversed and the case must be remanded in order that the plaintiff may

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have an opportunity of proving that he is an agriculturist within the Statute.

Costs to be costs in the *darkhast*.

Appeal accepted; Case remanded.

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I am asked to treat this as a petition to revise the decision in the suit itself though it is a petition to revise the order, refusing to grant a review. It was, however, admitted that there is pending in this Court a separate petition already filed to revise the decision in the suit.

I, therefore, dismiss the petition.

Petition dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 622 OF 1914.

September 30, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

In re CHIDIPATU SOMAYYA—PETITIONER.
Civil Procedure Code (Act V of 1908), O. XVII,
r. 3—Decision passed 'forthwith,' whether one on merits.

A decision passed 'forthwith' under Order XVII, rule 3, Civil Procedure Code, is a decision passed on the merits on the materials then before the Court.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Ongole, dated the 8th May 1914, in Interlocutory Petition No. 693 of 1914, in Original Suit No. 584 of 1913.

FACTS.—The District Munsif of Ongole, purporting to act under Order XVII, rule 3, Civil Procedure Code, "forthwith decided" a suit under section 9 of the Specific Relief Act. He also dismissed a petition praying for a review of the judgment. Against the order refusing to grant the review the present civil revision petition was filed in the High Court.

Mr P. Chenchiah for Mr. T. Prakasam, for the Petitioner, contended that a review ought to have been granted as there was no decision on the merits.

JUDGMENT.—A decision passed "forthwith" under order XVII, rule 3, of the Civil Procedure Code is a decision passed on the merits on the materials then before the Court and if it is a decision in a suit under section 9 of the Specific Relief Act, a review of such a decision is barred by section 9 itself.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 665 OF 1914

April 23, 1915.

Present:—Mr. Stanyon, A. J. C.

NARAIN AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

BEHARI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Landlord and tenant—Abadi land—Central Provinces—Wajib-ul-arz—Tenant or village resident, position of—Licensee—Tenant of house—Landlord, right of—Transferee, position of—Site ceasing to be used as dwelling house—Ejectment

In the Central Provinces the whole of the *abadi* site belongs to the landlord, and, *prima facie*, every tenant or village resident dwelling thereon and growing crops in the *bari* attached to his house is a licensee, protected in his occupation by the terms of the *wajib-ul-arz*. [p. 308, col. 2.]

Where the house in the occupation of one tenant passes by sale to another person, the landlord may claim that, the license to occupy the site being non-transferable, the vendee shall vacate, taking away the house materials, but where the vendee is also a tenant or a regular resident of the village, the landlord may allow the transfer of occupation expressly or impliedly by raising no objection. [p. 308 col. 2.]

A transferee of a house standing on an *abadi* site whose occupancy of the site is not objected to by the landlord, must be presumed to have been permitted to occupy it on the same terms as his transferor, namely, as the licensee of the landlord, subject to the village *wajib-ul-arz*. [p. 309, col. 2.]

Where such an occupant ceases to use such site for the purposes of a dwelling house, he loses the protection of the *wajib-ul-arz* and becomes a bare licensee liable to ejectment at the will of the landlord, unless he expressly sets up and earns by lapse of time, a prescriptive title to occupy the land, [p. 309, col. 2.]

NARAIN U. BEHARI.

Appeal against the decree of the District Judge, Saugor, dated the 22nd July 1914, confirming that of the Munsif, Khurai, dated the 4th May 1914.

Dr. H. S. Gour, for the Appellants.

Mr. G. L. Subhedar, for the Respondents.

JUDGMENT. This appeal and second Appeal No. 666 of 1914 arise out of suits by the same *malguzar* for different *abadi* sites in the same village against different defendants. The plaintiffs' case is that the defendants in each case, having purchased the house belonging to a tenant who had given up his holding, gradually allowed the building to fall into ruin and have now diverted the site into a plot for the cultivation of tobacco and maize. The plaintiffs are non-resident landlords and they assert that they only became aware of this diversion of the site in 1911. They sue to eject the defendants. The Courts below have concurred in dismissing both suits, and they have done so on the following grounds:—

(1) that in each case the tenant, who occupied the site with his dwelling house, sold the house more than 12 years before the suit;

(2) that under the terms of the *wajib-ul-arz* such sale conveyed to the purchasers only a right to carry away the materials of the house and gave them no right to occupy the site;

(3) that the sale gave the landlords a right of re-entry on the site;

(4) that the landlords did not in fact re-enter, and the purchasers continued to occupy the site;

(5) that this occupation by the purchaser was adverse to the landlords, whose title in the site or at any rate whose right to re-enter the same, has been extinguished by prescription.

The plaintiffs have, therefore appealed to this Court, and I have no doubt whatever that the appeals are well laid. This judgment will govern the disposal of both of them. Such decisions afford proof of the wisdom of the Legislature in enacting that suits between landlords and tenants as such shall be tried by officers trained in Revenue Law. I do not think that any Revenue Officer, familiar with the circumstances of village life and the principles underlying the revenue system

in the Central Provinces, would have delivered a judgment so inconsistent with those circumstances and so foreign to that system as has been given in each of these two cases upon a misapplication of a rule of Civil Law.

In the first place, it has not been ascertained whether or not the defendants are agricultural tenants possessed of holdings in the village. It is not known whether they purchased the dwellings of the former tenants simultaneously with a purchase of their holdings. The whole of the *abadi* site belongs to the landlord, and *prima facie* every tenant or village resident dwelling thereon and growing crops in the *bari* attached to his house is a licensee, protected in his occupation by the terms of the *wajib-ul-arz*. Where the house in the occupation of one tenant passes by sale to another person, the landlord may claim that, the license to occupy the site being non-transferable, the vendee shall vacate, taking away the house materials. But where the vendee is also a tenant or a regular resident of the village, the landlord may allow the transfer of occupation expressly or impliedly by raising no objection. That is a course which landlords constantly take: but it would undermine the whole scheme of village life to hold that in the absence of any express agreement, the transferee of the license becomes an adverse holder, who will extinguish the landlord's title in 12 years if allowed to hold on unquestioned. That is a preposterous proposition. It is neither Revenue Law nor Civil Law. It is a misapprehension of the law of prescription. When A buys a house and site from B, he takes only what B has to transfer, and no more. If he claims to earn a higher right by prescription, he must make an overt assertion of that right to the knowledge of the person against whom prescription is to operate. A tenant in a Central Provinces village is ordinarily the owner of the house in which he lives and a licensee of the site on which the house is built. Every such site is only partly built over, while the remainder of the plot is used for certain subsidiary purposes customary as a part of the village life. Some land in front of and sometimes also

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on one or both sides of the dwelling house, is used as a yard (*angan*) and a plot at the back, called a *bari*, is used as a kitchen garden or for growing small crops of certain kinds, among which tobacco and maize are very common. All this occupation is under licenses protected by the *wajib-ul-arz*. When, therefore, a tenant sells his house and *bari*, the landlord may object to the transfer of the license to occupy. But he is not bound to do so, and in a large majority of cases, especially where the transferee is himself one of the villagers, he allows the transfer to stand. In such a case, the vendee gets all that the vendor had, namely, a dwelling house coupled with a license to occupy the site on which it stands, according to village custom. Unless he expressly sets up an adverse title, *e. g.*, by claiming to be the owner of the land, he continues to occupy with the permission of the landlord. Even when the house tumbles down he may, if the landlord does not object, continue to grow the usual crops on the *bari*. By doing so, he does not publish any possession adverse to the landlord. There is this difference only, that while he uses the site for its primary purpose, namely, that of dwelling in a house standing thereon, the *wajib-ul-arz* will protect him from disturbance: when the house disappears and its appurtenant *bari* cultivation alone remains, the license to occupy becomes terminable at the will of the landlord. It may happen that a dwelling house may tumble down owing to heavy rain or an earthquake or the like, and it may take some years to re-build owing to lack of funds or other cause. The license to occupy would be preserved in such a case and the tenant would cultivate his *bari*. A reasonable landlord will not seek re-entry merely because for the time being a house has become unfit for habitation. It is only where, as in the cases now before me, the conduct of the occupant indicates with certainty a desire to permanently transform the building site and compound into an agricultural field that the landlord is justified in putting an end to his license. If the judgments of the Courts below were to prevail, we should soon have the *abadi* of every village dotted about with petty proprietors or rent-free

tenants in perpetuity, and the whole system of settlement and revenue now in vogue, would be dislocated by the vagaries of the Civil Courts. If that was a result which flowed out of the law as it stands, it could not be avoided: but it is not. There is a good deal of confusion and technicality in the application of the *lex prescriptionis* by our subordinate Courts, and the cases now before me are an example. But the Courts below have overlooked the elementary rules that, in the absence of anything to the contrary, a vendee succeeds to the right, title and interest of his vendor, and that where he succeeds to a permissive occupation, he must openly assert an adverse title if he wishes to earn it by prescription.

As a general rule then, the transferee of a house standing on an *abadi* site whose occupancy of the site is not objected to by the landlord, must be presumed to have been permitted to occupy it on the same terms as his transferor, namely, as the licensee of the landlord subject to the village *wajib-ul-arz*. Where such an occupant ceases to use such site for the purposes of a dwelling house, he loses the protection of the *wajib-ul-arz* and becomes a bare licensee liable to ejectment at the will of the landlord, unless he expressly sets up and earns by lapse of time a prescriptive title to occupy the land. Whether by such prescription he would become a proprietor or a tenant would depend on the circumstances of the case. It is not a question which arises here.

The above remarks apply only to land strictly included in the *abadi* area of the village. They have no application to fields on the outskirts of the village habitations, which may temporarily have been used as building sites and have subsequently been cleared and again brought under cultivation. In such a case a transferee of a dwelling house and premises, if he was allowed to pull down the buildings and cultivate the field for a year or two without objection by the landlord, might claim to be an ordinary tenant. But no such case has been pleaded here. Tenancies cannot be allowed to grow up amid village habitations. The defendants have set up prescriptive titles to purely *abadi* sites, and no such titles have been established. Both appeals

MUCHIRAZU RAMACHANDRA ROW v. SECRETARY OF STATE.

must be allowed and the plaintiffs' claims decreed. But as the plaintiffs have displayed considerable laches in both cases and given the defendants some reason to think that they are entitled to continue occupancy of the sites, I will not allow them their costs.

For the above reasons, this appeal is allowed. The decrees of the Courts below are reversed, and the plaintiffs will be given a decree requiring the defendants to vacate the plaintiff land as soon as any crop or crops now standing thereon sown by the defendants has or have been reaped. Each party will bear his own costs throughout.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1635 OF 1914.

September 20, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Tyabji.

MUCHIRAZU RAMACHANDRA ROW—
PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL, REPRESENTED BY
THE COLLECTOR, GODAVARI—
DEFENDANT—RESPONDENT.

*Madras Village Courts Act (I of 1889), s. 24—
Person holding vakalatnamah, appearance by—Privilege denied—Suit to declare right, maintainability of.*

Under section 24 of the Madras Village Courts Act, any person holding a vakalatnamah from a party may appear and plead in a Village Court; and there is no provision in the Act for debarring any one from this privilege.

Where this privilege is denied by an illegal order passed by an officer, a right of action to have that right declared exists in common law, if not under section 42 of the Specific Relief Act.

Robert Fischer v. Secretary of State for India in Council, 22 M. 270; 26 I. A. 16; 3 C. W. N. 161, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Cocanada, in Appeal Suit No. 191 of 1913, preferred against that of the Court of the District Munsif of Cocanada, in Original Suit No. 239 of 1913.

Mr. T. Ramachandra Row, for the Appellant.

Mr. K. S. Krishnaswami Aiyangar for the Government.

JUDGMENT.—We are not satisfied that the suit is covered by section 42 of the Specific Relief Act, but it does not follow that it is not maintainable. [Vide *Robert Fischer v. Secretary of State for India in Council* (1) and *Ramakrishna Pattar v. Narayana Pattar* (2).] We can see no reason for holding that the present suit does not lie.

The order in question is passed by the Deputy Collector in charge of the Cocanada Sub-Division, and debars plaintiff from practising in any of the village Courts of that Division. Under section 24 of the Madras Village Courts Act, any person holding a vakalatnamah from a party may appear and plead in a Village Court; and there is no provision in the Act for debarring any one from this privilege.

Mr. K. S. Krishnaswami Aiyangar, who appears for the Government Pleader, is unable to support the legality of the order. Whatever general powers of supervision can be inferred from the power of appointment, suspension and removal of Village Munsifs conferred by sections 7 and 8 of the Madras Village Courts Act, cannot be held to extend to the passing of an order of this description. It is, no doubt, desirable that bad characters should be prevented from practising in Village Courts and the Act may need amendment; but as it stands, the order is undoubtedly illegal, and in our opinion the District Munsif exercised a correct discretion in granting the declaration sued for.

We set aside the decree of the lower Appellate Court and restore that of the District Munsif with costs in this and the lower Appellate Court.

Appeal allowed; Suit decreed

(1) 22 M. 270; 26 I. A. 16; 3 C. W. N. 161.

(2) 26 Ind. Cas. 593; 27 M. L. J. 634; (1914) M. W. N. 912.

RAMCHANDRA DINKAR P. KRISHNAJI SAKHARAM.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 590 OF 1912.

August 17, 1915.

Present:— Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Shah.

RAMCHANDRA DINKAR PRABHU

AND OTHERS—DEFENDANTS NOS. 10 TO 12—

APPLICANTS—APPELLANTS

versus

KRISHNAJI SAKHARAM PRABHU—

DEFENDANT NO. 2—RESPONDENT.

Execution—Decree for partition specifying several shares—One party getting more than his due share—Re-adjustment of partition in order to make it accord with terms of decree, whether allowed.

A partition-decree was passed in 1888 specifying the shares to be allotted to all the sharers and the terms on which such allotment was to take place. In 1894 defendant No. 8 applied for his share and got it, so did most of the other sharers. In 1900 defendants Nos. 10-19 applied for separate possession of their share. It was then found that the lands remaining for their share were far less than they should have got and that the plots below and adjoining their houses had been allotted to the share of other sharers. They then applied to the Collector to re-open the partition, who declined to do this but proposed that the surveyor should at the applicants' expense see if they could be compensated out of other lands. The applicants wanted time to pay the expenses and the Collector reported to the Court that the applicants refused to take possession of their share.

Held, that inasmuch as the Collector's partition had not been made in accordance with the directions of the decree, the shares of defendant No. 8 and the applicants must be re-adjusted so as to remedy the injustice done to the applicants, who were entitled to have their right share, so far as they could get it, at the expense of defendant No. 8. [p. 312, cols. 1 & 2.]

Second appeal from the decision of the 1st Class Subordinate Judge at Ratnagiri, in Appeal No. 438 of 1910, confirming the order passed by the Subordinate Judge at Devgad, in *Darkhast* No. 727 of 1900.

Mr. A. G. Desai, for the Appellants.

Mr. K. N. Koyajee, for the Respondent.

JUDGMENT.—The partition suit in which the execution proceedings (*Darkhast* No. 727 of 1900) now in question are taken, was brought by the plaintiff, a member of a *mirasi* family interested to the extent of eight annas in certain three villages named Kuvali, Bharni and Chafet. The other eight annas in each village belonged to a Desai family. The plaintiff claimed a one-thirty-sixth share.

In November 1888, a decree was passed for partition, the main provisions of which were: (1) That the plaintiff should take into

his possession his 1/36th share, division by metes and bounds being effected of the whole property in dispute except the Kulkarni Watan, but the plaintiff before taking possession of his share was to pay with their consent to certain of his *mirasi* co-sharers, including the present appellants, certain specified sums of money.

(2) Two equal divisions between Desais and *mirasis* were to be made in each village.

(3) Then from the eight annas separated share of the *mirasis* the shares of the sub-sharers should be separated, the respective fractions being specified in the decree.

(4) After they had paid the proper Court fee in respect of their shares their shares were to be separate, and as regards the lands which were with the sharers the same were as far as possible to be kept with them at the time of partition, subject to certain provisions to secure equality.

The plaintiff first filed his application for execution of the decree in *Darkhast* No. 127 of 1893 and the main inquiry in connection with the partition was held under the Collector's direction in that *darkhast* proceeding. Thereafter the defendant No. 8 filed *Darkhast* No. 404 of 1894 for his share, and the Collector's surveyor who had been employed by the Collector on this *Darkhast* proceeding No. 127 stated in his report in *Darkhast* No. 404 that no *thikan* having in it the houses of any other party had been allotted to defendant No. 8's share. That *darkhast* was disposed of in or about 1898 according to the statement of the appellant, but the date cannot be verified as many papers are missing and the only note of the Subordinate Judge which we have relating to any *darkhast* other than that of the appellants, relates to *Darkhast* No. 118 of 1896 of defendant No. 2 and notes that the warrant for Kuvalegar having been executed and the *darkhastdar* raising no objections this *darkhast* is disposed of. The appellants state that they applied for separate possession of their share in 1900, but when the surveyor prepared a list of lands remaining over after the first partition as the share of the applicants the latter found the *khassgi* lands in Kuvali remaining for their share far less than they should have got and that the plots below and adjoining their houses had been allotted to the share of other sharers.

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They then applied to the Collector to re-open the partition. The Collector declined to do this but proposed that the surveyor should at the applicants' expense see if they could be compensated out of the Desais' lands. The applicants say they wanted time to pay these expenses and the Collector then reported to the Court that the applicants refused to take possession of their share.

It is stated by the Subordinate Judge in these proceedings, in confirmation of the applicants' complaint, that the Collector's surveyor has noted that the applicants' house in Survey No. 76, Falni No. 8, of Chafet village was allotted to defendant No. 8's share, while the same defendant got about double his share in the *khasgi* lands and for the applicants only about half their proper share remains.

The lower Courts, while recognizing the injustice to the applicants in the partition which has been effected, felt unable to interfere. The lower Appellate Court thought that the share prepared for defendant No. 8 had been and "must have been embodied in the final partition decree and it would operate as *res judicata* even as among the defendants, the suit being for partition." There is no trace in the proceedings of any final decree and on inquiry the District Judge has informed us that it was not the practice to make partition decrees final and reports that the last order in the proceedings is one dated the 1st of July 1897, directing the papers sent by the Collector after effecting compliance with the Court warrant and delivering possession to be filed.

It is evident from the findings of the lower Courts that the Collector's partition has not been made in accordance with the directions of the decrees. The Collector acts ministerially in executing the Court's decree, see *Dev Gopal Savant v. Vasudeo Vitthal Savant* (1) and an injustice has been done by awarding to defendant No. 8 the appellants' house as well as too much land. The appellants were according to the decree to get their shares on paying the proper Court-fee. No time was specified within which such payment should be made. The suit was not the defendants' suit and they should be allowed to pay at

their convenience. That they paid and applied for their shares later than the others, is no reason for non-compliance by the Court's agent with the terms of the decree. The lower Courts evidently suspected fraud on the part of defendant No. 8 and possibly the Collector's surveyor in the earlier proceedings. We will not, however, assume it. It is sufficient to say that this Court cannot allow a mistake of one of its agents in carrying out its directions to work permanent injustice.

The applicants must have their right share so far as they can get it at the expense of defendant No. 8.

The case resembles that of a legatee overpaid by an executor by order of the Court. Such legatee must refund to allow of equal distribution of the estate. This principle has long been recognised. It is to be found stated in Vernon's Reports (1690) and is applied in section 135 of the Probate and Administration Act, 1881.

We set aside the order of the lower Court, and direct that the papers be returned to the Collector to adjust the share of the defendant No. 8 and the appellants as far as possible according to the provisions of the decree.

The defendant No. 8 must pay the appellants' costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1133 AND 1134
OF 1914.

September 28, 1915.

Present:—Mr. Justice Napier.

INDOOR SUBBARAMI REDDI AND

ANOTHER—PLAINTIFFS—APPELLANTS

versus

NELATUR SUNDARARAJA AIYANGAR

AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 35, O. XXIII, r. 1 (3)—Discretion of Court as to costs, extent of—Power of Appellate Court to interfere Order as to costs incorporated in decree, whether appealable—Pleader's fees Madras Civil Rules of Practice, rr. 276, 279, 284.

In a mortgage suit plaintiff withdrew his claim against some of the defendants, while it was decreed against the others. The trial Judge ordered those defendants against whom the claim had been withdrawn to bear their own costs. On appeal the District Judge ordered the plaintiff to pay the

(1) 2 B. 371 at p. 376.

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costs. In second appeal it was contended that no appeal lay against the order of the trial Judge as it was not a decree:

Held, that as a decree was passed in the case, the defendants were entitled to appeal. [p. 313, col. 2.]

Discretion as to award of costs vested in a Court under section 35 of the Code of Civil Procedure is not absolute, and can be interfered with by an Appellate Court if exercised wrongly and arbitrarily. [p. 313, col. 2; p. 314, col. 1.]

Bew v. Bew, (1899) 2 Ch. 467; 68 L. J. Ch. 657; 81 L. T. 284; 48 W. R. 124; *Parshram Bhaico v. Dorabji Pestonji*, 2 Bom. L. R. 254; *Rao Sahab T. Numberumal Chettiar v. Krishnaje*, 22 Ind. Cas. 919; 15 M. L. T. 263; (1914) M. W. N. 310; 26 M. L. J. 356; *Vadlanamunati Bala Tripura Sundaramma v. Dada Sahib*, 19 Ind. Cas. 474; (1913) M. W. N. 334, followed.

Clauses (a) and (b) of rule 279 of the Civil Rules of Practice, Madras, apply equally to the word "withdrawn" as to the word "compromised" and the rule, therefore, has no application to the question of Vakils' fees in cases where the plaintiff withdraws his suit. [p. 314, col. 1.]

Order XXIII, rule 1, of the Code of Civil Procedure fixes no time within which a plaintiff should withdraw his suit; he may do so at any time before judgment is pronounced. But where he withdraws the suit against some of the defendants after both parties have adduced evidence on a preliminary issue, he does so only "after contest" within the meaning of rule 278 (a) of the Civil Rules of Practice. Even if the case is not covered by rule 278 (a), the Court has under Order XXIII, rule 1 (3), of the Code of Civil Procedure power to award against the plaintiff such costs as it thinks fit. [p. 314, col. 2.]

Where there are several defendants raising various defences a Court has power to award different sets of costs. [p. 315, col. 1.]

Second appeals against the decrees of the District Court of Nellore, in Appeal Suits Nos. 45 and 46 of 1913, preferred against the decree of the Court of the Temporary Subordinate Judge of Nellore, in Original Suit No. 9 of 1912.

Mr. T. V. Venkatarama Aiyer, for the Appellants.

Mr. S. Varadachariar, for the Respondents.

JUDGMENT.—These are two second appeals from decrees of the District Judge of Nellore ordering the plaintiffs to pay the costs of defendants Nos. 13 to 16 in a mortgage suit. The Subordinate Judge had originally ordered those defendants to bear their own costs. Four points are taken in these appeals.

The first is that no appeal lay against the order of the Subordinate Judge as it was not a decree. That objection has now been amplified by the learned Vakil in reply by an argument that under Order XXIII of the Civil Procedure Code costs can be

ordered to be paid in the circumstances of this case and that, therefore, it is not a decree. I express no opinion as to the question whether, if the suit had been entirely withdrawn against all the defendants, and no order other than that contemplated under Order XXIII had been made, it would have been a decree. But as undoubtedly a decree was passed in this case, I have no hesitation in holding that these defendants could appeal against that decree.

The next point taken was that the costs in a case where a suit is withdrawn against any defendant are in the discretion of the Court under section 35 of the Code just as in any other case, and alternatively, in reply, that section 35 does not apply. Assuming that section 35 did apply, the learned Vakil argues that the discretion is absolute provided that it is purported to be exercised, and relies on a decision of the English Court of Appeal in *Bew v. Bew* (1), where the learned Lords Justices say that the Appellate Court will assume the exercise of discretion unless it is satisfied that the Judge has not exercised it. He then points out that Sir Lawrence Jenkins, Chief Justice of Bombay, has adopted that view in *Parshram Bhaico v. Dorabji Pestonji* (2). It is true that the learned Chief Justice does adopt those words, but the case shows that he subsequently proceeded to consider whether it was shown that the absolute discretion had been exercised properly by the learned Judge on the original side of the Court. With the greatest deference to a Judge of the eminence of the late Chief Justice of Calcutta, I am unable to see how a discretion can be absolute subject to a proviso. That case was considered by the late Chief Justice of this Court in the case of *Rao Sahab T. Numberumal Chettiar v. Krishnaje* (3), and reliance is placed on the language used by him where he says: "I do not want to suggest that I am not prepared to accept the proposition as laid down by Sir Lawrence Jenkins." But the proposition there referred to is not the statement that

(1) (1899) 2 Ch. 467; 68 L. J. Ch. 657; 81 L. T. 284; 48 W. R. 124.

(2) 2 Bom. L. R. 254.

(3) 22 Ind. Cas. 919; 26 M. L. J. 356; 15 M. L. T. 263; (1914) M. W. N. 310.

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the discretion is absolute, but the statement that an Appellate Court will not interfere with the exercise of discretion unless it has proceeded on a manifestly wrong ground, etc. In my view it is not an absolute discretion. I can find nothing in the language of section 35 specifically providing that the discretion is absolute, and I find a strong indication in sub-section (2) to the contrary: "Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing." It is a recognised canon of construction that where a Court is directed to give its reasons, it is so directed for the purpose of assisting the Court that has to consider that decision either in appeal or revision. And I am satisfied that the same rule applies here, and that this sub-section indicates clearly that the discretion is not absolute. I entirely agree with what is stated by Sadasiva Aiyar, J., in *Vadlamanuati Bala Tripura Sundaramma v. Dada Sahib* (4) where in dealing with the main words of the section, and not the sub-section, he says: "I think the lower Court's discretion as to costs (which discretion, I admit, is a very large discretion not to be lightly interfered with) has been exercised almost arbitrarily in this case," and then proceeds to modify it. The second point, therefore, fails.

The next point is that the Vakil's fee in cases withdrawn can only be allowed under rule 279 of the Civil Rules of Practice, the words of which are: "In suits withdrawn or compromised (a) before any defence is put in, (b) before the settlement of issues but after defence is put in, etc," the argument being that the words to be found in clauses (a) and (b) do not apply to the word "withdrawn." In my view that suggestion is unarguable, as the language is perfectly clear, and everything contained in clauses (a) and (b) must apply equally to the word 'withdrawn' as to the word 'compromised'. Therefore, the rule does not apply.

It is then argued that if it does not come within rule 279, there is no provision for it and that rule 278 (a) does not apply. Rule 278 (a) is as follows:

(4) 19 Ind. Cas. 474; (1913) M. W. N. 334.

"When such suits or appeals are decided on the merits after contest, etc." Now the facts of this case are as follows. The defendants Nos. 13 to 16 pleaded discharge and want of notice. The Subordinate Judge very properly framed issues on those pleas and required the defendants to prove them. They called their evidence and filed a number of documents. The plaintiffs called two witnesses and filed four documents. The case on these issues was argued, and at that stage, the plaintiffs withdrew their suit. I have very grave doubt whether in those circumstances, it can be said that the suit has not been decided on the merits after contest. There is no limit to the power of a plaintiff to withdraw his suit, (*vide* Order XXIII). He may do so at any time until judgment is delivered. It seems to me that the rule should if necessary be given a wide construction so as to cover cases where the plaintiff, realizing that the judgment of the Court will be against him, withdraws his suit. But at the last moment the power to give costs can be supported on the words of Order XXIII, rule 1, sub-clause (3): "Where the plaintiff withdraws from a suit.....he shall be liable for such costs as the Court may award." I see no reason why there should be any limit to the power of the Court to fix these costs, if rule 278 (a) of the Civil Rules of Practice does not apply. The Subordinate Judge ordered the defendants to bear their own costs. The lower Appellate Court has ordered the plaintiffs to pay the defendants' costs which have been fixed on the ordinary scale. In my opinion the lower Appellate Court had power to make this order, assuming of course that it rightly interfered with the discretion of the first Court.

The last point of law taken is that there was no power to order two sets of costs, rule 284 of the Civil Rules of Practice providing that if several defendants who have separate interests, set up separate and distinct defences and succeed thereon, a fee for one Legal Practitioner for each of the defendants.....may be allowed irrespective of his separate interest." It is argued that they have not succeeded on those issues, because they could not plead that those issues are *res judicata* in another

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suit. I do not think it necessary to decide this point either; for I think the powers given under Order XXIII, rule 1 (3), are wide enough to authorize the Court to award two sets of costs.

The sole remaining question is whether the lower Appellate Court has acted properly in interfering with the discretion of the first Court, assuming that the case is covered by section 35. I have examined the reasons given by the first Court, and, agreeing with the lower Appellate Court, can only describe them as incomprehensible. I think the lower Appellate Court's decision to vary that order by making the plaintiffs pay these defendants' costs, was right.

The result will be that these two appeals will be dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL ORDER NO. 51 OF 1915.

July 5, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Richardson.

AHMED MUSAJI SALEJI—PETITIONER—
APPELLANT
versus

MAMOOJI MUSAJI AND OTHERS—
RESPONDENTS.

Appeal—Discretion—Appellate Court, [power of, to interfere with lower Court's discretion.]

The Court of Appeal should be slow to interfere with the exercise of a discretion by a lower Court. [p. 317, col. 2.]

Appeal against the order of Mr. Justice Greaves, dated the 1st July 1915.

FACTS of the case appear from the following Order dated 1st July 1915 of

GREAVES, J.—On the 11th May 1915 of this year I made an order directing the applicant to pay into Court certain sums on certain dates mentioned in the order, in default of which a warrant for his arrest was to issue. That order was appealed against and on appeal it was ordered that the warrant was not to issue until four days after the instalments fell due, in

order to enable the applicant, if he so desired, to make an application to me to vary the order that I made on the 11th May 1915 by extending the time in which the sums mentioned in that order were to be paid into Court. In pursuance of that order the applicant has paid into Court two sums of one lac each and according to my order a further sum of Rs. 1,00,000 falls to be paid into Court to-day. The application that is now made to me is that the applicant may be ordered now to pay into Court Rs. 16,000, as being the balance of the principal payable by him under the original decree in pursuance of which my order was made and that he may be given easier and more lenient terms for payment of the interest due by him under the decree and that the order for the issuing of the warrant of arrest may be suspended. Now by the order of Mr. Justice Fletcher, which as slightly varied by the Appeal Court was confirmed by the Judicial Committee, the applicant had to pay into Court a sum of roughly about Rs. 50,000 together with interest at the rate of 6 per cent. from the 1st July 1907, which it is admitted, amounts to about a further sum of rupees two lacs, that is to say, the applicant had to pay into Court the sum of Rs. 6,30,000. As before stated he has paid into Court rupees two lacs of this amount and he urges before me that with the exception of the sum of one lac of the interest and a sum of Rs. 18,000 for principal, any further sum that he pays into Court will come back to him ultimately. He says that it would be a hardship on him if he is compelled to pay the whole amount directed by the order of the Judicial Committee to be paid into Court including the sum which he says will come back to him. When the matter came before me to-day, Counsel on behalf of the applicant made this proposal that he should be directed to pay into Court on the 4th July a sum of Rs. 50,000 and a further sum of Rs. 6,000 on or before the 4th of August 1915 and that he should be treated with the utmost leniency with regard to the payment of any further sums which, he contends, will come back to him and which he says are really his moneys. Now the amount that will come back to him is disputed by Sir S. P. Sinha on behalf of Mamooji and he urges with considerable force before me that this matter can never be concluded until the whole sum

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which represents the partnership assets is paid into Court, when it would be definitely ascertained what is to come back to the parties according to their respective shares in the partnership after discharging the debts and liabilities of the partnership and the costs of the suit. When I originally made the order of the 11th May of this year, the matter of the applicant's ability to pay was fully gone into upon affidavit evidence and I then satisfied myself upon the affidavit evidence placed before me that the applicant was really in a position to pay the sums in question, but to make assurance doubly sure when an application was made to me in June of this year for an extension of the time for making the June payment directed by my order of the 11th May, I directed that the applicant should be cross-examined and he was cross-examined before me for nearly one day with regard to his ability to pay the amount and I think it right to state shortly what the effect of that cross-examination was. He stated that between the 17th May and 1st or 4th June when the application was made, his firm had had large business dealings to the extent of lacs, although of course, they had payments to make. He stated that his firm had not purchased largely but that they had made large sales for which they had got large sums of money. He was cross-examined with regard to the amounts and the value of goods which they had sent between the 17th May and the 1st June by steamer to Rangoon. After considerable hesitation and considerable pressure and considerable prevarication with regard to certain of the goods, it was extracted from him that between those dates his firm had sent goods to the value of Rs. 50,000 to Rangoon and Akyab. Both with regard to the applicant's own property and with regard to the property of the firm (between which it is somewhat difficult to distinguish) I was not treated with frankness. For example, the applicant told me that he owned a three-annas share in the business, but it afterwards transpired that he really owned a considerably larger share than what he stated and that he and Ismail, Ahmed Mohomedi and Mohommed owned the whole business between them, the applicant's share amounting to six annas.

With regard to the applicant's property and the property of the

firm I ascertained that the applicant had three shares in a Company, called the Surti Burabazar Company, which were worth Rs. 2,500 each; that his firm had shares in a property called the Twinza Oil Company which shares were worth at the market price one lac of rupees. It is true that he stated that these shares were pledged and Ismail in the witness-box gave further information with regard to this, stating that the shares had been pledged to a gentleman in Rangoon named F. K. H. Chetti. It is in evidence that there was no deed or document relating to the pledge of these shares and in the absence of some proof of the pledge of these shares, I am not prepared to believe, as I was asked to believe, that these shares were pledged and if pledged that they were pledged to their full value. It seems to me that the applicant has entirely misapprehended his position. If he comes to the Court to ask for an indulgence, he ought to place before the Court all materials that are in his possession and not have the facts dragged out one by one as was the case here.

In addition to the Twinza Oil shares worth one lac, the applicant stated that he had two houses of his own in King's Road, Howrah, and Mirzapore Street, Calcutta, which he had bought for Rs. 37,500 in all. He valued the houses at Rs. 50,000 and he stated that he could sell these properties at this price if he could get a month to do so; he stated that he would not sell at Rs. 50,000 now as it would not be the proper value, and he was not prepared to sell unless he got full value for the properties, a somewhat extraordinary statement to make in view of his position as a debtor.

Then again he stated that there was a house in Gobind Chandra Dhur's Lane in Calcutta which belonged to the firm and that it was unincumbered. He stated that he had been offered Rs. 65,000 for the house and he was prepared to sell if he could get this sum, but not otherwise; although it is fair to say that he stated that there was some difficulty with regard to the documents relating to the property. Then he said that since the war, the firm had made a profit to the extent of one lac on sugar.

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He also stated that from the 19th May to the 1st June his firm had drawn Rs. 1,50,000 or Rs. 1,25,000 from the Chartered Bank and also a further sum of Rs. 10,000 from the Mercantile Bank.

He also stated that he had a share in his father's estate, but that the estate was in the hands of the Receivers, that the estate was worth Rs. 4,00,000, his share being Rs. 3,00,000, that his share in this estate had been made over as security for the money; that it was good security, but the capitalists said that they would not advance money on it as it had already been given as security.

I think these are the principal matters that I need mention with regard to the cross-examination of the applicant before me at the beginning of June and the conclusion I then came to is that he was in a position, if he chose to do so, to pay the sums referred to in the order within the time limited by the order and to comply with the order. No evidence was adduced before me to-day to show any change for the worst in the applicant's position or to lead me to suppose that he cannot comply with the order if he wishes. The result is, I am not prepared to give the applicant any further time than he got under the original order as varied by the Court of Appeal for the payment of the lac payable to-day and I dismiss this application with costs. I will allow one set of costs.

Mr. Bagram, for the Appellant.

Sir S. P. Sinha, for the Respondents.

JUDGMENT

JENKINS, C. J.—We certainly do not decide that there is any right of appeal in this case. But even if there were such a right we would decline to interfere.

The obligation of the defendants is clearly defined by an order of the 11th May 1915, which fixed certain dates for payment of instalments of the considerable sum of money which their Lordships of the Privy Council directed to be paid into Court. Instead of imposing upon the defendants the obligation, which was strictly theirs, of paying the whole sum at once, a provision was made for this payment by instalments. The matter came before the Court of Appeal not by way of appeal from that order, but from an order for enforcement of payment. As I

was a member of the Court of Appeal, I think I can say that I doubt the wisdom of the indulgence that was then granted by the Court. It was an indulgence which was intended to be used properly and we did not anticipate that it would be abused.

Assuming an appeal lies, did Mr. Justice Greaves err in such a way as to justify our interference in appeal when he refused to grant time beyond that limited by the order of the 11th May 1915 as modified by the order of the Court of Appeal in respect of the July instalment? The learned Judge has dealt with the matter most carefully and with complete knowledge of the facts, for it is not the first application of the kind that has come before him. In the exercise of the discretion he has considered that further time should not be allowed. The Court of Appeal is at all times slow to interfere with the exercise of a discretion and on that ground, it would be enough to say that we refuse to interfere. But apart from that, the presentation of the case by Mr. Bagram, who I am sure, has told all that, could be said on behalf of his client, has failed to convince me that there is anything in the merits that would justify the further indulgence that has been sought. Therefore, in my opinion, this appeal should be dismissed with costs.

Each of the four sets of respondents will get his costs of this appeal.

MOOKERJEE, J.—I agree.

RICHARDSON, J.—I agree.

Appeal dismissed,

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1068 of 1914.

September 24, 1915.

Present:—Mr. Justice Srinivasa Aiyangar.

A. P. R. S. CHINNIAH CHETTY, BY
AGENT, KALYASUNDARAM IYER

—PLAINTIFF—PETITIONER

versus

TIKKANI RAMASWAMI CHETTY AND

ANOTHER—DEPENDANTS—RESPONDENTS.

Hindu Law—Promissory note by member of undivided family—Loan for purposes of family—Liability of all members.

Where two members of a joint family borrowed some money for the purposes of the family and executed a promissory note for the amount in favour of the plaintiff:

RAJAM AIYAR v. ANANTHARATNAM AIYAR.

Held, that all the members of the undivided family were liable, the liability being imposed upon them by the Hindu Law, apart from the contract entered into by two of them. [p. 318, col. 1.]

Krishna Ayyar v. Krishnasami Ayyar, 23 M. 597, followed.

Petition, under section 25 of Act IX of 1877, praying the High Court to revise the order of the Court of the District Munsif of Tirupati, in Small Cause Suit No. 338 of 1914.

Mr. N. Chandrasekhara Aiyar, for the Petitioner.

JUDGMENT.—This is a suit on a promissory note executed by defendants Nos. 1 and 2, and the other defendants Nos. 3 and 4 are sought to be made liable on the ground that the debt borrowed by the defendants Nos. 1 and 2 was borrowed for the purposes of the joint family of which all the defendants are members. The lower Court has given a decree against the defendants Nos. 1 and 2 and has declined to give a decree against defendants Nos. 3 and 4, on the ground that as the note was a negotiable note, defendants Nos. 3 and 4 who did not execute it ought not to be made liable. I think the lower Court is wrong in so holding. The Full Bench decision in *Krishna Ayyar v. Krishnasami Ayyar* (1) really concludes this matter. The mistake that is made is in supposing that persons other than the party who executes the note, are sought to be made liable on the contract itself. The other persons are sought to be made liable on account of the debt which is contracted by the managing member or managing members. It is a liability imposed on them by the Hindu Law apart from the contract entered into by the other members. The decree of the lower Court is, therefore, modified, and there will be a decree against defendants Nos. 3 and 4 also; but they would not be personally liable on the note, but the plaintiff will be entitled to attach the family property in execution. I make no order as to costs.

Petition allowed.

(1) 23 M. 597.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 18 OF 1914.

October 4, 1915.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

RAJAM AIYAR—ASSIGNEE DECREE-HOLDER
—PETITIONER—APPELLANT

versus

ANANTHARATNAM AIYAR AND OTHERS
—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Part payment of decree debt by judgment-debtor—Payment not certified to Court within three years—Application for execution, whether barred—Limitation Act (IX of 1908), s. 20.

There is no period of limitation within which a decree-holder is bound to certify part payments to Court. Once the certificate is made, the Court is bound to recognize the payments previously made and section 20 of the Limitation Act comes in to save limitation. [p. 319, col. 1.]

Where, therefore, in a petition for execution the decree-holder relied upon a part payment made by the judgment-debtor within three years of the last application for execution but certified to Court after three years:

Held, that the payment was effectual within the meaning of section 20 of the Limitation Act and the application was not barred. [p. 319, col. 1.]

Lakshmi Narain Ganguli v. Felamani Das, 27 Ind. Cas. 11; 20 C. L. J. 131, followed.

Gokul Chand v. Bhika, 23 Ind. Cas. 753; 12 A. L. J. 387; *Bhajan Lal v. Chedla Lal*, 24 Ind. Cas. 215; 12 A. L. J. 825; *Amir Singh v. Chhattar Singh*, 29 Ind. Cas. 274; 13 A. L. J. 666, dissented from.

Appeal against the order of the District Court of Trichinopoly, in Appeal Suit No. 1 of 1913, preferred against that of the Court of the District Munsif of Kulitalai, in Execution Petition No. 522 of 1912, in Original Suit No. 677 of 1905.

Mr. K. R. Narayanaswami Aiyar for Mr. T. Natesa Aiyar, for the Appellant.

Mr. S. Varadachariar, for the Respondents.

JUDGMENT.—This appeal raises a question of limitation. The lower Courts have held that the appellant's petition for execution was barred and that the alleged part payments which are relied upon to save limitation, though made within three years and would therefore be operative for that purpose, did not have the desired effect, because they were certified to the Court by the decree holder more than three years after the date of the last application. The matter has to be construed with reference to section 20 of the Limitation Act read along with Order XXI rule 2, of the Civil Procedure Code.

PANCHUMONI DASSI v. CHANDRA KUMAR GHOSE.

Section 20 of the Limitation Act says that "debt" within the meaning of the section includes money payable under a decree or order of the Court. The learned Plender for the respondents has argued his clients' case on the basis that there is no distinction to be drawn between a decree and money payable under a decree of the Court. For the purposes of this section it is rightly conceded that there is no period of limitation prescribed for certifying payment to Court by the decree-holder; but it is argued on behalf of the respondents that clause 3 of rule 2 of Order XXI of the Civil Procedure Code, which says that "a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree", should be construed to mean that the Court cannot recognize payments made within time if they were not certified before the expiry of the period of limitation, that is, three years. But it seems to us that the decree-holder not being tied down to any time for certifying payment to the Court, the necessary result must be that once the certificate is made, the Court is bound to recognize the payments previously made and then section 20 of the Limitation Act comes in to save limitation. There is a conflict of decisions on the point. The Calcutta High Court takes [the view which we have suggested in the case *Lakhi Narain Ganguli v. Felamani Dasi* (1) and that ruling is followed in an unreported decision of Mr. Justice Sadasiva Aiyar in this Court in C. R. P. No. 880 of 1914. A different view has prevailed in the Allahabad High Court. See the decisions in cases *Gokul Chand v. Bhika* (2) and *Bhajan Lal v. Cheda Lal* (3) and the decision in the case *Amir Singh v. Chhattar Singh* (4). For the reasons which we have given, we are inclined to agree with the decision in the case *Lakhi Narain Ganguli v. Felamani Dasi* (1) and of Mr. Justice Sadasiva Aiyar.

The result will be that we allow the appeal and the case must be remitted to the Court of first instance to ascertain whether the alleged part payments were

actually made and whether the other provisions of section 20 of the Limitation Act were complied with. Costs will follow the result.

Appeal allowed; Case remitted.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 1 OF 1913,
July 12, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Holmwood.

PANCHUMONI DASSI AND ANOTHER—
OBJECTORS—APPELLANTS

versus

CHANDRA KUMAR GHOSE AND OTHERS
APPLICANTS—RESPONDENTS.

Probate—Appeal—Division Bench, difference of opinion in—Letters Patent, cl. 15, appeal under, if maintainable—Will, execution of, determination of—Comparison of signature with 7 or 8 years' previous signature, propriety of—Finding of fact, reversing of.

In a probate case an appeal under clause 15 of the Letters Patent is maintainable when the Judges of a Division Bench originally hearing the appeal differ in their opinion. [p. 320, col. 1.]

In order to decide whether a Will was executed or not, it is a dangerous ground to proceed on the estimate of the signature as derived from a comparison with other admitted signatures written seven or eight years before the signature on the Will and to reverse on that ground the appreciation of fact by the trial Judge. [p. 320, col. 1.]

Letters Patent appeal against the judgment of Mr. Justice Coxe, disagreeing with Mr. Justice Roy, dated the 16th July 1913, in appeal from Original Decree No. 324 of 1911, passed by the District Judge, 21-Perganahs, dated the 27th June 1910.

Dr. Sarat Chunder Bysak and Babu Bepin Chandra Bose, for the Appellants.

Babu Probodh Chandra Chatterjee, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This appeal comes before us under clause 15 of the Letters Patent by reason of the difference of opinion between the two learned Judges of the High Court, who on the first instance heard the original appeal.

It has been suggested that no appeal lies to us under the Letters Patent. But we have overruled that objection and we

(1) 27 Ind. Cas. 11; 20 C. L. J. 131.

(2) 28 Ind. Cas. 753; 12 A. L. J. 387.

(3) 24 Ind. Cas. 215; 12 A. L. J. 825.

(4) 29 Ind. Cas. 274; 13 A. L. J. 666.

PUCHALAPALLI ADISESHADRI V. MUNGAMUR SIVARAMAYYA.

think that it is perfectly clear that an appeal does lie under clause 15 of the Letters Patent. Any other conclusion would lead to a very anomalous result.

Having said so much in favour of the appellants, I think there is nothing more to be said in their favour in this case. It is a pure question of fact as to whether the Will was executed or not. Mr. Richardson, as he then was, the District Judge of Alipur, decided in favour of the Will and he did not do so lightly and without thought, because at the very outset of his judgment he made it clear that there were circumstances which made it clear, in his opinion incumbent, that the evidence should be examined with more than usual care. He certainly did not fail in carrying out that obligation. His judgment is a very careful judgment, in which he gave specific reasons for accepting the oral evidence that had been adduced in favour of the Will. On appeal to this Court, the same view was taken by Mr. Justice Coxe. Mr. Justice Harinath Roy, however, thought that the case had not been rightly decided. In that he was very greatly influenced by his inspection of the signatures on the Will and his estimate of these signatures as derived from a comparison with other admitted signatures, written seven or eight years before the signature on the Will. This is at all times a dangerous ground on which to proceed and to reverse the appreciation of fact by the trial Judge. In this case it seems to me that there really was very little that justified the learned Judge's conclusion. First, he seems to think that the learned District Judge was not fully able to appreciate all that calligraphy suggested to him. But it is well known to us that the learned District Judge, as he then was, was very familiar with Bengali writing and there can be no doubt that he carefully did study these signatures, and I find that both my learned colleagues, who are certainly in a position to pronounce a very valuable opinion, so far from agreeing with Mr. Justice Harinath Roy, take the opposite view and think that there are remarkable and significant characteristics in the signatures on the Will and the admitted signatures which go to prove the identity of the authorship. I have looked at the signatures

and I am unable to form any conclusion which would lend any support to Mr. Justice Harinath Roy's view.

This is how the whole matter stands. Two learned Judges including the trial Judge were satisfied on the facts that the Will had been proved. One learned Judge, however, from an examination of the handwriting principally, thinks otherwise.

Something has been said to us as to the provisions of the Will. I must confess that the provisions seem to me not unnatural. Having regard to all the circumstances of the case, e.g., the propriety and the desire of people in the position of the testator to keep the immoveable property in the family, I think there is nothing improbable in the provisions of the Will.

In my opinion we ought to dismiss this appeal. But we will say nothing as to costs.

MOOREJEE, J.—I agree.

HOLMWOOD, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 19 OF 1914.

September 17, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Tyabji.

PUCHALAPALLI ADISESHADRI
REDDI—PETITIONER—APPELLANT

versus

MUNGAMUR SIVARAMAYYA—
DEFENDANT—RESPONDENT.

Practice—Mistake in preliminary decree passed by High Court—Final decree in accordance with High Court's preliminary decree passed by District Court—District Court, power of, to correct mistake—Interest on total amount awarded, if legal—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 2.

Where a District Court draws up its final decree in accordance with the High Court's preliminary decree, it cannot correct an error in its final decree as copied from the latter decree. [p. 321, col. 1.]

There is nothing in Order XXXIV, rule 2, of the Civil Procedure Code, which prevents a Court from providing in its own decree for interest on the total amount awarded because such total includes interest on the bond sued on. [p. 321, col. 1.]

Appeal under clause 15 of the Letters Patent against the decision of the Hon'ble Mr. Justice Bakewell, dated the 27th November

FAKIR CHANDRA GAIN V. GIRIBALA DASSYA.

1913, in Civil Revision Petition No. 856 of 1912, preferred against that of the District Court of Nellore, in Civil Miscellaneous Petition No. 191 of 1912, in Original Suit No. 29 of 1908.

Mr. P. Nagabhushanam, for the Appellant.

Messrs. P. Doraiswamy Aiyangar and S. Rangaswami Aiyangar, for the Respondent.

JUDGMENT.—The High Court's preliminary decree superseded the District Court's preliminary decree. An error in the High Court's preliminary decree cannot be corrected by the District Court. The District Court was legally bound to draw up its final decree only in accordance with the High Court's preliminary decree.

The District Judge, therefore, rightly refused the application to correct his final decree, which was in accordance with the preliminary decree passed by the High Court. There was, therefore, no ground for interference under section 115, Civil Procedure Code, with his said order of refusal. We dismiss the Letters Patent Appeal with costs on this ground, though we differ respectfully from the view of the learned Judge whose decision is now under appeal, namely, that there is anything in Order XXXIV, rule 2, to prevent a Court from providing in its decree for interest on the total amount awarded to the plaintiff because such total includes interest on the bond sued on.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 74 OF 1914.

February 15, 1915.

Present:—Mr. Justice Fletcher and

Mr. Justice Teunon.

FAKIR CHANDRA GAIN—

DECREE-HOLDER—APPELLANT

versus

GIRIBALA DASSYA—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47. O. XXI, r. 58—Execution of decree against legal representative of deceased judgment-debtor—Property attached—Property, if assets of deceased, decision as to Appeal, maintainability of.

An appeal lies from a decision in execution of a decree against the legal representative of a deceased judgment-debtor as to whether the property attached

in execution forms part of the assets of the deceased, as the proceedings come under section 47 of the Civil Procedure Code, 1908, and not under Order XXI, rule 58 of the Code. [p. 322, col. 1.]

Appeal against the order of the District Judge of Bankura, dated the 1st December 1913, reversing that of the Munsif of Bishenpore, dated the 23rd June 1913.

Babu Bejoy Coomar Bhattacharya, for the Appellant.

Babu Hirendra Nath Ganguly, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal against a judgment of the learned District Judge of Bankura reversing the decision of the Munsif of the first Court of Bishenpore. There were certain proceedings in execution. The decree-holder is the appellant before us and the respondent is the widow and the legal representative of the judgment-debtor. In execution of the decree, the appellant before us attached a certain property that stood in the name of the respondent, on the allegation that it formed part of the assets of her deceased husband. The learned Munsif held that it did so. On appeal, the learned District Judge reversed the finding of the Munsif, holding that the property was not a portion of the estate of the deceased judgment-debtor. The only point that has been raised in this appeal is as to whether an appeal lay to the District Judge from the decision of the Munsif, that is, whether the proceedings before the Court were taken under Order XXI, rule 58, Code of Civil Procedure, or they came under section 47 of the Code itself. It is not possible to reconcile the various decisions in this Court; but we are bound by those decisions as they stand. This case cannot be distinguished from the Full Bench case of *Punchanun Bundopadhya v. Rabi Bibi* (1). It is quite true that that case was observed upon in the judgment delivered by another Full Bench of this Court in the case of *Kartick Chandra Ghose v. Ashutosh Dhara* (2). There, the facts were the converse of what they were in the case of *Punchanun Bundopadhya v. Rabi Bibi* (1). But, as is pointed out by the Full Bench in the case of *Kartick*

(1) 17 C. 711.

(2) 12 Ind. Cas. 163; 37 C. 295; 14 C. L. J. 425; 16 C. W. N. 26.

DRAVIYAM PILLAI V. CRUZ FERNANDEZ.

Chandra Ghosh v. Ashutosh Dhara (2), the Benches of this Court are bound by the decision in the case of *Punchann Bundopadhya v. Rabia Bibi* (1), until the same is overruled by a Special Bench. That being so, we are bound by the decision in that case. There have been two later cases in this Court, one being the case of *Ajo Koer v. Gorak Nath* (3) and the other being the case of *Upendra Nath Kalamuri v. Kusum Kumari Dasi* (4). The case of *Ajo Koer v. Gorak Nath* (3) is substantially the same as the case before us and the learned Judges in that case followed, as they were bound to follow, the decision in *Punchann Bundopadhya v. Rabia Bibi* (1). The case of *Upendra Nath Kalamuri v. Kusum Kumari Dasi* (4) is difficult to distinguish from the case of *Punchann Bundopadhya v. Rabia Bibi* (1), although the learned Judges who decided that case appear to have found reasons satisfactory to themselves which would differentiate the case from that reported in 20 C. L. J. All that is necessary for us to state in the present case is that we are bound by the decision of the Full Bench in the case of *Punchann Bundopadhya v. Rabia Bibi* (1). The present appeal, therefore, fails and must be dismissed with costs, one gold mohur.

TRUNON, J.—I agree.

Appeal dismissed.

(3) 27 Ind. Cas. 321; 20 C. L. J. 481; 19 C. W. N. 517.

(4) 27 Ind. Cas. 328; 20 C. L. J. 485; 19 C. W. N. 520; 42 C. 440.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 731 OF 1913.

September 22, 1915.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Seshagiri Aiyar.

THE FIRM OF K. E. P. T. V. DRAVIYAM PILLAI AND VENKATACHELLAM PILLAI OF TUTICORIN—PLAINTIFFS—

APPELLANTS

versus

CRUZ FERNANDEZ AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Madras District Municipalities Act (IV of 1884), s. 250 (1) (a), rules under, r. 4, note 1—Duty of Chairman to register voters—Acting "in good faith," meaning of—Liability in damages—Test.

The plaintiff firm applied to the Chairman of the Municipal Committee that the name of its representative be registered as a voter. The application was rejected and the firm's representative was not allowed to vote at the election. The plaintiff sued for damages:

Held, (1) that the real test to determine whether the Chairman was liable or not on the ground that the name of the firm was not clearly described in the register of voters, was whether he when he passed the order was acting "in good faith" which implied "due care and diligence;" [p. 323, col. 1.]

(2) that inasmuch as the Chairman was himself responsible for the ambiguous entry in the register, it was his duty to hold an enquiry if he entertained any doubt as to the identity of the firm's representative; [p. 324, col. 1.]

(3) that since he had rejected the plaintiffs' application without good cause he was liable in damages. [p. 324, col. 1.]

Chunilal Maneklal v. Kirpashankar, 31 B. 37; 9 Bom. L. R. 838; *Sabhapati Singh v. Abdul Gaffur*, 24 C. 107 at p. 114, followed.

Second appeal against the decrees of the District Court of Tinnevely, in Appeal Suit No. 181 of 1912, preferred against that of the Court of the District Munsif of Tuticorin, in Original Suit No. 23 of 1911.

FACTS of the case appear from the judgment.

Messrs. T. R. Ramachandra Aiyar, V. S. Govindachariar and V. S. Kallabhiram Aiyangar, for the Appellants.—The Municipal Chairman held no enquiry and refused to register the name of the other partner. He has no power to refuse to register and he can't be said to have acted *bona fide*.

Messrs. J. L. Rosario, K. V. Krishnaswami Aiyar and C. Krishnamachariar, for the Respondents.—If the register of voters was altered, it would be an amendment of the register of voters, to do which the Municipal Chairman has no power.

JUDGMENT.—The facts of this case are very simple. Plaintiffs are the firm of K. E. P. T. V. Draviyam Pillai and Venkatchellam Pillai. They are registered in the voting register of the Tuticorin Municipality as "K. E. P. T. V. Draviyam Pillai and another." Note (1) to rule 4 of the rules promulgated by Government under section 250 (1) (a) of the District Municipalities Act provides that a firm desirous of voting, "when entitled to be registered, must cause the name of a partner, member, agent or secretary to be entered in the register maintained under rule 3 *supra* as their representative, and

DRAVIAM PILLAI v. CRUZ FERNANDEZ.

he alone shall be entitled to vote on behalf of the Company or family." This rule has been interpreted in G. O. No. 2020 M, dated 27th September 1905, as follows:—"It is the duty of the Chairman to see that proper representatives for purposes of voting are registered by the Companies, Associations and undivided families entitled to such privileges and brought on the register of voters at the time of its preparation."

"2. There is, however, no objection to the registration of the representatives of these bodies or to modifications of such registration under the note 1 to rule 4 at any time during the year. The nomination of a representative does not necessarily constitute an amendment of the register of voters, but is merely by way of subsidiary instruction which is essential to make the accepted list effective."

A Municipal election was held in Tuticorin on 6th October 1910. On the previous day the following petition was presented to the Chairman (1st defendant) (Exhibit N):

"The petition written by K. E. P. T. V. Draviam Pillai and Venkatachellam Pillai of the said place is as follows:—

"We request that Venkatachellam Pillai of us would be accepted as a representative of us two and that his name be registered in the voters' register of the 5th ward."

The following order was passed on this by the 1st defendant apparently early on the following day (6th October 1910):

"Rejected.....The names of both the persons mentioned in this, do not appear in the voter's list."

When Venkatachellam Pillai presented himself on that day at the polling booth, 2nd defendant who was the identifying officer referred him to this order and refused to allow him to vote. He, therefore, did not vote. The firm now sue for Rs. 1,000 damages.

That the order of the 1st defendant on Exhibit N was not justifiable is admitted by the District Judge. He says:

"There can, I think, be no doubt that under the rules, 1st defendant had power to allow Venkatachellam Pillai to vote as

the firm's representative. The description in the list, however ambiguous, could have been modified by him and no reason is shown why he did not modify it and allow Venkatachellam Pillai's vote. I must, therefore, hold that he exercised his discretion wrongly in disallowing the vote." He has, however, dismissed the suit, holding on the supposed authority of *Chunilal Maneklal v. Kirpashankar* (1) that malice, meaning presumably "express malice", is necessary to sustain the action and that such malice is not proved.

In our opinion the word "malice" which occurs in the penultimate sentence of the reported judgment in that case, means nothing more than a lack of *bona fides*. The learned Judges merely lay down that an officer in a position of this kind "is not liable to a suit because he made a mistake in good faith in determining questions that arose for his decision." [Vide also *Sabhapat Singh v. Abdul Gaffur* (2)]. The real test is whether 1st defendant when he passed his order was acting "in good faith", which implies "due care and diligence."

Viewed from this standpoint, we find it impossible to exonerate the 1st defendant. The grounds on which he seeks to justify his action are these, as set out in paragraph 6 of his written statement: "Under these circumstances, as in the suit petition which was received by defendant on 6th October 1910, it was requested that the name of Venkatachellam Pillai, an individual not found in the said list, may, be newly entered therein as the representative of two persons named in the petition, and as in the said petition the name of the particular firm of which that individual was required to be registered as the representative was not clearly described, and as it was not clear that the voter numbered as 136 was the said identical firm under the name K. E. P. T. V. or if it referred to the two individuals named in the suit petition and as an objection petition had been received in connection with vote No. 136, the defendant reasonably surmised that he had no authority to grant an order in compliance with the petition and in accordance with law and *mamool*, and to the best of his discretion

(1) 31 B. 37; 8 Bom. L. R. 838.

(2) 24 C. 107 at p. 114.

MG THA HLA V. MOKHLAS.

rightly and with *bona fide* intentions, the defendant came to be of opinion that it could not be registered as requested in the petition and in pursuance of this opinion, the endorsement on the suit petition was made."

Now as regards this, it may be observed (1) that the 1st defendant, as Chairman, was himself responsible for the ambiguous entry of "Draviyam Pillai and another" in the voting register, (2) that if he entertained any doubt of the identity of Venkatachellam Pillai with the person entered as 'another' it was easy and his plain duty to hold an enquiry, (3) that in a precisely similar case a firm was allowed to record a vote by a representative, although the names of all the partners were not specified in the voting register (*vide* paragraph 16 of the District Munsif's judgment), and (4) that the mere presentation of an objection petition by someone else could not possibly be an excuse for denying to plaintiffs their right of voting or, at any rate, for refusing to enquire into whether they did possess such a right. His learned Vakil has suggested that the G. O. above referred to has no legal effect and that it is doubtful if the Chairman has power to enter the name of the representative in the register except at the time of its preparation or revision. We see no reason to put a different interpretation on the rule than that set forth in the G. O. But, however this may be, the 1st defendant never pleaded that his action was in any way influenced by doubts on this score, and this argument cannot be considered in judging of his good faith. In our opinion, the 1st defendant was not acting in good faith in rejecting the petition, Exhibit N, and he is liable for damages. We see no reason to call for a finding from the lower Appellate Court as to the amount, as there is no basis for assessment; and we agree with the District Munsif that the plaintiffs are only entitled to nominal damages.

The decrees of the lower Courts will be set aside and the plaintiffs will be given a decree for Rs. 50 damages and full costs throughout against the 1st defendant only. Plaintiffs seek for no remedy in this Court against the 2nd defendant, who is exonerated; but we make no order as to his costs.

Suit decreed; Appeal allowed.

LOWER BURMA CHIEF COURT. SECOND CIVIL APPEAL No. 259 OF 1913.

August 16, 1915.

Present:—Mr. Justice Young.

MG THA HLA—APPELLANT

versus

MOKHLAS—RESPONDENT.

Malicious prosecution, damages for, suit for—Proof essential—Damages, when awarded—Principle.

In an action for malicious prosecution, the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the Tribunal before which the accusation was made. [p. 325, col. 1.]

A man is not to be mulcted in damages merely because he fails to prove another's guilt, nor is a man to receive compensation merely because there is a reasonable doubt about his guilt: if there is any doubt about his innocence, he fails to prove the absence of reasonable and probable cause. [p. 325, col. 1.]

A man is acquitted in a criminal case if there is a reasonable doubt as to his guilt, but a Civil Court will not award him compensation in a subsequent suit for damages for malicious prosecution unless it has not only itself no reasonable doubt as to his innocence but considers the prosecutor either bad, or should as a reasonable man have had, none either. [p. 325, col. 2.]

Mr. *Sin Hla Aung*, for the Appellant.

Mr. *J. E. Lambert*, for the Respondent.

JUDGMENT. This is a suit brought by a revenue surveyor named, Mg. Tha Hla, against one Mokhlas for damages for an alleged malicious prosecution, in which Mokhlas charged Mg. Tha Hla under section 151, Indian Penal Code, with taking from him a bribe of Rs. 15. The complaint was dismissed and characterised as false and malicious. Mg Tha Hla then prosecuted Mokhlas under section 211, Indian Penal Code, for bringing a false charge against him. In this he in his turn was unsuccessful. He then brought the present suit in which he succeeded in the Court of first instance but failed in first appeal. He now appeals to this Court. I may say at once that I agree with the decision of the lower Appellate Court. It is one of those almost hopeless cases in which a person of ordinary common sense should have realised that any further attempt to vindicate his honour than that afforded by his acquittal, was under the circumstances doomed to failure. He (Mg. Tha Hla) who was admittedly within a mile or two of the defendant on the day on which he was charged with having extorted a bribe from him, completely failed to show where he was at the time when he was alleged to have committed the

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offence. One of his witnesses knows nothing of his movements after 8 o'clock in the morning, the other commences his story at a time when the plaintiff might well have been to the defendant and returned. The defendant's witnesses were not materially shaken by cross-examination. The defendant, it is true, delayed in bringing the charge, and it is very probable that in bringing he was actuated by malice, but it need hardly be said that this is very poor evidence that the charge was false, and that, however malicious a charge may be, the Court must convict if satisfied of its truth. As a fact, the charge of taking a bribe was found to be unproved; the complaint against the plaintiff was dismissed and was classified false and malicious. But in these criminal proceedings Mokhlas had to prove that Mg. Tha Hla had actually taken a bribe; in the civil proceedings brought by Mg. Tha Hla, Mg. Tha Hla had to prove his innocence, *vide per Brown, L. J., in Abrath v. North Eastern Railway Company* (1), a decision confirmed by the House of Lords in *Abrath v. North Eastern Railway Company* (2) and in which that learned Judge remarked, "In an action for malicious prosecution, the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the Tribunal before which the accusation was made." It may be at once admitted that the dictum as to its being necessary for the plaintiff to prove his innocence was not necessary for the decision of the case, that the exact point seems never to have been actually judicially decided in England: *vide Halsbury's Laws of England*, but it has been so decided in India: *vide Nalluappa Goundan v. Kailappa Goundan* (3) and I agree with the decision. A man is not to be mulcted in damages merely because he fails to prove another's guilt; and a man is not to receive compensation merely because there is a reasonable doubt about his guilt. Usually speaking if there is any doubt about his innocence, he will fail to prove the second essential ingredient to success, namely, the absence of reasonable and probable cause, which is perhaps the

reason why the point has never apparently been actually decided in England where the reported cases do not appear to have been based on the direct testimony of the prosecutor, but upon information given to him, and the question has been whether the prosecutor believed this information and whether he was justified in doing so. Unless the plaintiff can prove either that the defendant did not believe the information on which he launched his prosecution or that if he believed it, he ought not have to do so, and in so doing did what a reasonable man would have not done, he will fail if there is, however at the close of the case, any doubt in the mind of the Court not only as to the acquittal but as to his actual innocence. It is difficult to see how a Court can find a man had no reason to believe evidence which leaves the Court itself doubtful. There are, however, cases where as here the prosecution, to adopt Brown, L. J.'s words, must know whether his story is false or true, and where if the accused is innocent, the prosecutor must be telling a falsehood and there must be want of reasonable and probable cause. This was the line adopted by the appellant's Counsel before this Court. He argued that Mokhlas himself professed to have given the bribe and that, therefore, as Mg. Tha Hla was acquitted on the charge of having received a bribe the accusation was not only false but false to Mokhlas' own knowledge, or at any rate that it was for him (Mokhlas) in the events that had happened, to prove that the decision was wrong and that Mg. Tha Hla had really taken the bribe, a shifting of the onus which would obviously lead to his client's victory. The reasoning, however, seems to me fallacious. A man is acquitted in a criminal case if there is a reasonable doubt as to his guilt, but a Civil Court will not award him compensation in a subsequent suit for malicious prosecution unless it has not only itself no reasonable doubt as to his innocence, but considers that the prosecutor either had, or should as a reasonable man have had, none either. If the plaintiff had either been able to account for his own movements on the day in question or so to shatter by his cross-examination the defendant's witnesses as to leave no doubt that their story was false, he would have won, but he has failed in doing so and having

(1) 11 Q. B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692.

(2) 11 A. C. 247; 55 L. J. Q. B. 457; 55 L. T. 63; 50 J. P. 659.

(3) 24 M. 59.

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failed, though I dare say that it is through no fault of his own, I cannot hold that he has proved his case, though I desire to say that the evidence leaves me without a doubt that Mokhlas entirely failed to substantiate his charge and that the verdict of not guilty was absolutely correct.

I also desire to say that the learned Judge of the District Court erred in not considering the evidence brought before him. He virtually treated the acquittal of Mokhlas on the charge under section 211, Indian Penal Code, as decisive of the present case. I must doubt whether the judgment was even evidence. *A fortiori* he erred in criticising the reasoning of the Magistrates who tried the two cases and in hinting that they were biased, when he was not exercising appellate jurisdiction over them. I desire to say that I have read the report of the one Magistrate and the judgment of the other in the two cases and consider that each dealt with the case carefully and that the criticisms are in my opinion unjustified. It is obviously a case when neither litigant could prove that the other was guilty. The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT. FULL BENCH.

SECOND CIVIL APPEAL No. 1098 OF 1914.

August 4, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Sadasiva Aiyar and
Mr. Justice Srinivasa Aiyangar.

NARAYANASWAMY AIYAR—PLAINTIFF
—APPELLANT

versus

D. VENKATARAMANA AIYAR AND
ANOTHER—DEFENDANTS—RESPONDENTS.

*Madras Estates Land Act (I of 1908), ss. 189, 213—
Suit for damages for illegal distraint by tenant holding
under ryotwari tenure—Jurisdiction—Interpretation of
Statute.*

A suit by a tenant of a *ryotwari* land-owner or of any sub-tenant of such for damages for illegal distraint of moveable property, growing crops or the produce of land or trees, in a defaulter's holding is exclusively triable by a Revenue Court. [p. 330, col. 1; p. 331, col. 1.]

Section 189 of the Estates Land Act read with section 213 (1) has the effect of taking such suits out of the jurisdiction of Civil Courts, which can be exercised only where the suit is for other reliefs such as injunction, declaration, possession, etc. [p. 330, cols. 1 & 2.]

West Derby Union v. Metropolitan Life Assurance Society, (1897) 1 A. C. 647; 66 L. J. Ch. 726; 77 L. T.

284; 61 J. P. 820 and *Zamindar of Ettayapuram v. Sankarappa Reddiar*, 27 M. 483, followed.

Obiter dictum (Wallis, C. J.—The creation of a new jurisdiction does not affect previously existing jurisdiction in the absence of express provision. [p. 329, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Coimbatore, in Appeal Suit No. 20 of 1913, preferred against that of the Additional District Munsif of Tirapur, in Original Suit No. 858 of 1910.

Mr. N. Srinivasa Charya, for the Appellant.

Mr. L. A. Govinda Raghav Aiyar, for the Respondents.

This second appeal coming on for hearing on the 25th March 1915, and having stood over for consideration till the 9th April 1915, the Court (Sadasiva Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE.

NAPIER, J.—This is an appeal from a judgment of the Temporary Subordinate Judge of Coimbatore dismissing a suit brought by one Narayanaswamy Aiyar, a sub-lessee of certain *ryotwari* lands, against *ryotwari* owners to recover damages for an alleged illegal distraint by the defendant for rent, the ground for the dismissal being that the District Munsif's Court had no jurisdiction to entertain the suit.

The plaintiff together with his immediate lessor had previously instituted a suit in the Revenue Court against the same two defendants under section 95 of Madras Act I of 1908, praying for the cancellation of the attachment of the crops and costs and such further and other relief as the Court might deem fit. The Deputy Collector directed that one Palani Mudali, the other co-lessor of the plaintiff, should be added as plaintiff, and this was done. Subsequently the three plaintiffs withdrew their suit, stating that they intended to bring a fresh suit for damages before the Civil Court.

The lower Appellate Court held on the construction of section 213 and the Schedule of the Madras Estates Land Act that the Civil Court had no jurisdiction.

The Madras Estates Land Act, I of 1908, was passed to amend and declare the law relating to the holding of land in estates. An estate is defined by section 3 of the Act as being the whole or any part of any permanently

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settled estate or *zemandari*, any unsettled *palaiyam* or *jaghir*, certain plots in village *inams* and any portion of such villages. Admittedly, land held under *ryotwari* tenure does not come within the definition of an estate. We find, however, that one chapter of the Act has been made partially applicable to such holdings. This is Chapter VI, which deals with the recovery of rent by suit or by distraint and sale of moveable properties or of the holding. Section 77 of that chapter entitles a landholder to bring a suit before the Collector for the recovery of the arrear of rent and also to distrain the produce of the land or trees in the defaulter's holding. The distraint complained of in this suit was of the produce in the defaulter's holding, though the crops distrained belonged to the sub-lessee.

Section 93 entitles a defaulting *ryot* or cultivator to file a suit before the Collector to set aside distraint within 15 days from the date of the service of notice by the sale officer on the defaulter under section 95. It was under this provision that the lessee from the *ryot* and his sub-lessee brought their suit in the Deputy Collector's Court. Section 134 is as follows:— "The provisions contained in this chapter for the recovery of rent, ... by distraint and sale of moveable property shall apply, as far as may be, ... to the recovery of rent by a land-owner under *ryotwari* settlement, ... from a tenant from whom he has taken a written agreement..." The first thing to be noticed is that section 134 does not extend to a *ryotwari* land-owner the whole of the rights given by Chapter VI. It does not entitle him to bring a suit before the Collector to recover his rent. Nor does it entitle him to exercise the powers given to a land-holder of selling the holding. The omission of these two powers of a land-holder from the section throws, in my opinion, considerable light on the extent to which the other sections of the chapter are applicable. The Revenue Court has no jurisdiction to entertain a suit for rent and it has no jurisdiction to permit the sale of the holding; that is to say, where the remedy requires the intervention of the Collector, the procedure is not applicable to *ryotwari* holdings. No permission or intervention of a Revenue Officer is required for the exercise of the

right of distraint and it is only after the property has been distrained and it is sought to recover the amount by the sale of the property, that any public officer intervenes. That is the sale officer referred to in section 79, a statutory official created by Act VII of 1839. This officer's position is analogous to that of a sheriff with regard to sales in execution. Section 2 of the Act referred to, is as follows:—"All *Tahsildars* shall be vested with powers of Commissioners for the sale of property distrained for arrears of the rent or of revenue..." His functions have always been the same whether he was selling the property taken by the process of distress under the provisions of the Rent Recovery Act (Madras Act VIII of 1865) or the Revenue Recovery Act (Madras Act II of 1864) (*vide* section 2 of the former Act and section 9 of the latter). It is, therefore, clear that so far as the procedure for recovery of arrears by distraint is concerned, there is no intervention by the Collector. Turning again to section 134 of the Madras Estates Land Act, we find that the provisions applicable are limited to those for the recovery of rent and they are made applicable by sub-clause 2 to the recovery of rent. No section in this chapter which does not provide for the recovery of rent is applicable to the case of *ryotwari* tenants and no portion of any section which does not deal with the recovery of rent is applicable either; and further, the language being "shall apply to the recovery of rents by a land-owner," any provision under which a person whose property has been distrained can seek relief is not applicable either, such provision not being one for the recovery of rent by a land-owner. This conclusion based on the strict language of the section is, in my opinion, fortified by the examination of the procedure in the remaining sections. In my view, all the section does is to make statutory provision for the exercise of the right of distraint by a *ryotwari* land-owner and to provide certain formalities for the protection of the lessee. It was not intended to give the Revenue Court any jurisdiction to entertain a suit either by the land-owner to recover the rent or by the tenant to set aside the distraint. I now turn to the other provisions of the Act. Section 189 provides that a Collector shall hear and determine all suits and applica-

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tions of the nature specified in parts A and B of the Schedule. The Schedule contains an enumeration of suits. One of them is by a *ryot* to set aside distress under section 95. This description obviously does not apply to a *ryotwari* tenant, for admittedly he is not a *ryot* within the meaning of the Act. And it is a fair observation that the failure to provide for a suit by any other person to set aside a distress is an indication that the procedure under section 95 was not intended to be made applicable to persons other than *ryots*. The last description in Schedule A is a suit for damages not otherwise provided for. The Subordinate Judge applies section 213 to description of suits—the language of section 213 is “any person deeming himself aggrieved by any proceeding taken under colour of this Act, or by neglect or breach of any of its provisions, shall be at liberty to seek redress by filing a suit for damages before the Collector”—and holds that section 189 ousts jurisdiction of the Civil Court with reference to any dispute or matter in respect of which such suits might be brought. In my opinion, this is giving too wide a meaning to the words “for damages not otherwise provided for”. Section 213 itself does not bar the right of action in a Civil Court, unless that right of action is taken out of the jurisdiction of the Court by the Act. If the words in the Schedule are to be given the wide meaning contended for, then the provisions of sub-sections 2 and 3 of section 213 are nugatory. Therefore, some limitation must be put on the words “damages not otherwise provided for.” It is extremely difficult to say what those limitations are and I do not propose to consider any case other than the one before us.

As pointed out above, nothing but the provisions laying down the procedure for distress is incorporated in the law governing the relations between a *ryotwari* land-owner and his tenant. It seems to me, therefore, that the Legislature, which refrained from extending the right of suit under section 95 to such a tenant, cannot have intended to make the Collector's Court the sole Court in which a tenant could seek damages for an illegal distraint. The suit under section 95 is one to contest the distraint. In nature it does not differ from one for damages; and as the former is not extended to the *ryotwari*

tenant, I cannot think that the Legislature intended to bar his suit in the ordinary Court by the wide words “for damages not otherwise provided for” in the Schedule. I am inclined to the view that the Schedule suits are all suits with reference to land in an estate. As the matter, however, is not free from doubt, and as my learned brother feels more difficulty in the matter than I do, I agree that the following question be referred to a Full Bench.

“Is a suit by the tenant of a *ryotwari* land-owner or of any sub-tenant or such for damages for illegal distraint of moveable property, growing crops or the produce of land or trees, in a defaulter's holding solely cognisable by the Revenue Court.”

SADASIVA AIYAR, J.—I also think that it is appropriate that the question should be settled by a Full Bench. While section 76 (paragraph 1) of the old Act VIII of 1865 allowed an unqualified right of resort to the Civil Court to obtain damages for acts “professedly done under the authority” of that Act, notwithstanding the “summary suit” remedy given by section 49 of that Act to be filed before the Collector for that same relief of damages, section 213, clause 2, of the Estates Land Act gives a right of action in the Civil Court only in cases “not taken out of its (the Civil Court's) jurisdiction by this Act.” Further, suits before the Collector are not distinguished by the designation of “summary” suits in the new Act, that is, distinguished from suits before the Civil Court. It seems also clear that resort to Civil Courts was intended by the new Act to be discouraged as far as possible. Suits which are not for damages, though arising from acts professedly done under the Statute, lie no doubt ordinarily in the Civil Courts [see *Ghouse Moideen Sahib v. Muthialu Chettiar* (1)].

This second appeal coming on for hearing as per above order on the 2nd and 3rd August 1915, upon perusing the said Order of Reference, and upon hearing the arguments of Mr. N. Srinirasa Charya, for the Appellant, and of Mr. L. A. Govinduraghava Aiyar, for the Respondents, and the question having stood over for consideration till this day, the Court expressed the following

(1) 21 Ind. Cas. 762; 14 M. L. T. 523; 26 M. L. J. 36; (1914) M. W. N. 55.

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OPINION.

WALLIS, C. J.—I do not think that the fact, the proceedings for the recovery of rent by distraint and sale of moveable property which have given rise to this suit, were taken by a land-owner under *ryotwari* settlement pursuant to section 134 of the Madras Estates Land Act, or the fact that the present suit was instituted in respect of proceedings so taken not by a tenant of such land-owner but by a sub-tenant, makes any difference, because in my opinion the effect of section 134 is to enable such a land-owner, though not governed by the general provisions of the Act, to avail himself of the summary remedy thereby provided for the recovery of rent, and the effect of section 213, sub-section (1), is to give "any person deeming himself aggrieved by any proceedings taken under colour of this Act" a right to sue for damages before the Collector, words which are sufficient to give the Collector jurisdiction in a suit of this nature if filed before him.

The question is as to whether suits as to which jurisdiction is conferred upon the Collector under section 213 (1) are withdrawn from the jurisdiction of the Civil Courts by section 189.

Sub-sections (2) and (3) of section 213 seem at first sight to suggest that it was contemplated that there should be concurrent jurisdiction in the Collector and the Civil Court in suits falling under sub-section (1), but as against this we have the express provisions of section 189, which after collecting in Schedules A and B all the suits and applications to be entertained by the Collector mentioning in each case the governing section, goes on to provide explicitly that no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute—matter in respect of which such suit or application might be brought or made. These provisions are express and I cannot find anything repugnant to them in the terms of section 213 which would justify us in holding that suits which fall under sub-section 1 of that section are triable concurrently by the Civil Court. It is, I think, immaterial whether the result of so holding is to leave little or no effective operation

for sub-sections (2) and (3), for these sub-sections are in the nature of provisoes, and as pointed out in *West Derby Union v. Metropolitan Life Assurance Society* (2), it would not be legitimate to cut down the operative portion of section 189 to which these provisoes do not in terms apply merely because otherwise the provisoes would be "meaningless and even senseless". What seems to me probable in this case is that sub-sections (2) and (3) which were drafted in place of sections 49 and 78 of the old Act, were retained by inadvertence after the jurisdiction of the Civil Court had been taken away by section 189 in its present form. After all both sub-section (2) of section 213 and section 78 of the old Act are nothing but statements of a well-known rule of statutory construction that the creation of new jurisdiction does not affect previously existing jurisdiction in the absence of express provision. I desire to say, though the point in my opinion does not arise for decision, that the effect of provisions of sub-section (2) is not to preserve a concurrent jurisdiction in the Collector in the case of suits under section 91; in my opinion suits under section 91 are exclusively within the jurisdiction of the Civil Court and do not come within the provisions of sub-section (1) of section 213 giving the Collector jurisdiction, because I think that apart from section 91, no suit would lie to call in question lawful orders of the Collector passed under section 89 or 90 on the ground that the plaintiff was aggrieved by such lawful orders. The proceedings contemplated under section 213 (1) are in my opinion unlawful proceedings done under the colour of the Act.

Next as regards sub-section (3), I find it difficult to accept the suggestion that the Legislature went to the trouble for enacting sub-section (3) for the purpose of saving the right to sue in a Civil Court for reliefs other than damages in respect of causes of action as to which suits for damages lie before the Collector under sub-section (1), even if sub-section (3) as drafted, permits of such suits.

(2) (1897) A. C. 647; 66 L. J. Ch. 726; 77 L. T. 284; 61 J. P. 820.

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These considerations here do not affect my judgment in the order in question and I would answer the reference in the affirmative.

SADASIVA AIYAR, J.—It seemed to be admitted in the arguments on both sides that clause (2) of section 213 of the Estates Land Act and the proviso which forms clause (3) of the same section, are somewhat ambiguously worded.

Reading, however, section 213 (1), section 189 and clause (2) of Schedule A together, I feel little doubt that the present suit (which is a suit seeking redress *by way of damages* and brought by a person feeling himself aggrieved by proceedings taken under the colour of sections 77 and 134 of the Act) has been taken away out of the jurisdiction of the Civil Court. Clause 2 of section 213 preserves the Civil Court's jurisdiction only in cases "not taken out of its jurisdiction by this Act", and suits for damages brought on particular causes of action are so taken away by section 189 of the Act read with section 213, clause (1), and Schedule A No. 21. In other words, clause 2 of section 213 saves the Civil Court's jurisdiction only where the suit is not brought for the relief of pecuniary damages for proceedings taken under colour of the Act, that is, where it is brought for other remedies (such as injunction, declaration, possession, etc.), if any, open to the plaintiff under the ordinary law. Similar provisions in other rent, revenue and similar special Acts showing a reluctance on the part of the Legislature to take away the jurisdiction of Civil Courts over suits involving claims for other than pecuniary damages, while conferring jurisdiction on Revenue Courts to entertain suits for the award of pecuniary damages in particular cases, can, it seems to me, be quoted in support of the above view. The proviso forming clause 3 of section 213 takes away the jurisdiction of the Civil Court even in respect of cases claiming other redress than pecuniary damages, if the redress of damages had been already claimed by the plaintiff in a suit filed before the Collector under clause 1 of section 213.

After giving my best consideration to the whole matter, I agree with my Lord that the present suit is exclusively cognizable by the Revenue Court. It is unnecessary for the decision of this case to express a final opinion

on the questions whether the remedy by a suit in the Collector's Court to set aside a distress under section 95 can be availed of by a Government *ryot's* tenant whose moveables have been distrained under section 77 and whether assuming that he could do so, the jurisdiction is an exclusive one in the Revenue Court, Schedule A, clause 10, referring only to a suit by a "*ryot*" under section 95, and the word "*ryot*" being defined in clause 15 of section 3 of the Act so as to exclude a Government *ryot's* tenant from its connotation.

SRINIVASA AIYANGAR, J.—Defendants Nos. 1 & 2, who are land-owners under *ryotwari* settlement with the Government, availing themselves of the powers given them under section 134 of the Madras Estates Land Act, distrained the crops on the land of the plaintiff, their tenant. The distrained crops were subsequently sold. The plaintiff complains that the distraint was illegal and files this suit for damages in the District Munsif's Court, Tirupur. The question is whether a Civil Court has jurisdiction to entertain a suit of this description. The solution depends on the correct interpretation of sections 213 and 189 of the Estates Land Act. Clause 1 of section 213, which corresponds to section 49 of the repealed Rent Recovery Act, Madras Act VIII of 1865, gives jurisdiction to Revenue Courts to entertain suits for damages filed by persons deeming themselves aggrieved by any proceedings taken under colour of the Act. That the present suit is a suit of that nature, scarcely admits of doubt and the plaintiff, if he had chosen, could have filed this suit before the Collector. But this would not take away the jurisdiction of the ordinary Civil Courts and clause 2 of section 213, which corresponds to the 1st clause of section 78 of the repealed Act, provides that "this section shall not be deemed to bar any right of action in a Civil Court in any case not taken out of its jurisdiction by this Act." Now section 189 of the Act takes away the jurisdiction of the Civil Courts in respect of suits of the nature specified in part A of the Schedule to the Act and suits of the nature now in question are specified in the Schedule (see No. 21 of the Schedule). The words of the section are quite clear and unambiguous, and if the matter had rested there, there could be no doubt that a Civil Court could not take

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cognizance of this suit. But it is said that this construction renders the proviso to section 213 meaningless, because there can hardly ever be a case to which it would apply. I think it quite possible to give a meaning to the proviso consistent with the construction I put on section 189. Persons deeming themselves aggrieved by proceedings taken under colour of the Act are not confined to relief by way of damages. They may be entitled to ask for other reliefs such as an injunction, a declaration, or recovery of the specific property. [See *Zamindar of Ettayapuram v. Sankarappa Reddiar* (3).] Even if the appellant is correct in his contention that the proviso would be rendered nugatory by the construction I put on section 189, following the principle of the decision in *West Derby Union v. Metropolitan Life Assurance Society* (2), I should still come to the same conclusion as the words of section 189 are quite clear and unambiguous.

I agree to the answer to the reference.

Reference answered in the affirmative.

(3) 27 M. 483.

BOMBAY HIGH COURT.

CIVIL APPLICATION NO. 305 OF 1915.

August 12, 1915.

Present:—Sir Basil Scott, K.T., Chief Justice,
and Mr. Justice Batchelor.

MINNIE WALLACE—APPLICANT

versus

ARTHUR WALLACE—RESPONDENT.

Divorce Act (IV of 1869), ss. 17, 37, 44—Decree for dissolution of marriage passed by Divisional Judge and confirmed by High Court—Application for alimony—Jurisdiction.

Where a decree for dissolution of marriage passed by a Divisional Judge was confirmed by the High Court under section 17 of the Divorce Act and the successful petitioner applied to the High Court for an order for payment of alimony:

Held, (1) that the Court which was empowered to make the order either for alimony or for the maintenance and education of the children was the Court of the Divisional Judge and not the High Court; [p. 331, col. 2.]

(2) that in view of the nature of the High Court's jurisdiction the Court of the Divisional Judge was not a subordinate Court within the meaning of section 24(1) (a) of the Civil Procedure Code and the High Court could not transfer the proceedings to the Divisional Court for disposal. [p. 332, col. 1.]

Mr. N. M. Patwardhan (with him Messrs. Dixit and Purushottamrai), for the Applicant.

JUDGMENT.—This is a petition by the successful petitioner in a suit for dissolution of marriage under the Indian Divorce Act instituted in the Court of the Divisional Judge, Nagpur Division, in which the decree of the Divisional Judge for dissolution was confirmed by this High Court on the 20th November 1914. The petitioner prays that this Court may decree such sums per month by way of alimony from the 1st April 1912 or such other date as to this Honourable Court may seem proper. This petition was, when presented, served through the War Office upon the respondent, and in consequence of such service a letter, dated the 11th June 1915, has been addressed by his Solicitor on his behalf to the Registrar of this Court making certain proposals for payment to the petitioner for the children of the marriage. It is now stated on behalf of the petitioner that she was re-married in the month of May last, and only claims alimony up to that date. But she has two children dependent upon her whose father is the respondent, and she desires that provision should be made for their maintenance and education. The relevant sections of the Indian Divorce Act are respectively sections 37 and 44. Each of them empowers the High Court to act on any decree absolute declaring the marriage to be dissolved, and the District Judge to act, if he thinks fit, on the confirmation of any decree for dissolution. In the present case, the decree was the decree of a District Judge confirmed by this High Court by reason of the personal jurisdiction which the High Court possesses over European British subjects under section 3 of the Indian Divorce Act. The jurisdiction is not, strictly speaking, that of a superior over a subordinate Court, but arises purely owing to the race and nationality of the persons concerned. The decree for dissolution was not a decree absolute under section 16 of the Act upon a decree *nisi* which could only be passed by the High Court, but it was a decree confirming the Divisional Judge's decree for dissolution under section 17. It is, therefore, clear, we think, that the Court which is empowered to make the order either for alimony or for the

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Pe could not sue during his mother's life-time as she was a step-child of Mi On Gaing and was, moreover, the sole heir of her husband, the adopted son Shwe Nyein. The Judge, therefore, purporting to act under Order I, rule 10, Code of Civil Procedure, joined Mi Pan Zi as a plaintiff and ultimately decided that she was entitled to 3/4ths of Mi On Gaing's estate as against Mi On Gaing's surviving husband, and that the original plaintiff, Saw Pe, was entitled to nothing.

The Divisional Judge's procedure was erroneous. On his finding that the plaintiff Saw Pe had no right of action in his mother's life time, the proper course would be to set aside the decree of the District Court and dismiss the suit. Neither Order I, rule 10, nor any other provision of the Code authorises a Court, on finding that the plaintiff must fail, to import into the case as co-plaintiff a person who has a different cause of action inconsistent with that of the original plaintiff and who moreover has not paid Court-fees on the new claim. The case was not an administration suit in which all those claiming to share in the estate of the deceased must be represented. It was a claim by one member of the family suing in his own right and the Judge should have adjudicated this claim on its own merits.

The defendant, Shwe Paw, having appealed to this Court and the original plaintiff, Saw Pe, not having appealed, the ordinary course would be to set aside the Divisional Court's decree so far as it amounts to a dismissal of Saw Pe's original suit. But the circumstances are peculiar. It appears that it was Mi Pan Zi who conducted the suit and the appeal in the Divisional Court for her son, Saw Pe, and it is only the action of the Divisional Court that has placed her formally in antagonism to her son. It may be inferred that Saw Pe has refrained from appealing to this Court because he expects that the decree in favour of his mother will ultimately benefit him. It does not appear that Saw Pe himself was consulted as to the addition of Ma Pan Zi as a co-plaintiff or that he waived his rights in her favour.

In the circumstances it seems that the case should be remanded to the Divisional Court for a fresh decision on the defendant, Shwe

Paw's appeal uncomplicated by any claim on the part of Ma Pan Zi who should be struck out. Mr. Lambert for the appellant, Shwe Paw, agrees to this course.

The Upper Burma rulings mentioned in the District Court's judgment should be of great use in deciding the case. Attention is also invited to the instructive ruling *Ma Gun Bon v. Po Kyue* (3), which has many points of similarity to this case and which gives reasons for thinking (i) that when there are no children surviving but only the grandchildren the latter succeed on the same footing as children and (ii) that the rule as to "out-of-time" grandchildren is requisite only when a distinction has to be made between different classes of heirs (e. g., children and grandchildren) and has no application when the nearest heirs all stand in the same degree of relationship to the deceased.

It has been urged that Saw Pe has a brother, Tun Win, and that he should be joined as co-plaintiff. This is not necessary. If Saw Pe is one of two sons of the *kittima* son, Shwe Nyein, and if it is held that Saw Pe is entitled to a share, he should get only one-half of the share to which he would be entitled as the only son. The other half would be claimable by his brother, Tun Win, but it need not be awarded in this suit.

It may be questioned whether the Divisional Judge is right in regarding Mi Pan Zi as Shwe Paw's step-daughter. Shwe Paw is the subsequent husband of Mi Pan Zi's step-mother, Mi On Gaing, and the rules relating to partition between step-child and step-father seems to have no application as between them. When Mi Pan Zi's father, Tun U, died, Mi Pan Zi might have claimed partition from her step-mother, Mi On Gaing, but apparently did not do so because she was the wife of Mi On Gaing's *kittima* son.

"Step-children", the Divisional Judge remarks, "would seem to be treated under Buddhist Law upon the same principles as children." This is true only when there are no children of the whole blood. Children of the half blood cannot succeed on the footing of children when there are children of the whole blood. And one of

(3) U. B. R. (1897-01), II, 66.

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the points which has to be decided in this case is whether a *kittima* son, as being for all purposes equivalent to a natural born son of his adoptive parents, does not exclude a child of the half blood.

When a son dies before his parents and the parents afterwards die, the question arises whether the deceased son's widow or his children or both widow and children represent him in the ultimate partition of the parental estate. Among other authorities sections 162 and 164 of the Digest may be consulted on this point.

The decree of the lower Appellate Court is set aside and the case is remanded to the Divisional Court for a fresh decision after striking out Mi Pan Zi's name as co-plaintiff. The costs of this appeal will be borne by the estate.

A certificate will be given to the appellant under section 13, Court Fees Act, for the refund of the Court fee on the memorandum of appeal.

ORMOND, J.—I concur.

Decree set aside; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1050 OF 1913.

July 29, 1915.

Present:—Mr. Justice Spencer and

Mr. Justice Coutts-Trotter.

MARJI JETA—PLAINTIFF—APPELLANT

versus

HONNAVAR PUTHU HARI PAI AND

ANOTHER—DEPENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 83, 91—Shipment of goods—No letter of requisition to Captain—Liability in case of loss—Difference between Indian and English Law

Where the plaintiff in pursuance of the instructions given by the 2nd defendant as agent of the 1st defendant, who carried on business at Honnavar, shipped 101 bags of Rangoon rice on board the "Machva" to Honnavar without indicating the consignee to the Captain but desiring that the rice should be delivered only on payment of the price, and owing to a storm in Mangalore harbour, the ship was stranded and the rice damaged; on the question as to who was to bear the loss representing the difference between the contract rate and the rate at which the damaged rice was sold, there being no evidence as to the intention of the parties:

Held, that the property passed to the purchaser as soon as the goods were shipped, and the purchaser was liable for the loss. [p. 335, col. 1.]

Brij Coomarse v. Salamander Fire Insurance Co., 32 O. 816, referred to,

Second appeal against the decree of the Court of the Subordinate Judge of South Canara in Appeal Suit No. 148 of 1911, preferred against that of the Court of the District Munsif of Mangalore in Original Suit No. 181 of 1909.

Messrs. K. P. Madhava Rau, B. Sitarama Rau and K. P. Lakshmana Rau, for the Appellant.

Mr. K. Yegnanarayana Adiga, for the Respondents.

JUDGMENT.—The question raised by this second appeal is whether the purchaser, i.e., the 1st defendant is liable for the price of Rangoon rice shipped to him in pursuance of the instructions given by the 2nd defendant. The facts are that the 2nd defendant, as the agent of the 1st defendant who carried on business at Honnavar, instructed plaintiff at Mangalore to send to the 1st defendant 101 gunny bags of Rangoon rice by loading them in the "Machva." This instruction is referred to in Exhibit A, dated 1st May. On the 4th May the plaintiff shipped 101 bags of rice on board the "Machva" to Honnavar. No letter of requisition was given to the Captain of the ship instructing him to deliver the goods to the 1st defendant, the purchaser, but the plaintiff sent his servant in advance with the letter, Exhibit F, to the 1st defendant, dated 4th May, in which occurs the following passage: "As soon as they reach you, you should obtain them and write to that effect. The rate, description and *ankda* thereof will be communicated to you later on. As there is a great urgency for money you should pay Rs. 700 to Mr. Venkatesa Prabhu, the bearer of this letter." On the 7th May, there was a storm in Mangalore harbour, the ship was stranded and the rice was damaged and had to be sold at a considerable loss.

The question to be considered is, which of these persons is to bear the loss representing the difference between the contract rate and the rate at which the damaged rice was sold. The Courts below have held that the loss must be borne by the plaintiff, on the ground apparently that as the vendor shipped the goods without indicating the consignee to the Captain and desired that the rice should

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not be delivered until its price was paid, it could not be held that the property in the goods passed from the vendor to the purchaser. It is suggested that in the Indian Law the position is different from that under the English Law. It is quite clear in English Law that the passing of the property will be governed by the intention of the parties, and that the rules laid down in section 18 of the Sale of Goods Act for the determination of what the intention of the parties is are not to override the intention of the parties, if that intention is otherwise clear. It is suggested that in India, the law is different and whatever be the intention of the parties in fact, the Statute lays down definite rules in accordance with which the property passes at the time and in the circumstances prescribed in the rules. That appears to be the view taken by the Calcutta High Court in the case of *Brij Coomaree v. Salamander Fire Insurance Co.* (1). It is not necessary for the purpose of this case to decide whether this is the true construction of the Statute or not, because in this case there is no evidence that the intention of the parties, i.e., of both of them was that the passing of the property should not follow the ordinary course. In the ordinary course, as a result of section 83 and section 91 of the Indian Contract Act, property would pass on shipment. When the 2nd defendant instructed the plaintiff to sell him rice and send it on board the ship, he must be taken to have proposed to the plaintiff that the property should pass to the purchaser upon shipment. That was the offer and plaintiff accepted it by shipping the goods and the acceptance was not made subject to the condition that plaintiff should reserve to himself the right of disposal until the price of the goods was paid.

On these grounds we hold that the property passed as soon as the goods were shipped and the loss must fall on the 1st defendant. We allow the appeal with costs in this Court and dismiss the memorandum of objections.

Appeal allowed.

(1) 32 C. 516.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 319 OF 1914.

October 1, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

TIRUMALANADHAM SURAYYA—

PLAINTIFF—PETITIONER

versus

TIRUMALANADHAM BAPIRAZU AND

OTHERS—DEFENDANTS—RESPONDENTS.

Contract—Promise to perform on demand after certain date—Breach of contract—Suit for damages Commencement of period of limitation—"On demand", meaning of—Limitation Act (IX of 1908), Sec. 1, Arts. 49, 115, 120.

Where the contract between the parties was that to discharge the loan of 30,000 burnt tiles made to the defendants by the plaintiff in May 1905, the same number of property burnt tiles should be returned to the plaintiff on demand after 20th January 1906, and if the tiles offered in satisfaction were not approved by the plaintiff and his four *panchayatdars* the identical tiles lent, though they had been used in covering a temple roof, should be brought down from that roof and returned to the plaintiff, and where the plaintiff demanded the return of the tiles about six years after the loan and on their refusal, brought a suit for damages for breach of contract in 1913.

Held, that the contract was broken when the defendants failed to offer to deliver 30,000 properly burnt tiles on the 21st January 1906, on which date the right of the plaintiff to make a demand on the defendants arose, and not on the date on which performance was actually demanded by the plaintiff and refused by the defendants: [p. 336, col. 1.]

that Article 115 and not Article 49 of the Limitation Act, 1908, applied to the case. [p. 336, col. 1.]

An actual demand is not necessary to establish a starting point of limitation under Article 115 of the Limitation Act, even if the document makes the compensation payable on demand. [p. 336, col. 2.]

"On demand" is a technical expression meaning immediately or forthwith. [p. 336, col. 2.]

Perumal Ayyan v. Alagirisami Bhagavathar, 20 M. 245 at p. 248; 7 M. L. J. 222; *Perianna Gounden v. Muthurain Gounden*, 21 M. 139; 7 M. L. J. 315, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment and decree of the Court of the District Munsif of Rajahmundry, in Small Cause Suit No. 1032 of 1913.

FACTS.—The plaintiff brought this suit to recover Rs. 60, being the value of tiles, or 30,000 tiles due under a letter executed by 1st defendant and father of defendants Nos. 2 to 4 in his favour, dated 22nd May 1905. The letter ran as follows:—

"As there are no ready-made tiles available for the temple of the village deity, called Vemulamma, in the village of Madburapudis, the (number of) tiles borrowed from you is

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thirty thousand. These thirty thousand tiles, any one of us will deliver to you on demand after Pushya B 10 of the year Visvavasu (20th January 1906).

If you do not approve of the burning, etc., of the said tiles, and if any four respectable men you like, do not also approve of it, then we shall have your own tiles brought down from the roof of the temple and delivered to you. We shall have the delivery of the tiles to be made to you at your house."

The suit was brought six years after the tiles were lent and it was alleged that the plaintiff demanded the return of the tiles three months before the suit. The plaintiff contended that the cause of action arose on the date of actual demand and refusal and consequently he was in time. The defendants contended that the cause of action arose on 21st January 1906, when the plaintiff became entitled to performance under the letter and the suit, having been brought more than three years after that date, was barred. The District Munsif upheld the contention of the defendants and dismissed the suit.

Mr. B. Narasimha Row, for the Petitioner

Mr. P. Chenchiah, for Mr. T. Prakasam and Mr. S. N. Rao, for the Respondents

JUDGMENT.—I am satisfied from a perusal of Exhibit A that the contract between the parties was, that to discharge the loan of 30,000 burnt tiles made to the defendants by the plaintiff in May 1905, the same number of properly-burnt tiles (not the identical 30,000 tiles after they had been, as intended, used by the 1st defendant and the father of defendants Nos. 2 to 4 in covering the temple roof, but the same number of burnt tiles) should be returned to the plaintiff on demand after 20th January 1906 and if the tiles offered in satisfaction are not approved by the plaintiff and his four *panchayatdars* the identical tiles lent, though they had been used in covering the temple roof, should be brought down from that roof and returned to the plaintiff. I think this contract was broken when the defendants failed to offer to deliver thirty thousand properly-burnt tiles on the 21st January 1906, the plaintiff's right to make a demand on the defendants for satisfaction of his claim under Exhibit A having arisen on the said 21st January 1906. That an actual

demand is not necessary to establish a starting point under Article 132 of the Limitation Act, even though the document makes the money payable "on demand," has been established by the decisions of this Court. See *Perumal Ayyan v. Alagirisami Bhagavathar* 1 and *Perianna Gounden v. Muthuvira Gounden* (2).

As is said in *Perumal Ayyan v. Alagirisami Bhagavathar* (1), "on demand" is a technical expression meaning "immediately or forthwith." I cannot admit the petitioner's learned Vakil's contention that Article 49 applies to this suit brought for damages for breach of contract (based on a contract of loan of tiles), this suit not being a suit in tort for the wrongful taking, injuring or wrongful detention of specific moveable property or for the recovery of specific moveables.

Article 115 seems to me to clearly apply to this case, and not Article 120 (which was relied on by Mr. Chenchiah for the respondents and which is a much more general Article than 115 and which should be relied on only in the last resort). The suit was clearly barred when it was brought in 1913, and this revision petition is, therefore, dismissed with costs.

Petition dismissed.

(1) 20 M. 245 at p. 248; 7 M. L. J. 222.

(2) 21 M. 139; 7 M. L. J. 315.

MACHHIA v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 86 OF 1915.

May 22, 1915.

Present:—Mr. Justice Shah Din.

MACHHIA—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Revision—Unreliable evidence—Conviction, legality of—Criminal Procedure Code (Act I of 1898), s. 439.

Where the persons who restored the stolen property to its owner deposed that it was recovered from the petitioner and he was consequently convicted under section 457, Indian Penal Code, but no name of any burglar was given in the first report to the Police and their evidence was not reliable according to the circumstances of the case:

Held, on revision that the lower Courts were not justified in believing it and convicting the petitioner.

Petition for revision under section 439 of the Criminal Procedure Code of the order of the Sessions Judge, Lyallpur, dated the 18th November 1914, affirming that of the Magistrate, First Class, Lyallpur, dated the 12th September 1914, convicting the petitioner.

Mr. Nand Lal, for the Petitioner.

Mr. Jai Gopal Sethi, for Government Advocate, for the Respondent.

JUDGMENT.—The bare perusal of the judgment of the Magistrate is sufficient to show that the conviction of the petitioner of an offence under section 457, Indian Penal Code, was wholly unjustified. The alleged burglary took place on the night between the 4-5th August 1914, the matter was reported to the Police on the evening of the 7th August; and the Police came to the village and commenced the investigation only on the 13th August. For this belated investigation the Police put forward the excuse that they were too busy with other matters to turn their attention to this case; but the question of the Police being busy or not is perfectly immaterial, and the fact that the investigation did not commence until about ten days after the alleged burglary has a very material bearing on the question whether any value can be attached to the result of that investigation.

For the prosecution it is stated that the complainant's cattle which had been stolen from his enclosure on the night in question were recovered by Hussain Ali Shah and Nadir from two thieves, one of them being the petitioner, before the report was made to the Police by Walia *chaukidar*. In the report

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the names of the burglars are not mentioned. Hussain Ali Shah and Nadir when they restored the cattle to the complainant did not mention to him the names of the person or persons from whom they had recovered them; and it was for the first time on the 19th of August that they (Hussain Ali Shah and Nadir) stated to the Police that the thieves were the petitioner and one Alia. Alia has been acquitted by the Magistrate, but the petitioner has been convicted upon grounds which appear to me to be thoroughly unsatisfactory. To his brother Walia *ambavilar*, Hussain Ali Shah stated on the 14th August that he had recovered the cattle from the petitioner and one Shami, but on the 19th August Hussain Ali Shah admitted to the Police that he had mentioned the name of Shami purely as guess work (*qiayason*), whatever that may mean. It is clear to my mind that Hussain Ali Shah is a perfectly unreliable witness, and I am surprised that the Magistrate should have convicted the petitioner on the strength of this man's testimony. The circumstances under which Hussain Ali Shah and Nadir came forward to give evidence against the petitioner clearly point to a false story having been concocted by the prosecution; in any case both these prosecution witnesses are unreliable and it was improper for the Magistrate to convict the petitioner on their evidence.

I accept this revision and setting aside the petitioner's conviction and sentence I acquit him.

Revision accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 336 OF 1914.

CRIMINAL REVISION PETITION No. 285
OF 1914.

January 27, 1915.

Present:—Mr. Justice Spencer and

Mr. Justice Seshagiri Aiyar.

In re MUKKA MUTHIRIYAN AND OTHERS

—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act I of 1898), s. 227—Charge, addition of, in appeal—Able to charge under section 143, Penal Code—Addition, whether valid—Penal Code (Act XLV of 1860), ss. 113, 426, 431.

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The addition by an Appellate Court to charges under sections 451 and 426 of a charge under section 143 of the Penal Code in appeal is not permissible inasmuch as the addition would have the effect of imposing a constructive responsibility for individual acts of all persons who were members at the time of the assembly.

The mere carrying of *savalai kalis* will not be presumed to be unlawful, and in determining the object of an unlawful assembly, the Court must find that the accused had an intention to use criminal force or commit some other offence at all costs and were not acting in self-defence.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1893, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Trichinopoly, in Criminal Appeal No. 35 of 1914, preferred against the judgment of the Town Second Class Magistrate of Trichinopoly, in Calendar Case No. 382 of 1913.

Messrs. E. R. Osborne and P. R. Narayanaswami Aiyar, for the Petitioners.

Mr. P. R. Grant, for the Government.

ORDER.—We are unable to agree with the Sub-Divisional Magistrate that the addition of section 143, Indian Penal Code, to the charge at the hearing of the appeal did not place the appellants at any disadvantage in their defence under the second count of the charge.

The addition of this section would have the effect of imposing a constructive responsibility for individual acts of all persons who were members at the time of the assembly, whereas it would be necessary to prove the guilt of each of the persons charged for his individual acts if the charges were only under sections 451 and 426 of the Indian Penal Code. The section 143 should not have been added and must now be struck out.

As regards the first count of charge, the Magistrate has not addressed himself to a consideration whether the object of the assembly was unlawful as defined in section 141, Indian Penal Code. Ordinarily it may be said that there would be no presumption that the mere carrying of *savalai kalis* would be unlawful, and the Court must, therefore, find that the accused had an intention to use criminal force or commit some other offence at all costs and were not acting in self-defence.

We reverse the judgment and direct the Sub-Divisional Magistrate to re-hear the appeal in the light of the above remarks.

Judgment reversed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 47 OF 1915.

August 12, 1915.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

EMPEROR—PROSECUTOR

versus

BHIMAPPA ULVAPPA—

ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 380, 408, 562—Proceedings submitted to First Class Magistrate—Sentence by that Magistrate—Appeal, where lies.

Where proceedings are submitted to a First Class Magistrate under section 562 of the Criminal Procedure Code and he passes sentence in the case under section 380, the conviction must, for the purposes of appeal, be considered to be within the meaning of section 408 of the Code and the order is appealable to the Sessions Court. [p. 339, cols. 1 & 2.]

Criminal reference made by the District Magistrate of Dharwar.

JUDGMENT.

SHAH, J.—In this case notices were issued to the District Magistrate and the appellant, but there is no appearance. The facts which have given rise to this reference are briefly these:

The accused was tried on a charge under section 379 of the Indian Penal Code by a Second Class Magistrate. The Magistrate convicted the accused; but being of opinion that it was a case to which the provisions of section 562 of the Criminal Procedure Code might be applied, under the proviso to that section he submitted the proceedings to a Magistrate of the First Class on the 22nd February 1915. The First Class Magistrate then, acting under section 380 of the Code, passed an order on the 4th March 1915 convicting the accused and sentencing him to rigorous imprisonment for one month and a fine of Rs. 25. The accused appealed to the Court of Session against this order of the First Class Magistrate. The learned Additional Sessions Judge, before whom the appeal came on for

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hearing, however, held that the appeal would not lie to his Court, but to the District Magistrate under section 407, Criminal Procedure Code, as he was of opinion that originally there was in this case a conviction by the Second Class Magistrate, and that that was the conviction from which an appeal could be and ought to be preferred. When the matter came by way of appeal before the Sub-Divisional Magistrate he was of opinion that the appeal really lay to the Court of Session, and accordingly submitted the papers to the District Magistrate in order that a reference may be made, if necessary, to this Court. The District Magistrate has now made a reference to this Court, and we have to consider the question, whether in this case an appeal lies to the District Magistrate from the Second Class Magistrate's order of conviction or whether it lies to the Court of Session from the conviction and sentence passed by the First Class Magistrate under section 380 of the Code.

It seems to me to be clear under the provisions of section 380 that when a case is submitted to a Magistrate of the First Class or a Sub-Divisional Magistrate as provided by section 562, that Magistrate may, thereupon, pass such sentence or make such order as he might have passed or made if the case had originally been heard by him. It follows, therefore, that for the purposes of appeal ultimately the conviction recorded is a conviction by the First Class Magistrate or the Sub-Divisional Magistrate and the sentence passed also is unquestionably a sentence passed by that Magistrate. Under section 408, therefore, the appeal lies to the Court of Session in this case, as the order of conviction and sentence complained of and to be complained of is passed by a First Class Magistrate under section 380.

The view taken by the Additional Sessions Judge involves a curious anomaly. According to him there would be an appeal from a conviction by a Second Class Magistrate to the District Magistrate, at a time when there would be no sentence to appeal from and when the proceedings might be pending before a First Class Magistrate under section 380 of the Criminal Procedure Code

with powers to consider the propriety of that very conviction. Further, there would be either no appeal from the sentence or an appeal to the Court of Session when an appealable sentence is passed by a First Class Magistrate under section 380 of the Code. I do not see any indication in the Code to justify such a dissipation of conviction from sentence in one and the same case. I do not think that the scheme of the Code favours any such view, nor can I think that the proper interpretation of sections 380 and 562 leads to any such result.

We hold that the appeal in this case lay to the Court of Session. We accordingly set aside the order made by the Additional Sessions Judge on the 4th of May 1915 and direct that the appeal be heard and disposed of by the Court of Session according to law.

HAYWARD, J.—I concur that just as a sentence by a First Class Magistrate under section 349 of the Criminal Procedure Code is appealable to the Sessions Court, so a sentence by a First Class Magistrate under section 380 must also be held to be appealable to the Sessions Court. I think this must be so held, because the First Class Magistrate is given power not only to pass sentence, but to make such order as he might have passed or made if the case had originally been heard by him, and if he thinks further inquiry or additional evidence on any point necessary, he may make such inquiry as specifically prescribed by section 380. His proceedings appear, therefore, to me to be practically a trial. The only difficulty in the way of this conclusion is that specific reference is made to section 349, but no reference is made to section 380 in the provision allowing appeals from the decisions of First Class Magistrates to the Sessions Court in section 408 of the Criminal Procedure Code. But after giving the matter my best consideration, it seems to me that the proceedings of the First Class Magistrate practically amount to a trial, and that, therefore, his decision must be held to be appealable within the meaning of section 408 of the Criminal Procedure Code.

Order set aside.

GUDALA SURIAH v. JAMAL BEE BEE.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS PETITION No. 394
OF 1915.

September 20, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
 Mr. Justice Napier.

GUDALA SURIAH—RESPONDENT—
No. 3—PETITIONER

*versus***JAMAL BEE BEE AND OTHERS—****APPELLANTS—RESPONDENTS.**

Criminal Procedure Code (Act V of 1898), s. 195—
Perjury committed in course of judicial enquiry—
Sanction by High Court—Penal Code (Act XLV of
1860), s. 193.

Where on a petition being presented to the High Court for setting aside an *ex parte* decree on the ground that the petitioner was not served with notice of the appeal, an enquiry was ordered and the District Munsif's report showed that the petitioner had committed perjury while giving evidence before the Munsif.

Held, that the High Court had jurisdiction to sanction the prosecution of the petitioner on a charge under section 193, Indian Penal Code.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to set aside the *ex parte* decree and re-hear Second Appeal No. 2592 of 1912, preferred against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry, in Appeal Suit No. 144 of 1912, preferred against that of the Court of the District Munsif of Coconada, in Original Suit No. 38 of 1910.

Messrs. T. Rangachariar and P. Somasundaram, for Mr. P. Narayana Murthi, for the Respondents.

ORDER.—After perusing the District Munsif's report and hearing the petitioner's learned Vakil's arguments, we must find that the petitioner has totally failed to prove that he was not served with notice as third respondent in Second Appeal No. 2592 of 1912.

This petition to set aside the *ex parte* decree passed against him in the second appeal is, therefore, dismissed with costs.

The District Munsif's report shows that there are good grounds to prosecute the petitioner for the perjury committed (according to the District Munsif's report) in his (the petitioner's) evidence given at the enquiry before the District Munsif, he having denied the signature purporting to be his in the notice issued to him as 3rd respondent from this Court and that denial has been disbelieved by the District Munsif and not

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accepted by us, though our opinions are, of course, not binding upon the Magistrate who would try the criminal case. Under section 195 of the Criminal Procedure Code, we give sanction for the prosecution of the petitioner on a charge under section 193 of the Indian Penal Code in connection with the petitioner's said statement. The District Munsif will direct the process-server (petitioner's witness No. 4 at the inquiry) to act upon the said sanction.

*Sanction granted.***BOMBAY HIGH COURT.****CRIMINAL REFERENCE No. 74 OF 1915.**

August 26, 1915.

Present:—Mr. Justice Batchelor and
 Mr. Justice Hayward.

EMPEROR—PROSECUTOR*versus***RAMA DHAN POWAR—ACCUSED.**

Criminal Procedure Code (Act V of 1898), ss. 164 (3), 533—Magistrate recording confession certifying it to be not voluntary—Confession, whether admissible—Duty of Magistrate—Prosecution, whether can supply deficiencies by calling Magistrate—Evidence Act (I of 1872), s. 24—Confession made to Police Patil, validity of.

Where an accused charged with murder made a confession before a Second Class Magistrate who in place of the certificate required by section 164 (3) of the Criminal Procedure Code remarked that the confession was not voluntary, and where the prosecution sought to remove this defect by calling the Magistrate and examining him as to the precise points which, in his opinion, were involuntarily made:

Held, (1) that the confessional statement was inadmissible in evidence being made under circumstances diametrically opposed to those which the law requires as a condition precedent to the admissibility of a confession; [p. 341, col. 2.]

Reg. v. Garbad Bechar, 9 B. H. C. R. 344, referred to.

(2) that the only course which the Magistrate could properly follow when he came to the conclusion that the accused was not speaking voluntarily before him was to refuse to continue to record the examining any further; [p. 341, col. 2.]

(3) that it was not competent for the prosecution to supply by calling the Magistrate the deficiencies which existed in the confession from the time it was recorded. [p. 341, col. 2.]

A confession must be read as a whole. [p. 341, col. 2.]

A confession made to a Police Patil is invalid. [p. 342, col. 2.]

Criminal reference made by the Sessions Judge of Thana.

Mr. S. S. Patkar (Government Pleader), in support of the reference.

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Mr. P. V. Kane, for the Accused.

JUDGMENT.—This is a reference by the learned Sessions Judge of Thana, under section 307 of the Criminal Procedure Code, in a case where one Rama Dhan Powar was charged, under section 302 of the Indian Penal Code, with murder by causing the death of his uncle, Balu Rama Powar, on the night of the 22nd April 1915. The Jury unanimously returned a verdict of "not guilty." But the learned Judge disagreed with that Jury, and being clearly of opinion that it was necessary for the ends of justice to submit the case to the High Court, he has accordingly submitted it, recording the grounds of his opinion that the accused should have been convicted of murder.

Upon this reference the whole case is open before us, and we have heard a complete argument. The result of that argument on our minds is to satisfy us that upon the evidence on the record the accused is entitled to a verdict of acquittal.

There is, we think, no doubt that the accused bore ill-will to his uncle, the deceased, whom he regarded as a sorcerer and to whose malign influences he attributed the illnesses which had befallen his wife and son. That, no doubt, would supply to the accused a motive for wishing to kill his uncle. It would also supply to the villagers and the Police a reason for suspecting the accused of his murder if no other more likely clue happened to present itself. It was natural then in the circumstances stated that suspicion should fall upon the accused, and it may be that that suspicion still rests upon him. But a man cannot be convicted of murder on suspicion, and the question remains whether the evidence on the record is such as would justify a conviction. It is clear that the learned and experienced Sessions Judge before whom this trial was had bestowed great care on the case. But we could wish that his charge to the Jury had been somewhat more moderate and neutral in tone, having regard to the undeniable infirmities which attach to the evidence for the Crown.

The evidence for the prosecution falls into three classes: the so-called judicial confession, the alleged extra-judicial con-

fession, and the conduct of the accused. Dealing, first, with the judicial confession as it has been called, that is Exhibit 19 on the record and the record of it was made by Mr. V. H. Thakor, Second Class Magistrate and Mamlatdar of Kalyan. In place, however, of the certificate required by section 164 (3) of the Criminal Procedure Code, for the admissibility of such statements, we have a certificate in these words:

"I believe that this confession is not voluntary. It was taken in my presence and hearing and was read out to the person making it and admitted by him to be correct and it contains a full and true account of the statement made by him."

Upon this certificate it appears to us that the confessional statement is inadmissible in evidence being made under circumstances diametrically the opposite of those which the law requires as a condition precedent to the admissibility of a confession. The case appears to us stronger than that in *Reg. v. Garbud Berhar* (1), where a detailed confession, made by an accused before a Magistrate but retracted on being read over to the accused, was held to be inadmissible in evidence. It seems to us that the only course which the Second Class Magistrate could properly follow when he came to the conclusion that the accused was not speaking voluntarily before him was to refuse to continue to record the examining any further. The prosecution sought to remove this difficulty by calling the Second Class Magistrate and examining him as to the precise parts of the statement which, in his opinion, were involuntarily made. In our opinion, however, it is not competent for the prosecution by this means to supply the deficiencies which exist in this confession and which existed in it from the time it was recorded. Moreover, even if the confessional statement were held to be admissible in evidence, its value would, in our judgment, be nil, for a confession must be read as a whole, and this statement, which is self-contradictory, is simply incapable of being read as a whole so as to give it any sensible meaning. The Court would be driven to speculate whether it should believe the first inculpatory part of

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the statement or the second exculpatory part. For, both parts cannot be believed at once. We think, therefore, that the case of the prosecution is not advanced by reason of this so-called confession. We observe further that in one not unimportant particular the confession is curiously at variance with the evidence, which admits of no doubt. According to the confession the accused strangled the deceased with his own hands. According to the medical evidence that is an impossible theory, and the marks left on the deceased's body show decisively that the strangulation was by means not of human hands but of a cord or rope.

Next the prosecution relied upon what is called an extra-judicial confession, that is to say, a confession alleged to have been made by the prisoner to a group of villagers on the 23rd April at some time, presumably in the afternoon, though the time is not definitely stated. The case, however, for the Crown is that this confession was made before the arrival of the District Police on the night of the 23rd April. It is unfortunate that evidence as to this confession was excluded by the Committing Magistrate on the ground that the confession was made in the presence of the Police. We do not suggest that the learned Magistrate was not right in excluding that evidence. We mean only that for purposes of the present argument it is unfortunate that we are without the assistance which we should derive from a study of the depositions of the material witnesses before the Magistrate. For, the result is that the evidence concerning this extra-judicial confession is first disclosed before the Court of Session, and there the witnesses to it are Soma and Valku. Soma, whether for the reasons stated or for other reasons, made no allusion to this incident in the Magistrate's Court. Valku was not examined before the Magistrate at all. He was first called in the Court of Session. Now if Valku is to be believed, when this confession was made by the accused to a group of villagers the Patil was among the group, and it was the Patil who directed the questioning of the prisoner. If the Patil was present at all, it is, we think, natural and probable to suppose that it would be

he who would conduct this informal examination of the suspect. But a confession thus made to the Police Patil would clearly be invalid. It is true that Soma says that the Patil was not present when the villagers were examining the prisoner. But we see no particular reason why the evidence of Soma on this point should be preferred to that of Valku. And, as we have said, if Valku's statement be accepted, the confession goes out of the case. The matter, however, does not rest there; for there is, it appears to us, grave reason to doubt whether this extra-judicial confession was ever made at all. The witness Hari Rama who was the deceased's employer, and who seems to be a witness of credit, deposes that "before the arrival of the Police we made inquiries about the murder. The accused did not make any statement before the Police came". And this is the more significant as Hari Rama was one of the village party who found the deceased's dead body on the bank of the river. The inference, therefore, would naturally arise that the alleged confession made to this group of villagers would be as familiar to Hari Rama as to any one else. Hari was examined on the 6th July before the Court of Session, and on the same day the Village Police Patil, Dharma Hari, was first examined. In this statement the Patil says: "We did not make any inquiry before the Police came. The accused Rama did not give me any information". Soma and Valku were examined on the 12th July, and the Patil recalled on the 12th July bethinks himself for the first time of this alleged confession made to the villagers. It seems to us, therefore, to detract materially from the value of his evidence that throughout his deposition made on the 9th July this circumstance seems never to have occurred to his memory. Moreover the Head Constable, Parbati Haibati, deposes that he arrived in the village on the night of the 23rd April, which would be some hours after this alleged confession to the villagers, yet Parbati makes no effort to arrest the accused, nor is the accused arrested even when the Sub-Inspector arrives on the following morning at 7-30. He is merely kept under surveillance, such as would be amply

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accounted for by the villagers' suspicion to which we have alluded, and is not arrested till the night of the 24th. It seems to us that this delay in the arrest of the accused is also difficult to reconcile with the theory that the accused had made a clean breast of his crime to his fellow-villagers on the afternoon of the 23rd. In this connection it may be added that the Patil's report, Exhibit 4, made after the villagers had found the body by the bank of the river, contains no mention of the name of the accused. We think, therefore, that the case against the accused is not materially strengthened by this alleged confession to the villagers.

There remains only the *third* piece of evidence upon which the prosecution have relied, and that consists in this that while the accused was under the surveillance of the District Police he was allowed to go home to take his meal, and that thereafter, under the pretext of retiring for natural purposes, he broke away from those who were guarding him and leapt down a well some twenty cubits deep. We see no reason whatever to doubt the truth of this evidence. But the significance of it is much more uncertain. For the prosecution it is contended that the true meaning of it is that the accused, conscious of his guilt which he had confessed, made this attempt to commit suicide, and it cannot be denied that the accused's conduct is consistent with such a theory. On the other hand, it seems to us to be even more consistent with the theory that the accused had not confessed, but that being goaded and annoyed and harassed by the villagers who were endeavouring to force him to confess the offence of which they suspected him, he was unable to tolerate such treatment further and jumped into the well in order, temporarily at least, to liberate himself. It seems to us that this explanation of the admitted conduct is even more probable than the explanation offered on behalf of the Crown. For if the accused, being guilty of this crime, had made a clean breast of it by means of an open confession to his co-villagers, we regard it as not specially likely that he would, within a short time of such confession, have sought to commit suicide. While, therefore, we have no

doubt as to the truth of this evidence of the third item in the case for the Crown, we very gravely doubt whether the meaning of it is in favour of the theory which the Crown submits.

There is no other evidence in the case and, for the reasons which we have given, it seems to us impossible to hold that on this evidence any man could safely or properly be convicted whether of murder or of any other crime.

We direct, therefore, that the accused be acquitted and discharged.

Accused acquitted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 305 OF 1915.

CRIMINAL REVISION PETITION NO. 251
OF 1915.

August 23, 1915.

Present:—Mr. Justice Spencer.

In re MUKKA MUTHRIAN AND OTHERS—

ACCUSED NOS. 1 TO 4, 7 TO 10, 14 TO 19,
24 AND 29—PETITIONERS.

Penal Code (Act XLV of 1860), ss. 143, 147—Lawful assembly, whether becomes unlawful by exciting others to unlawful acts—Rioting—Duty of Court.

An assembly lawful in itself does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts. [p. 344, col. 2.]

Beatty v. Gillbanks, 9 Q. B. D. 308; 51 L. J. M. C. 117; 47 L. T. 194; 31 W. R. 275; 15 Cox. C. C. 138; 46 J. P. 783, followed.

An assembly of persons lawfully exercising their lawful rights would not become an unlawful assembly by repelling an attack made on them by persons who had no right to obstruct them nor by exceeding the lawful use of their right of private defence. [p. 344, col. 2.]

Kunja Bhuniya v. Emperor, 15 Ind. Cas. 481; 16 C. W. N. 1053; 13 Cr. L. J. 481; 39 C. 896, followed.

Where an assembly lawful in its origin subsequently becomes unlawful and rioting takes place, it is the duty of the trying Magistrate to determine which party was the aggressor and how the riot actually arose. [p. 344, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Trichinopoly, in Criminal Appeal No. 18

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of 1915, preferred against the judgment of the Court of the Town Second Class Magistrate of Trichinopoly, in Calendar Case No. 382 of 1913.

Messrs. *E. R. Osborne* and *P. R. Narayanasami Aiyar*, for the Petitioners.

Mr. P. R. Gant, for the Government.

ORDER.—After re-hearing the appeal the Deputy Magistrate has acquitted the appellants on the charges of house-trespass and mischief for the acts alleged to have been committed during the second stage of the disturbance.

He has confirmed the conviction of the present petitioners on the charges of rioting and voluntarily causing simple hurt for the acts alleged to have been committed during the first part of the occurrence, namely, when the car was being taken in procession through the streets and when the Ambalagars were carrying "*sevalai kalis*" in front of the car.

He draws the inference that the Ambalagars intended to commit rioting because the carrying of these bamboo sticks, which are said to be used for catching flower balls, was unprecedented on the occasion of the festival and was objected to by the Pallars. He adds: "To explain it still further, these sticks have been in the end the cause of the rioting, for it was the use of those sticks that was remonstrated (*sic*) by the Pallars and the obstinate attitude of the appellants in refusing to lay down the sticks that led to the riot." The Second Class Magistrate expressed his views in this way: "The Ambalagars (accused) have not gone to the Village Munsif or to the Police Station, which is close by, to represent the apprehended disturbance. The accused have on the other hand taken the law into their own hands. In the first place, the accused should not have taken the "*sevalai kalis*" in the face of the evidence tendered on their behalf that at a previous festival the sticks were wrested from their hands by the then Village Munsif as it foreboded rioting. They have committed this initial error. Secondly, the accused, knowing that the Pallars are stoutly opposing this procedure, should have lost no time to

seek the help of the Police and Magistracy, who are in close vicinity, to prevent the disturbance."

This Court has already pointed out in *In re Mukka Muthiriyar* (1) that ordinarily there would be no presumption that the mere carrying of "*sevalai kalis*" would be unlawful.

In itself it was a perfectly lawful act although it may have been resented by the Pallars as against "*mamul*" and as an infringement of their rights. An assembly lawful in itself does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts [*vide Beatty v. Gillbanks* (2)].

Of course, if the Ambalagars used their *sevalai kalis* to make an unprovoked attack on the Pallars, the assembly, lawful in its origin, would have become at once an unlawful one. But the Deputy Magistrate has not found that these accused were the aggressors. He says it is not necessary to decide which party was the aggressor and how the riot actually arose. In his opinion, "these points need no consideration in a disturbance of this kind where both the parties have been accused of rioting." In this he is mistaken. The defence let in evidence to prove that while the accused were peacefully carrying the *sevalai kalis*, a large body of Pallars with sticks set upon them and beat and wounded them. The truth of this story has not been determined. At any rate there is no finding that it is false.

It was held in *Kunja Bhuniya v. Emperor* (3) that an assembly of persons lawfully exercising their lawful rights would not become an unlawful assembly by repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence.

Individuals would doubtless be liable for particular acts of hurt committed by them, which they failed to justify as done in self-defence, but here the Magistrates have not found any of the petitioners guilty of causing hurt, except constructively.

(1) 31 Ind. Cas. 337.

(2) 9 Q. B. D. 339; 51 L. J. M. C. 117; 47 L. T. 194; 31 W. R. 275; 15 Cox. C. C. 133; 43 J. P. 783.

(3) 15 Ind. Cas. 431; 33 O. 838; 18 C. W. N. 1053; 13 Cr. L. J. 451.

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The convictions are, therefore, set aside. The fines imposed on the petitioners will be refunded.

Convictions set aside.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 79 OF 1915.

September 9, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

EMPEROR—PROSECUTOR

versus

HARI BIJAL AND ANOTHER—ACCUSED.

Penal Code (Act XLV of 1860), ss. 302, 149, 34, 141, 144—Gang of twenty persons armed with deadly weapons—Arrest of two members of this gang by villagers—Subsequent murder of one of villagers by a member of gang at large—Arrested men whether liable for murder—Intention to commit dacoity—Burden of proof—Common object of gang.

Where a gang of persons making preparations to commit dacoity was discovered and pursued by a body of villagers who succeeded in arresting two members of the gang and just about this time one of the dacoits at large fired his gun and killed one of the pursuing party:

Held, that inasmuch as the separation of the two accused from the gang was prior to the murder, neither section 149 nor section 34 of the Penal Code applied, and the accused could not be held liable for a murder committed by a member of the gang to which they no longer belonged; [p. 346, col. 1.]

(2) that as the prosecution had failed to prove that there was an intent to commit dacoity, or that the party made any movement towards the commission of a dacoity, the charge under section 399 of the Penal Code must fail; [p. 346, col. 2.]

(3) that since there was no proof that the common object was dacoity, nor any evidence that any force or violence was used by the accused party up till the time when the two accused were unwillingly removed from membership of the party, the accused were not guilty of an offence under section 148, Indian Penal Code; [p. 347, col. 1.]

(4) that the accused assembly of about 20 persons in a field at dead of night, many of these persons being armed with deadly weapons, was undoubtedly an unlawful assembly within the meaning of section 141, Indian Penal Code, and since both the accused were so armed, they were liable to punishment under section 144. [p. 347, col. 1.]

Criminal reference made by the Additional Sessions Judge at Ahmedabad.

Mr. G. S. Rao, for the Accused.

Mr. S. S. Patkar, (Government Pleader),
for the Crown.

JUDGMENT.—This is a reference made by the learned Additional Sessions Judge of Ahmedabad in a case in which the two accused, Hari Bijal and Ganda Hari, were charged *inter alia* with the murder of a village Pagi, named Jiva Becher. The learned Sessions Judge was for convicting the accused on the evidence, but the Jury were unanimously of opinion that the accused were "not guilty." The learned Judge, thinking it necessary in the interests of justice to do so, has submitted the case for this Court's orders.

Very briefly stated, the story for the prosecution is that on the night of the 8th April a gang of persons, making preparations to commit dacoity, was discovered in the village limits and was pursued by a body of villagers. But while the dacoits—so to call them—were yielding before the advance of the villagers, these two accused were seized and arrested by two of the villagers, and that at or about this critical moment one of the dacoits at large fired his gun and killed the deceased Pagi. The evidence is not consistent as to the precise time at which the Pagi was killed, and it seems to us that we are bound to adopt that version of the prosecution story which bears least heavily upon the accused. That is, the version, to which several prosecution witnesses deposed, that the two accused were arrested before the unseized dacoit shot at and killed the deceased. On that state of facts it appears to us that the two accused cannot be visited with liability for the murder committed by a member of that gang to which they no longer belonged. In so far as the common object of the unlawful assembly had been originally to commit a dacoity, that object at the critical time must, in our view, be taken to have been abandoned. And the two accused being by force of circumstances separated from the gang, the subsequent murder committed by one who still remained a member of the gang ought, we think, to be regarded in fact as an independent and isolated act for which the two accused cannot be held liable. The case would seem clearer if an interval of half an hour, say, had elapsed between the arrest of the two accused by the villagers and the shooting of the Pagi by the dacoit. Yet

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in substance there seems to us to be no difference between that case and the case which we have here, where some unknown interval, less than half an hour but appreciable, separated the two events. The important point is that the separation of the two accused from the gang was prior to the murder on the evidence for the prosecution, and in that view of the case we hold that neither sections 149 nor section 34 of the Indian Penal Code can render the accused liable for the murder as if the murder had been within the common intention or the common object of the accused and other persons. We find as a fact that it was not within such common intention or object.

We think, therefore, that on this reference the accused are entitled to be acquitted and discharged on the charge of murder.

We have now to deal with the appeals from the convictions recorded under sections 148 and 399 of the Indian Penal Code, the former section dealing with the offence of rioting when armed with a deadly weapon and the latter dealing with the offence of preparation made for dacoity. Here the Assessors were of opinion that the accused should be acquitted. In our opinion the evidence does not suffice to establish the guilt of either of these appellants under either of these charges.

It seems to us that much significance is due to the prosecution evidence as to the occurrences on the 7th April, that is, the day preceding this alleged crime. On that day it is clear that, according to the case for the prosecution, the Pagis of Pachham and the Pagis of Fedra had an interview concerning their reciprocal tendencies to theft, which ended in angry words and angry feelings. The accused No. 1 is Pagi of Pachham, and, according to the case for the prosecution, was the leader of the gang of the dacoits as the prosecution described them. The evidence, however, as to the events of the 7th April suggests that the mere assembly of the accused's party in the field of Devising to the south of Fedra is insufficient to show that the common object of that assembly was the offence of dacoity, or that the persons assembled were preparing to commit a dacoity. The more probable view, it seems

to us, upon the prosecution's own evidence, is that the accused party were assembled there in order to intimidate the villagers of Fedra, but without any specific intent to commit dacoity. The burden of proving that there was an intent to commit dacoity lies, of course, upon the prosecution and that burden has not been discharged by the evidence which has been produced. Indeed, there is practically no evidence at all on the subject, if we except the doubtful statement of the witness Budhia that the accused's party were "sitting secretly as if lying in ambush to commit a dacoity." But the party made no movement towards the commission of a dacoity. On the contrary, they stayed where they were until challenged by the villagers of Fedra. This view of the case seems to us to receive support from the two great difficulties which confronted the prosecution before the Sessions Court. We mean, *first*, the grave divergence between the account given in the Mukhi's report and the account given in the eye-witnesses' depositions, and, *secondly*, the inability of these eye-witnesses to supply an intelligible explanation of how it happened, on the theory of a dacoity, that two of the intending dacoits were arrested, although the intending dacoits and the pursuing villagers do not seem to have come into any actual conflict, and of the pursuing villagers not one received any blow or injury except, of course, the unfortunate man who was killed on the spot.

We think that if due weight is allowed to these circumstances and to the evidence concerning the meeting at Ratanpur on the 7th April, the only conclusion possible is that the prosecution have failed to show that the accused's party were assembled with the object of committing a dacoity. The charge, therefore, under section 399 must fail.

The charge under section 148 is also unsustainable, because by the definition in section 146 the offence of rioting is constituted where force or violence is used by an unlawful assembly in prosecution of their common object. Now, here, as we have said, there is no proof that the common object was dacoity, and moreover, there is no evidence that any force or

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violence whatever was used by the accused's party up till the time when two accused were unwillingly removed from membership of that party. Therefore, the charge under section 148 also fails.

It seems to us, however, that the accused's assembly of about twenty persons in the field of Devising at dead of night, many of those persons being armed with deadly weapons, was undoubtedly an unlawful assembly within the meaning of section 141, the common object of those persons being, as is proved by the evidence, to commit mischief or criminal trespass. That being so, the two accused are properly liable as members of an unlawful assembly. The evidence shows that the first accused was armed with a gun and the second accused with a somewhat formidable knife. The consequence, therefore, is that both are liable to punishment under section 144. We convict the appellants under that section and sentence each of them to two years' rigorous imprisonment.

Convictions and sentences modified.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 337 OF 1915.

September 13, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

In re MUTHUMADA NADAN—PRISONER—APPELLANT.

Penal Code (Act XLV of 1860), s. 300, Exception 4—Use of knife—No risk of serious hurt to person—Offence.

Exception 4 to section 300 of the Indian Penal Code does not apply to the case of an accused, who uses a knife where there is no appreciable risk of even serious hurt to his person.

Kadalkarayan v. Emperor, 4 Cr. L. Rev. 373, followed.

Appeal against the order of the Court of Session of the Tanjore Division, in Case No. 24 of the Calendar for 1915.

The Public Prosecutor, for the Government.

JUDGMENT.—The use of a knife by the accused when there was no appreciable risk of even serious hurt to his person makes it difficult to hold that Exception 4 to section 300, Indian Penal Code, could

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apply to his case. [See *Kadalkarayan v. Emperor* (1).]

On the evidence the learned Sessions Judge rightly convicted the appellant of murder. The sentence of transportation for life, passed on the appellant, being the lesser of the only two possible sentences for the offence, is confirmed and this appeal is dismissed.

Appeal dismissed.

(1) 4 Cr. L. Rev. 373.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 189 OF 1915.

August 6, 1915.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

EMPEROR—PROSECUTOR

versus

BAI MAHALAXMI AND ANOTHER—ACCUSED APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 209—Inquiry preparatory to commitment—Prosecution evidence, unreliability of—Duty of Magistrate to discharge—Preliminary inquiry, necessity of, for commitment—Prosecution witness, cross-examination of, by Magistrate, if allowed.

If in an inquiry preparatory to commitment, the evidence tendered for the prosecution is totally unworthy of credit, it is not only within the power of the Magistrate but it is his duty to discharge the accused under section 209 of the Criminal Procedure Code. [p. 348, col. 2.]

In re Bai Parvati, 8 Ind. Cas. 631; 35 B. 163; 12 Bom. L. R. 923; 11 Cr. L. J. 692, followed.

Where, therefore, on a complaint being lodged against two persons under section 477, Indian Penal Code the Magistrate did not issue any process against one but examined him as a witness in the course of the inquiry against the other and also cross-examined the complainant's witnesses and after recording the whole evidence discharged the accused on the ground that in his opinion the evidence was very interested and unreliable, but the Sessions Judge set aside the order of discharge and remanded the case to the Magistrate with instructions to commit both the accused:

Held, (1) that the Magistrate was well within his powers in cross-examining the prosecution witnesses and in considering whether the witnesses examined on behalf of the prosecution were credible; [p. 348, col. 2; p. 349, col. 2.]

(2) that in so far as no enquiry whatever was made against the second accused under Chapter XVIII of the Criminal Procedure Code, he was not liable to any order of committal by the Sessions Court. [p. 349, col. 1; p. 350, col. 1.]

Criminal application for revision from an order passed by the Sessions Judge of Ahmedabad.

EMPEROR V. BAI MAHALAXMI.

Mr. T. R. Desai, for the Applicants.
Mr. G. N. Thakore, for the Complainant.

JUDGMENT.

SHAH, J.—This application arises out of a complaint made by one Kanaiyalal against two persons, Bai Mahalaxmi and Shankarlal. He charged these two persons under section 477 of the Indian Penal Code and alleged that a certain page containing two *khatas* of the accused in an account-book of his was torn and burnt by Bai Mahalaxmi in the presence of Shankarlal, when he had gone with his account book to demand money which was due by these persons to him.

The proceedings before the Magistrate were under Chapter XVIII of the Criminal Procedure Code, the offence charged being exclusively triable by a Court of Session. The Magistrate did not issue any process against Shankarlal, but examined him as a witness in the course of the inquiry before him. After recording the evidence which the complainant adduced, the learned Magistrate discharged the accused, Bai Mahalaxmi, on the ground that in his opinion the evidence was very interested and unreliable and that he did not at all believe it.

Against this order of discharge there was an application by way of revision to the Court of Session by the complainant. On this application the learned Sessions Judge has set aside the order of discharge and remanded the case to the Magistrate with instructions to commit. It is this order of the Sessions Judge that is now sought to be revised.

It is urged on behalf of the applicants, who were the persons originally charged by Kanaiyalal, that the learned Sessions Judge has erred in law in stating the powers of the Magistrate in dealing with a case under Chapter XVIII. The learned Sessions Judge says in his order that "the Magistrate has strained his powers. In the first place he seems to have himself cross-examined the prosecution witnesses. In the second place it is no part of the duty of the Committing Magistrate to find on the truthfulness of witnesses. If the evidence of witnesses, if true, make out a *prima facie* case against the accused and if the wit-

nesses are not patently false, he ought to commit." And further on he says as follows:—"Yet the circumstances might be such—I do not say that they are or are not—that the trying Court ought to convict on the evidence of the complainant." In the order which he has made there is no indication of his opinion as to the credibility of the witnesses examined on behalf of the complainant, nor is there any indication of any circumstances which, in the opinion of the learned Judge, might justify a conviction by the trying Court.

With this view of the powers of the Magistrate before whom an inquiry is held under Chapter XVIII, I am unable to agree. It has been pointed out in a number of cases of this Court, of which I need refer to only one—*In re Bai Parvati* (1)—that if the evidence tendered for the prosecution is totally unworthy of credit it is not only within the power of the Magistrate, but it is his duty to discharge the accused under section 209 of the Criminal Procedure Code. It seems to me that in this case the Magistrate was well within his powers in cross-examining the prosecution witnesses and in considering whether the witnesses examined on behalf of the prosecution were credible.

As regards the circumstances in the case outside the oral evidence, as I have already said, we have no indication in the order of the learned Sessions Judge nor have they been indicated to us in the course of the argument here on behalf of the complainant. We have heard the learned Pleaders on the merits of the case, and I am unable to say on a consideration of those arguments that the Magistrate under the circumstances of this case was not justified in describing the evidence as being very interested and unreliable. On that view of the case I am clearly of opinion that the Magistrate was not only justified but bound to discharge the accused.

There is one other point with regard to the accused Shankarlal. So far as he is concerned, there was no inquiry whatever against him under Chapter XVIII. On the contrary, he was examined as a witness in

(1) 8 Ind. Cas. 631; 35 B. 163; 12 Bom. L. R. 923; 11 Cr. L. J. 692.

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the case by the Magistrate. The learned Sessions Judge, however, in setting aside the order of discharge and in issuing instructions to the Magistrate to commit, apparently made an order against this petitioner also. It is difficult to see how, so far as he is concerned, any order to commit him to the Court of Session could be made without a preliminary inquiry under Chapter XVIII of the Code. In his case, there is this additional reason for not upholding the order of the Sessions Judge.

On these grounds I make the Rule absolute and set aside the order of the Sessions Judge.

HAYWARD, J.—I concur. The complainant, Kanaiyalal's case briefly was that he had taken two *khatas* from the two accused, Bai Mahalaxmi and Shankarlal, and that some time afterwards on going to recover his money, they had been torn up by the accused Bai Mahalaxmi, with the connivance of the accused Shankarlal. Kanaiyalal had, therefore, to prove two things, one that he actually had taken *khatas* from the accused, and secondly, that they had been torn up by the accused woman with the connivance of the other debtor.

With regard to the first point the direct evidence consisted solely of the statement of Kanaiyalal. He produced, it is true, an account book, but that was unpagged and unindexed and was not capable of being tested by reference to any other account books, such as the day-book commonly kept by money-lenders. It is true that the remnants of a torn page appear in this book, but they were only the remnants containing no writing whatever on them and could, without any difficulty, have been subsequently inserted in the book. It is true that he called the Manager, Trikamlal, of the firm from whom, it was alleged, he got the money to pay the two accused, but that Manager was not able to give any very definite evidence in corroboration of the loan. His statements in fact did not agree with those of the complainant and the books of the firm merely showed loans to the complainant without any reference to their having been taken for the purpose of payment to either of the accused. Two other witnesses were cited in the

vain endeavour to support the alleged *khatas*, one named Keshavlal, who alleged that he had been shown the *khatas*, and the other witness, Chimanlal, who alleged that he had heard an admission made to the effect that there were such *khatas*. It is difficult, in my opinion, to hold that these were credible witnesses as to the existence of the *khatas*.

With regard to the other point, the tearing up of the *khatas*, the sole evidence was that of the complainant, Kanaiyalal, and that was to the effect that they were torn up by the accused woman, Bai Mahalaxmi. He introduced another witness, Manilal, who was either a client or debtor of his who said that the following day some admission was made as to the matter by accused Shankarlal. It is again, in my opinion, difficult to hold that these were credible witnesses of the somewhat improbable story of the tearing up of the *khatas*.

It seems to me, therefore, that *prima facie* it was rightly held that there were no credible witnesses of the alleged offence and that the two accused were rightly discharged by the Magistrate. Nor does it appear to me that the witnesses were actually considered to have been credible witnesses by the learned Sessions Judge. What he stated was that their truthfulness ought not to have been considered and that they should not have been cross-examined and if their truthfulness had not been considered and they had not been cross-examined, then it would have been impossible to say that they were patently false witnesses, that is to say, that their bare statements without further investigation ought to have been acted on, and that if these bare assertions were not patently false, then the accused ought to have been committed for trial by the Sessions Court. But this does not seem to me to be the law laid down in the decisions. What has been insisted on in them is that not only shall there be witnesses in support of the charge but that they shall be credible witnesses. And in departing from this position and stating that all that is required is that they shall not be patently false, it appears to me that an error of law has been committed by the learned

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Sessions Judge. The legal position has been sufficiently indicated in the case of *Emperor v. Rautji Hari* (2) and in a recent case in *In re Bai Parvati* (1). It appears to me, therefore, that for these reasons the order to commit the accused No. 1, Bai Mahalaxmi, and the accused No. 2, Shankarlal, passed by the learned Sessions Judge cannot be supported by this Court.

There is also in the case of accused No. 2 Shankarlal this further serious objection that no inquiry at all has as yet been made into the case against him with a view to his committal to the Sessions. No process seems to have been ever issued against this accused. He would, therefore, appear not to have been liable to any immediate order of committal by the Sessions Court.

I concur, therefore, that the order of the learned Sessions Judge in the case of both the accused must be set aside by this Court.

Rule made absolute.

(2) 9 Bom. L. R. 225; 5 Cr. L. J. 213.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 3 AND 28 OF 1915.

CRIMINAL REVISION PETITIONS NOS. 1 AND 24 OF 1915 AND CRIMINAL MISCELLANEOUS PETITIONS NOS. 186 AND 187 OF 1915.

August 9, 1915.

Present:—Justice Sir William Ayling, Kt.,
Mr. Justice Tyabji.

SANKAR RANGAYYA AND ANOTHER—
COMPLAINANT

versus

SANKAR RAMAYYA AND ANOTHER—
ACCUSED.

Criminal Procedure Code Act V of 1898, ss. 345, 423 (1) (d), 439—Composition, when can be effected—Order allowing composition, nature of—High Court, whether can allow composition in revision.

Section 345 of the Criminal Procedure Code is exhaustive of the circumstances and conditions under which composition can be effected. [p. 351, col. 2.]

An order allowing composition of an offence is not an incidental order within the meaning of clause (d) of section 423, Criminal Procedure Code. [p. 352, col. 1.]

Ram Piyari v. Emperor, 5 Ind. Cas. 696; 32 A. 153; 7 A. L. J. 103; 11 Cr. L. J. 203, dissented from.

An offence cannot be allowed to be compounded when the case comes before the High Court in revision. [p. 351, col. 2.]

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the convictions of, and sentences passed upon, the accused in Calendar Case Nos. 77 and 84 of 1914 and 118 and 119 of 1914, on the file of the Court of the Joint Magistrate of Bezvada, and criminal miscellaneous petitions filed by all the petitioners in the above two criminal revision petitions for sanction to give effect to the compromise petitions entered into by both parties.

CRIMINAL REVISION CASE No. 3 OF 1915.

Mr. T. Ramachandra Row, for the Petitioners.

CRIMINAL REVISION CASE No. 23 OF 1915.

Mr. Gantu Venkataramiah, for the Petitioners.

Mr. Nugent Grant, Acting Public Prosecutor, on behalf of Government.

ORDER.

TYABJI, J.—The first point involved in this revision case is, whether the desire of the parties to compound the offence of causing grievous hurt punishable under section 325 of the Indian Penal Code can affect our decision. The point arises in a case where two brothers brought a charge and counter-charge against each other for causing grievous hurt and rioting and each of them was sentenced by the Joint Magistrate to one month's rigorous imprisonment.

From these sentences they could not appeal, but they have applied in revision and are now desirous of compounding.

The composition of offences is dealt with in section 345 of the Criminal Procedure Code.

Sub-section (1) specifies the offences which may be compounded without leave of Court by the injured person. It contains no reference to the stage at which the proceedings may lie.

Sub-section (2) provides that the offence of causing grievous hurt may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

Sub-sections (3) and (4) extend the sphere of composition by permitting it: (a) in the cases of abetments of and attempts to commit

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the offences that may be compounded and (b) by permitting guardians of minors, etc., to compound.

Sub-section (5) refers to cases where a person has been committed to trial or where he has been convicted and he has appealed, in either of which cases it is provided that no composition for the offence shall be allowed without the leave of the Court concerned.

Sub-section (6) gives to a composition the effect of an acquittal.

Sub-section (7) disallows composition except as provided by the section.

The section, therefore, contains provisions with regard to (a) the persons who may compound; (b) the nature of the offences that may be compounded; (c) the stage of the criminal proceedings at which the composition is sought to be made; (d) it also provides that in regard to some offences the mere consent of the injured person shall not suffice for composition; he must obtain the permission of the Court, the Courts being specified whose permission to compound has to be obtained.

Sub-section (7) must, therefore, be taken to mean that no offence shall be compounded except where the provisions of section 345 are satisfied as to each of these four matters.

The section mentions the Court before which the prosecution is pending, to which the accused is committed for trial and before which an appeal is pending. There is no reference to the High Court in its revisional powers. Conversely it is noteworthy that section 439 (which defines the powers and functions of the High Court in revision) does not refer to section 345.

It would, therefore, seem that if an offence were allowed to be compounded when the matter is pending before the High Court in revision, it could not be said that the composition was as provided by section 345 in two respects (1) as to the stage of the proceedings, (2) as to the Court which, it is provided by the section, must give leave. It follows that the offence cannot now be compounded.

It was argued before us that we are empowered (sitting in revision) to allow the composition to be made by reason of section 423 (1) (d) read with section 439 (1). For this argument it is contended that

the giving of leave to compound is merely a consequential or incidental order, a contention that was accepted in *Ram Piyari v. Emperor* (1), but rejected in *Ram Chandra v. Emperor* (2). Knox, J., who decided the latter case sitting alone, was a party to the earlier decision also but his attention was not drawn to it and he does not notice it.

In connection with this argument I observe that the Code in no place specifically empowers any Court to give permission to compound; nowhere is there any special provision conferring distinct powers to sanction compositions. In section 345 (2) the permission of the Court is referred to as a condition precedent to the act of the parties having any effect; and in section 345 (5) the absence of such permission is mentioned as depriving the composition of any effect; but in each case it is assumed that the Court has power to give permission provided there is any occasion for granting permission.

The point of view from which the sub-sections are drafted is, however, that it is the injured person who has to be empowered to compromise and the difficulty in the way of compromise in revision is, in my opinion, not so much that the Revision Court has not been specifically authorised to grant permission, but that the parties are not allowed to compound except at the stages when the prosecution is pending, or the accused has been committed for trial, or an appeal is being heard from a conviction. The absence of any power being given to the injured person to compromise when matters are before the Revision Court is fatal by reason of section 345 (7).

In my opinion, therefore, the offence cannot be compounded at the present stage.

AYLING, J.—I have had the advantage of perusing the judgment of my learned brother, and concur in the conclusion at which he has arrived on the preliminary question for our decision.

In my opinion section 345, Criminal Procedure Code, is exhaustive of the circumstances and conditions under which composition can be effected. No other mean-

(1) 5 Ind. Cas. 696; 32 A. 153; 7 A. L. J. 103; 11 Cr. L. J. 203.

(2) 28 Ind. Cas. 103; 37 A. 127; 13 A. L. J. 104; 16 Cr. L. J. 247.

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ing can be given to clause (7). With great respect to the learned Judges who decided *Ram Piyari v. Emperor* (1), I cannot see how an order permitting composition can be treated as an "incidental order" within the meaning of clause (d) of section 423, Criminal Procedure Code and I do not think that section confers on an Appellate Court any powers relating to composition independent of section 345.

BY THE COURT.—Dealing with the revision petitions on their merits we see no reason to interfere with the convictions. As regards sentences, the Public Prosecutor represents that in view of the family nature of the quarrel and the other circumstances of the case, it is not necessary to send the petitioners (who are now on bail) back to prison. We are disposed to take the same view, and we reduce the sentences in each case to the terms of imprisonment already undergone by the petitioners. The bail bonds are discharged.

Convictions upheld ; Sentence reduced.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 187
OF 1915.

August 12, 1915.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

BABAN DAUD—ACCUSED

versus

EMPEROR—PROSECUTOR.

Trial—Criminal Circulars of Bombay High Court, Circular No. 37—Trial on holiday, if irregular—Right of accused to defend himself.

A trial of an accused person on a Sunday or any other holiday would not necessarily make the proceedings invalid, but is irregular as being contrary to the provisions of Circular No. 37 of the Criminal Circulars of the Bombay High Court. [p. 352, col. 2; p. 353, col. 1.]

Where, therefore, the trial of an accused was commenced and practically finished on a Sunday, the accused being unable to engage a Pleader, and the judgment was pronounced on the following day:

Held, (1) that there was an irregularity in procedure which had prejudiced the accused who could not be said to have had a fair opportunity to defend himself; [p. 353, col. 1.]

(2) that the fact that the accused did not ask the Court to adjourn the case did not make any difference. [p. 353, col. 1.]

Criminal application for revision from conviction and sentence passed by the First

Class Magistrate at Pandharpur confirmed on appeal by the Sessions Judge at Sholapur.

Mr. Jinnah (with him Mr. D. G. Dalvi), for the Accused.

Mr. S. S. Patkar (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—The petitioner in this case was arrested on a charge under section 457 of the Indian Penal Code on the 13th of January 1913. He was kept in custody at Pandharpur and tried on the 17th of January 1915, which was a Sunday. The trial was commenced and practically finished on that day. The judgment was given on the 18th of January. He was convicted and sentenced to eighteen months' rigorous imprisonment.

In the petition before us he has complained that he was improperly tried on a Sunday, and that if he had not been so tried, he would have been in a position to engage a Pleader and to defend himself properly. It is not argued before us that the trial held on a Sunday is illegal. It seems to me, however, that having regard to Circular No. 37 of the Criminal Circulars of this Court, ordinarily it is not proper to hold a trial on a Sunday. In the present case it is not suggested that there was any urgency or any special circumstance for adopting this unusual course. I am, therefore, of opinion that under the circumstances of this case it was not proper for the Magistrate to have tried the petitioner on a Sunday.

From the facts disclosed in the petition here and from the report of the Magistrate which was called for on the petition to this Court, it appears that the accused was probably prejudiced in this case on account of the trial having been held on a Sunday. While he was in custody at Pandharpur on the 15th of January, he had sent a letter to his father at Hotgi through the Mamlatdar informing him that he was arrested and requesting his father and mother to go at once with money to Pandharpur. The mother arrived at Pandharpur with the money on Sunday, the 17th January, after the trial was over.

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If the trial had not been held on the 17th January, it is probable that on the following day the accused would have been in a position to engage a Pleader and to make such arrangement for his defence as he might have thought proper. Under these circumstances it seems to me that there has been an irregularity in the procedure which has prejudiced the accused, and that the accused cannot be said to have had a fair opportunity to defend himself. It is quite true, as pointed out by the Magistrate in his report, that the accused did not request the Court on the 17th to adjourn the case, and when he was asked whether he had a Pleader, he said that he had none. But this circumstance by itself does not, in my opinion, affect the conclusion which I have already stated.

The result, therefore, is that we set aside the conviction and sentence and order a re-trial of the accused according to law.

We leave it to the District Magistrate to determine whether under the circumstances the re-trial should take place before the same or any other Magistrate.

HAYWARD, J.—I concur. I have no doubt that the applicant *bona fide* intended to engage a Pleader. He was arrested on Wednesday night and on the Friday sent a letter to his father asking for pecuniary assistance. In reply to that letter, his mother arrived after the trial was over on the night of Sunday. It is true he was asked at the trial whether he had got a Pleader, but at that time having no answer to his letter, he naturally replied he had not got a Pleader. When his mother arrived on the night of Sunday, the trial was practically over. It was not, therefore, unnatural that she also did not specifically mention the need of a Pleader. It is moreover to be observed that there would probably have been no opportunity of engaging a Pleader on the spot on that day, which was a Sunday when Pleaders would not ordinarily attend the Court. The trial on a Sunday or any other holiday would not necessarily make the proceedings invalid, but it would, in my opinion, be irregular as contrary to the provisions of Circular No. 37 of the Criminal Circulars of this High Court.

It seems to me that the applicant was distinctly prejudiced by this irregularity in respect of his right to be represented by a Pleader, a right given to every accused person by the specific provisions of section 340 of the Criminal Procedure Code. The case against the applicant was not a petty one but serious, and was, in my opinion, one in which it was desirable that he should be defended by a Pleader. It is, therefore, necessary, in my opinion, to set aside the conviction and sentence and order a re-trial, which should be either before the same Magistrate or such other Magistrate as might be selected by the District Magistrate.

Conviction and sentence set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 486 OF 1915.

October 22, 1915.

Present:—Mr. Justice Abdur Rahim.

In re N. VENUGOPAL MUDALY—

PRISONER—APPELLANT.

Penal Code (Act XLV of 1860), s. 415—Cheating—Wrongful gain & loss.

Section 4-5 of the Indian Penal Code does not require, and does not say, that to constitute the offence of cheating, the wrongful gain must be made out of the person deceived. It simply provides that there may be either wrongful loss to the person deceived or wrongful gain to the person who deceives. [p. 354, col. 1.]

Khan Singh v. Empress, 25 F. R. 1890 Cr. followed.

Appeal against the order of the Court of the 3rd Presidency Magistrate, George Town, Madras, in Calendar No. 12355 of 1915.

Messrs. R. Shadagopachariar and R. V. Seshagiri Row, for the Appellant.

The Crown Prosecutor, for the Government.

JUDGMENT.—I think that in this case there can be no doubt that the convictions are right. The accused somehow or other got hold of orders sent to two different firms and sent value payable articles to the persons who had sent the orders. In one case it appears that the articles sent were not what were wanted, though, as stated, it may be that the market price of the articles actually sent was the same as or even a little more than the price of the articles ordered. In the other case, it appears that three tins of a

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particular medicine were wanted, and the accused sent two larger tins. The evidence is that they were practically of the same value as the three tins ordered. The accused in common with a large number of other persons in Georgetown carry on the business of what is called "V. P. firms"; that is to say, when men living outside Madras want certain articles which are to be had at the market these men receive their orders, buy the articles and send them by value payable parcel realising the price in that way. The profit they make is the commission which they receive from the shopkeepers. I think there can be little doubt that prosecution witnesses Nos. 2 and 7 were really deceived as to the man they were dealing with. They thought they were dealing with two other firms and not with the accused. The accused undoubtedly also made a profit in the nature of commission. It is argued by the learned Vakil for the accused that, granted there was deception, there was no fraud or dishonesty within the meaning of the Indian Penal Code, and he has cited in support of his contention a ruling of the Punjab Chief Court reported as *Kahn Singh v. Empress* (1). I am of opinion that there was clearly dishonesty in this case, the dishonesty consisting in the wrongful gain which the accused made by imposing upon the prosecution witnesses Nos. 2 and 7. The law does not require, and does not say, that the wrongful gain must be made out of the person deceived. That is the other case of wrongful loss which also is a constituent of dishonesty. But the Code provides that it may be either wrongful loss to the person deceived or wrongful gain to the person who deceived. I confirm the convictions, but this is apparently the first offence of the accused and the sentences are heavier than called for. The sentence on the first charge is two months' rigorous imprisonment and a fine of Rs. 250, in default further rigorous imprisonment for four months. The sentence on the second charge is the same. The sentences of imprisonment are to run one after another. The accused is said to have already undergone about ten days' imprisonment. I remit the rest of the sentence of imprisonment. The fines will stand.

Conviction affirmed; Sentence modified.

(1) 25 P. R. 1890, Cr.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 113 OF 1915.

May 15, 1915.

Present:—Mr. Justice Beaman and
Mr. Justice Macleod.

LAKSHMAN TOTARAM—ACCUSED
—APPLICANT
versus

EMPEROR—RESPONDENT.

Evidence Act (1 of 1872), ss. 33, 145—Criminal trial—Statement made by witness before Committing Magistrate, admissibility of, in Sessions trial—Witness procurable—Practice—Procedure.

The application of section 33 of the Evidence Act in criminal cases ought to be confined within the narrowest limits. Where a witness is material, justice requires that he should, if possible, be examined at the trial in the presence of the accused. Where the evidence of a witness is not material, there is no need to introduce it under section 33. [p. 357, col. 2.]

Where in a Sessions trial, the evidence of an absent witness was very material and was relied upon by the Sessions Judge in his charge to the Jury, but he was not produced although he resided within the Court's jurisdiction and could have been procured without any very great delay or expense:

Held, that the deposition ought not to have been admitted and was not evidence. [p. 357, col. 2.]

Where the entire evidence of the complainant given before the Magistrate was admitted as a whole during the cross-examination of that witness in the Sessions Court and where it was intended to be used to contradict him:

Held that it was contrary to principle to admit the evidence in this manner without first drawing the attention of the witness to every point upon which it was to be used to contradict him. [p. 358, col. 1.]

Seemle.—In every criminal trial, Judges cannot be too careful to conform strictly with the principles of evidence. [p. 358, col. 1.]

Criminal appeal from conviction and sentence passed by the Additional Sessions Judge of Khandesh.

Mr. Velinkar, with him Mr. P. B. Shingne, for the Accused.

Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.—In this case we are of opinion that the conviction and sentence must be reversed and set aside. There are points in the case which tell very strongly against the accused. All these points have not, in our opinion, been satisfactorily cleared up. There are other points in the case, however, which create so strong and reasonable a doubt as makes it, in our opinion, impossible to uphold the conviction.

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The particular facts which are necessary to be mentioned, as alleged by the prosecution, are that, on the 23rd of July 1913, the complainant, Supdu, an old man, purchased two stamp-papers of the value of Rs. 6 and 4 respectively with the object of executing a mortgage of one of his fields to a man called Dagdu for a sum of Rs. 1,000. He says that he was in need of the money to pay a Savkar Patil to whom, it appears, Dadu himself was also indebted. Having procured the stamp-papers, the complainant Supdu, contends that he took them to Waman, the *kulkarni* of the village, with the object of getting the mortgage-deed drafted, at any rate, to the extent of obtaining the boundaries of the land, which he proposed to mortgage, from the *kulkarni*. The *kulkarni* declined to write the deed until the mortgagee was brought before him. It is part of the complainant's case that the *kulkarni* desired to write the deed in order to obtain the writing fee. Supdu says that he then went in quest of Dagdu who lives in the village of Mamoorabad, some distance away from Neri. Dagdu, according to Supdu, was unwell and refused to return with him and when Supdu returned five days later, on the 28th of July 1913, he says that he learnt that Waman had given the blank papers to Laxman Totaram. Two days later Supdu says that he was informed that Laxman Totaram had forged a sale-deed of 3rd of Survey No. 57, a land belonging to Supdu in his (Laxman Totaram's) own favour. It appears that, on the 28th of July 1913, Laxman Totaram, the accused, did present such a deed attested by four witnesses and written by one Nathu Laxman purporting to be signed by the line or mark of the complainant, Supdu, for registration at the Sub-Registrar's office at Jamner. As the executant, Supdu, was not there, the Registrar refused to register. Subsequently, on the 18th of August 1913, Supdu filed a complaint against both Waman and Laxman Totaram in respect of the same deed which had thus been presented for registration. This complaint was verified on the 20th of August 1913. On the same day, the accused Laxman Totaram applied to the Registrar for notice calling upon the complainant, Supdu, to appear and acknowledge the execution of the deed. This notice was served on Supdu but he did not

comply with it. Accordingly, on the 30th August 1913, the Sub-Registrar finally declined to register, and, according to a statement made by the accused before the Magistrate, Mr. Joglekar, the impugned deed was returned to him by post. Now the trial upon the complaint made on the 20th August by Supdu was referred in the first instance by Mr. Kelkar, the Magistrate to whom the complaint was presented, to a *mamlatdar* called Mr. Raoji for preliminary investigation. This investigation appears to have gone on for some time between the 20th and 30th of August. It is a curious circumstance that although the inquiry was into the alleged forgery of this sale-deed, the deed itself was not before the inquiring officer. He appears to have procured the particulars of it, the names of the writer and attesting witnesses from the Registration Office and it is thus clear that the deed was with the Registrar while the inquiry was in progress. Afterwards by the order of his superior officer, Mr. Kelkar, the *mamlatdar*, Mr. Raoji, obtained the deed probably, though this is not apparent from his own report, from the accused himself and forwarded it to Mr. Kelkar. That Magistrate, after duly considering the preliminary inquiry made by the *mamlatdar*, Mr. Raoji, dismissed the complaint under section 203, that is to say, the conclusion of both these officers was that there was not even a *prima facie* case against the accused, Laxman Totaram. The Sessions Judge, probably Mr. Clements, directed further inquiry under section 437 of the Criminal Procedure Code. This inquiry was entrusted to another Magistrate, Mr. Joglekar, who took it up sometime in March 1914 and appears to have gone very thoroughly into the matter. Many witnesses were examined before him and he wrote an elaborate judgment ending with the discharge of the accused persons, Waman and Laxman Totaram. It is to be borne in mind that up to this time both these men were charged equally by the complainant, Supdu, with the forging of this sale-deed. On the 27th of November 1914, the Sessions Judge (Mr. Dutt) this time, we believe, (though this is not apparent on the record) acting under section 436 of the Criminal Procedure Code, directed Mr. Joglekar to commit the accused person, Laxman Totaram, to the

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Sessions. He accepted the Magistrate's conclusion with regard to the other accused Waman.

Now the statement of Waman throughout had been that Supdu's story about giving him the two blank stamp-papers in order to write the mortgage-deed upon them was absolutely false, and this story, as we have now shown, appears to have been accepted by three inquiring Magistrates and the Sessions Judge himself. But if that story is true, it strikes at the foundation of the whole case, and that is one point which, we think, tells very strongly in favour of the accused Laxman Totaram. If we are correct in saying that it was Mr. Dutt himself who directed Mr. Joglekar to commit Laxman Totaram for trial, then it is clear that the trial conducted before that learned Judge would have been, from the prisoner's point of view, open to very serious exception. We have not the learned Judge's order under section 436, but we presume that he must have entirely rejected the whole of Mr. Joglekar's reasoning and appreciation of the evidence, so far as that went in favour of the accused Laxman Totaram.

If we are right so far, then it is equally clear that when Laxman Totaram's trial began before the Sessions Judge, that officer's mind must have been considerably biassed against the accused. We do not mean to impute any impropriety to the Judge in this matter since, no doubt, it is the practice in the mofussil to direct Magistrates under section 436 to commit to the Sessions Court and not infrequently it is the same Judge who, after having made the order under section 436, himself tries the case. On general principles, however, this we should say, is, where avoidable, very undesirable. And where the case, as here, presents so many doubtful points, it is a consideration which, we think, ought not to be entirely overlooked. But we do not make it in any way determinative of our decision. That rests upon reasons drawn from the evidence on record as it stands in the light of certain admitted facts and dates. It is quite clear, in our opinion, there would have been no conviction of Laxman Totaram but for his own conduct. What tells most strongly against him is that very shortly after the inquiry conducted by Mr. Kalkar had re-

sulted in the dismissal of the complaint, the accused, Laxman Totaram, managed to lose the impugned sale-deed. His account of this is that after the termination of this inquiry in October 1913 he had taken the deed to a Vakil to obtain that legal gentleman's advice upon it. The Vakil then informed him that since registration had been refused and could not now be obtained, the deed was, for all practical purposes, mere waste paper. Adopting that view, the accused says, he took no particular care of it and that he believes that he dropped it out of his pocket while driving to his own village. The fact, however, lends itself to sinister comment and it is the more regrettable in a case of this nature that a document which is alleged to be a forgery should not be before the trying Court.

Again, the prosecution most strongly relied upon, the testimony of the four attesting witnesses. These agree in saying that they did not attest the signature of the complainant, Supdu, at all. That signature, as we are told, takes the form of a mere line which, the writer says, was made in his presence by the executant, Supdu, and the attestation of the witnesses is intended to guarantee that fact. All of them, however, say that the deed was brought to each separately by Laxman Totaram and that each in turn thus attested it, although the word "attest" so used is really an abuse of language. What they did attest was merely the deed as it stood, having a line which was said to be the mark of Supdu, and that is, of course, no guarantee that the line was in fact drawn by Supdu himself. It is contended, and there is force in the contention, that this is the kind of story which witnesses, situated as these witnesses were, would have been likely to tell. They knew that there was a great trouble about this document and they might very well have thought that the safest course was to tell a story which, whatever the decision of the Courts might ultimately be as to the genuineness or otherwise of the document, would have exposed them to no risk. There is, on the other hand, the writer Nathu who, of course, is obliged to substantiate the version of the accused. His position is quite different from that of the attesting witnesses and since he did write the deed and purports to have witnessed the mark made by Supdu,

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he could hardly go back upon that in his evidence without making himself liable as an abettor of forgery, if there had been a forgery. His evidence, therefore, although it tells in the accused's favour, has to be materially discounted upon such grounds.

The prosecution, again, very strongly relies upon the fact that the accused, although he must have known that no registration could be effected in the absence of the executant, Supdu, took the deed to the Registrar's office on the 28th of July.

It is further urged upon us that the accused says that the deed was in fact executed by Supdu on the 24th of July, whereas the evidence in the case proves conclusively that he was not in Neri on that day. It is, indeed, the conduct of the accused himself with reference to the registration of this document which has occasioned us so much difficulty in coming to our conclusion on the case as a whole. It is true that he must have known that his journey on the 28th to Jamner could produce no result and the only way it can be explained is by adopting his own explanation, namely, that he believed that Supdu was following him. However that may be, Supdu did not come to the Registrar's office and it was not until the 29th, the very day on which Supdu's complaint was verified, that the accused applied for notice. Now after that notice had been served and not complied with by the complainant, Supdu, and, as a result, registration had been finally refused by the Sub-Registrar on the 30th August, the accused took no further steps whatever to obtain registration of the deed. It is, therefore, true that by the time the deed was lost, it could have been of no use to him. It had remained unregistered till the time prescribed for appealing had elapsed. The rejection would, therefore, have been final and the deed being unregistered, could have no legal effect. Nevertheless, if the accused's story is true, it is strange that he should have allowed a genuine document of this kind to become nugatory without an effort. Against this, must be set the consideration that a complaint had been actually made by that time with reference to this very deed and that the complainant declared that it was a forgery. In such circumstances the accused might well have thought that there was very little likelihood of an appeal

to the Registrar being successful, at any rate until the criminal inquiry had terminated.

Now we have to consider another point which is of capital importance. The story of the complainant, Supdu, is that he required Rs. 1,000 from Dagdu and Dagdu had agreed to advance this to him upon a mortgage. It is obvious that upon this point the evidence of Dagdu was very material. He was not, however, examined in the Sessions Court, but the Judge appears to have admitted the deposition he made before the Magistrate under section 33 of the Indian Evidence Act. The conditions of that section, however, have not been complied with and no attempt appears to have been made in the Sessions Court to comply with them. Dagdu is, we are informed, still alive. He resides in a village within the jurisdiction of the Sessions Court and his attendance could have been procured without any very great delay or expense. Now, the application of such a section as 33 in criminal cases ought, in our opinion, to be confined within the narrowest limits. Where a witness is material, justice requires that he should, if possible, be examined at the trial in the presence of the accused. Where the evidence of a witness is not material, there is no need to introduce it under section 33. In this case, there can be no doubt that Dagdu's evidence was very material and the learned Sessions Judge has relied upon it in his charge to the Jury. There could have been no serious difficulty in bringing him before the Court and it was the right of the accused to have him there subjected to cross-examination, so that the Judge and the Jury might form their own opinion of the trustworthiness of the witness. It can only be in very extreme cases that it is right to make use of the evidence of an absent witness under section 33 in a criminal trial where that evidence, if true, would be extremely material, and this certainly was not such a case. We think, therefore, that the deposition of Dagdu ought not to have been admitted at all and is not evidence with which we are competent to deal now.

Again, it appears to us in view of all that had occurred that the evidence of Waman, kulkarni, was very material. The prosecution might well say that since that evidence practically destroyed their own case, it was not for them to call him. We think, how-

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ever, that the Court itself might very well have required his attendance, even if the accused had declined to call evidence on his own behalf. If Waman had given evidence in the Court of the same kind as his statement made during the inquiry before Mr. Joglekar and if that evidence had been believed, it is difficult to see how the present conviction could have been arrived at. There are other witnesses who were examined at earlier stages in the course of this inquiry, but who were not tendered for cross-examination in the Sessions Court. It is the accused's allegation that had many of these witnesses been cross-examined at the trial, their evidence would have been of great assistance to him.

Another defect in the procedure of the Sessions Judge is that the entire evidence of the complainant given before the Magistrate, Mr. Joglekar, was admitted as a whole during the cross-examination of that witness. Now, it is quite clear that if his previous deposition was intended to contradict him, it was contrary to principle to admit the evidence in this manner without first drawing the attention of the witness to every point upon which it was to be used to contradict him. It is equally clear that if the statement was intended to corroborate the witness as a whole, it could not have been put in in cross-examination. What actually happened, appears to have been that the witness was old and deaf and as the accused desired to make use of many statements in his former deposition which the prosecution had neglected to elicit from him at the Sessions trial, it was suggested by the cross-examining Counsel that if the witness admitted generally that all these statements were true, they might be put in, thus saving a great deal of time and trouble in the way of repeating each question and eliciting the same answers from him again in detail. To such a procedure no serious exception need be taken, but when it is combined with the same use of the same material for the purpose of contradicting the witness, the procedure followed by the learned Judge is obviously objectionable, and we think that in every criminal trial Judges cannot be too careful to conform strictly with the principles of evidence.

Now, in the absence of Dagdu's evidence before the Sessions Court we should certainly

not make use of any part of the statement he made before the Magistrate which, we think, had been wrongly admitted, to prejudice the accused. But there is much in it which favours the accused person here and, therefore, we think no injustice can be done if we point out that Dagdu clearly had not the command of so much money as to be able to make a loan of Rs. 1,000. His statement before the Magistrate, such as it is, suggests to us that the preliminaries of Supdu's story, in so far as they relate to the first transaction with Dagdu, are probably untrue. If, then, we find the story shaken at its foundation by the statement made by Waman on his own trial and accepted there and if we find again that the preliminaries of that story are not borne out by the evidence of the only material witness, Dagdu, it is clear that the conclusions reached by the learned Judge and one Assessor become at once exposed to criticisms from points of view not taken by the Judge himself and are open to serious and reasonable doubt. There is, in our opinion, an antecedent improbability in the *kulkarni* having deliberately given these blank papers to the Patil, Laxman Totaram. No reason is suggested why he should have done so and since it is the complainant's case that he (the *kulkarni*) wished to retain the papers in order to earn a fee by drafting the mortgage-deed upon them, this conduct becomes the more inexplicable. Then we have his own statement that they were never entrusted to him and that he never saw the papers. We say this from the attitude he adopted throughout the double trials in which he was himself an accused and there can be no doubt that had he been called, he would have adhered to the statements he then made. The fact that he was not called proves conclusively enough that the prosecution did not expect any assistance from him.

Then, again, there is to be considered the undeniable fact that after this complaint had already been made against him, the accused required the Sub-Registrar to issue notice to the complainant, Supdu, to come before him and acknowledge the correctness of the deed. If it had really been a forgery, it seems strange that the accused, Laxman Totaram, should have taken so bold a course at such a time. It may be suggested that as he had the writer with him and inasmuch as

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Supdu cannot write at all, he might hope easily to prove, in face of Supdu's own denial, that the line on the document was really Supdu's mark. Again, it is a strong point which we have not overlooked against the accused, that the consideration he alleges for the forged deed is money which he says that he advanced about a year before the events we have mentioned, occurred, on the occasion of the marriage of Supdu's granddaughter, Tulsi, with the accused's son, Kanya. There was such a marriage undoubtedly and we may accept Ganpat's (son of Supdu's) statement corroborated by that of the accused, that the marriage occurred somewhere about June 1912. The story which Supdu tells appears to us to be, on the face of it, absurd. He says he himself was wrongly confined and that he contributed Rs. 50 only to the marriage expense while Laxman Totaram defrayed the balance. On the other hand, it has not been made clear on behalf of the accused that he really expended Rs. 1,000 on Supdu's account for the purpose of this marriage. If that be the true story, Laxman Totaram should have had little difficulty in proving this by the production of vouchers and memos, of accounts. Nothing of the kind was attempted in the Sessions Court and Counsel for the appellant here protests that the point did not occur to any one during that trial, and that is the only reason why the accused did not meet it. It is certainly true that no great stress seems to have been laid upon this point, obviously material, even essential, we might say, though it is.

Lastly, the Government Pleader relies upon Sakham's evidence. In our opinion he belongs to a class of witnesses with whom we are too familiar in mofussil experience. If we could have said anything with confidence about any part of the case, we should have said that this witness, at any rate, was entitled to no credence whatever. He pretends to have come from his village which is at a distance of some fifteen miles from Neri on the evening of the 22nd of July. He admits that he is a relative of the accused and that is the sole ground upon which the learned Government Pleader insists that he ought to be believed. But if he were the

relative of the accused and not acquainted with Supdu, it is certainly strange that he should not have gone to the house of the accused, the Patil of the village. Next morning he learned that Supdu and his son had gone to the *kulkarni*. He followed them there just in time to witness Supdu making over the two stamp-papers to the *kulkarni* and requesting him to fill them in with the boundaries of his land. He then appears to have departed, accompanied by Supdu, to a village in which Dagdu does not reside. The whole of his story is absolutely false and tends to strengthen doubts arising out of the many grounds we have already indicated.

Our conclusion upon the whole matter is that although we think the case is one of very grave suspicion against the accused, there survive so many elements of doubt and the trial is so irregular in more than one important point that it would be unsafe to confirm the conviction and sentence. We, therefore, set it aside and direct that the accused be acquitted and discharged.

Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 468 OF 1915.

(TAKEN UP NO. 40 OF 1915.)

CRIMINAL APPEAL NO. 467 OF 1915.

September 28, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.

In re KARUPPAN SAMBAN—ACCUSED.

Evidence Act (I of 1872), ss. 32, 80—Dying declaration, admissibility of—Certificate of correctness by recording Magistrate—Presumption—Dying declaration reduced to writing—Substantive evidence—Criminal Procedure Code (Act V of 1898), ss. 164, 512.

An oral statement of a deceased person as to the cause of his death, if made in the absence of the accused, may be proved by any one who heard it made as well as by the person who recorded it. [p. 360, col. 2.]

Gouridas Nomasudra v. Emperor, 2 Ind. Cas. 341: 36 C. 359; 3 C. W. N. 680; 10 Cr. L. J. 186, referred to.

It is not necessary in order to make a dying declaration admissible in evidence that the

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Magistrate who recorded it be examined as a witness in the case. [p. 360, cols. 1 & 2.]

In the matter of the Petition of Samiruddin, 8 C. 211; 10 C. L. R. 11; *King-Emperor v. Mathura Thakur*, 6 C. W. N. 72, dissented from.

When the dying declaration has appended to it a certificate that it has been read over to the deponent and declared to be correct, and this is signed by the Magistrate who recorded the statement, section 80 of the Evidence Act creates a presumption that the circumstances under which it is stated to have been taken, are true. [p. 361, col. 1.]

Dying declarations which have been reduced to writing are under section 32 (1) of the Evidence Act admitted as relevant facts and become substantive evidence of the circumstances leading to the deceased person's death when the cause of the death is in question. [p. 360, col. 2.]

The Public Prosecutor, for the Government.

Mr. K. S. Jayarama Aiyar, for the Prisoner.

JUDGMENT.—Apart from the evidence of prosecution witnesses Nos. 7 and 8 that they recognise the accused, which the Sessions Judge considers doubtful, there is the evidence of prosecution witnesses Nos. 5 and 6 that they saw the accused running away after stabbing, and there are three dying declarations (Exhibits D, E and H) in which the deceased named the accused as his assailant.

But it is contended that Exhibit D, the principal of these, has not been properly proved, because the Magistrate who recorded it was not examined as a witness in the case. Reliance for this contention is placed on *In the matter of the Petition of Samiruddin* (1), *Gouridas Nomasudra v. Emperor* (2) and *King-Emperor v. Mathura Thakur* (3). A similar observation to that in *In the matter of the Petition of Samiruddin* (1), to the effect that when the Magistrate who records the dying declaration is not the Committing Magistrate and it is taken in the absence of the accused, it is not admissible unless the recording officer is examined as a witness, occurs also in *Panchu Das v. Emperor* (4). The learned Judges have not stated their reasons for this position, nor have they explained on what sections of the Criminal Procedure

Code and the Evidence Act it is based. In *Gouridas Nomasudra v. Emperor* (2), it is conceded that an oral statement of a deceased person as to the cause of his death, if made in the absence of the accused, may be proved by any one who heard it made, as well as by the person who recorded it. That is sufficient for the purpose of the case, as Exhibit D has been proved by the Sub-Assistant Surgeon who heard the statement being made and signed it. With all due deference, we are unable to follow the learned Judges who decided *In the matter of the Petition of Samiruddin* (1) and *King-Emperor v. Mathura Thakur* (3), when they say that the only way of proving such a statement is by calling a person who heard it made and permitting him to refresh his memory from the writing under section 159 of the Evidence Act. Whether they are treated as written statements of deceased persons or as written records of verbal statements, section 32 (1) allows dying declarations which have been reduced to writing to be admitted as relevant facts. They thus become substantive evidence of the circumstances leading to the deceased person's death when the cause of the death is in question. A statement taken in the absence of the accused from a witness for the prosecution is described as a 'deposition' in section 512, Criminal Procedure Code, but sections 157 and 158, Evidence Act, show that, if it satisfies the conditions of section 32, it is nevertheless a 'statement' and as such is relevant whether the absence of the witness is caused by his death or by some other cause which makes him incapable of giving evidence in person. Since the explanation to section 164 of the Criminal Procedure Code was added by the Code of 1898, the objection to Magistrates not having jurisdiction in the case recording dying declarations has lost its force.

Again section 164, Criminal Procedure Code, declares that confessions recorded under this section shall be recorded in the manner prescribed by section 364 for recording the confessions of accused persons, but mere statements of witnesses shall be recorded in one of such manners as are prescribed for recording evidence as the Magistrate may think best for the pur-

(1) 8 C. 211; 10 C. L. R. 11.

(2) 2 Ind. Cas. 841; 36 C. 659; 13 C. W. N. 680; 10 Cr. L. J. 198.

(3) 6 C. W. N. 72.

(4) 34 C. 698; 11 C. W. N. 666; 5 Cr. L. J. 427.

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pose. To lay down, as was done in *King-Emperor v. Mathura Thakur* (3), that dying declarations to be of use should, as a rule, set out the exact questions put to the dying person and the answer returned by him is, in effect, to insist on a procedure which the Code only makes obligatory in the examination of accused persons. How far the Court will treat the facts stated therein as proved by such statements is quite another matter.

When, as here, the dying declaration has appended to it a certificate that it has been read over to the deponent and declared to be correct and this is signed by the Magistrate who recorded the statement, section 80 of the Evidence Act creates a presumption that the circumstances under which it is stated to have been taken are true, the investigation by the Magistrate being a judicial proceeding. In this case, we have the additional security that the Medical Officer was present when the statement was taken and certified that the patient was in his senses at the time.

The other two statements, Exhibits E and H, recorded by the Village Magistrate and the Head Constable, have been proved by examining as witnesses Nos. 3 and 4 the officials who took them. They also are not inadmissible, although the value of Exhibit E, the earliest statement on record, is lessened by its being a joint statement of the deceased and of P. W. No. 6 who was simultaneously wounded, so that it is difficult to say how much of the statement represents the deceased's own words.

Some discrepancies are apparent by comparing the statements of the deceased made at different times with each other and also by comparing them with the depositions of the witnesses examined in the case, but they are not so serious as to cast doubt on the essential truth of the prosecution story.

We think that the Sessions Judge and the Assessors were right in coming to the conclusion that the accused was the person who stabbed the deceased. The nature of the wound which pierced the heart indicates his intention to kill. Two motives have been put forward for the crime, one being the immorality of the deceased who was admittedly keeping the accused's sister,

and the other being the deceased's refusal to send his sister, who was the accused's wife, to her husband. Both motives are mentioned in the deceased's statement to the Police, but only the former in his statement to the Magistrate. The Judge accepts the latter. It is difficult to say which was the real cause of the murder, but we consider that from any point of view, this is not one of those cases in which we should take the extreme step of altering the sentence from transportation for life to one of death.

We, therefore, confirm the conviction and sentence and dismiss the appeal. We do not interfere in the criminal revision case.

*Appeal and Petition dismissed;
Sentence confirmed.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL NO. 226 OF 1915.

July 29, 1915.

Present:—Mr. Justice Bachelor and
Mr. Justice Hayward.

JIVRAM DANKARJI—ACCUSED—

APPELLANT

versus

EMPEROR—PROSECUTOR RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 235 (1), 236, 237, 403—Previous acquittal on a charge of abetment of forgery—Subsequent trial under s. 471, Penal Code, whether barred.

Where in a trial for an offence under section 471, Indian Penal Code, for using a promissory note as genuine knowing or having reason to believe that it was a forged document, it appeared that the accused had previously been tried for abetting the forgery of the same document under sections 467 and 109, Indian Penal Code, but had been acquitted:

Held, (1) that inasmuch as no doubt could have arisen in the first trial as to the offence constituted by the facts proved, the case did not fall within the scope of section 236 of the Criminal Procedure Code and, therefore, was not governed by sub-section (1) of section 403; [p. 362, col. 1; p. 364, col. 1.]

(2) that the series of acts beginning with the forgery and ending with the user of the forged document in a Civil Court to support a civil claim must be regarded as so connected together as to form the same transaction or carrying through of a single pre-determined plan, so that under section 235 (1) of the Code it would have been competent to try the accused for both offences at the same trial,

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and the case, therefore, fell under sub-section (2) of section 403. [p. 362, col. 2; p. 364, col. 1.]

(3) that the plea of *autrefois acquit* was bad also for the reason that the case fell under sub-section (4) of section 403 of the Code, since the Court which acquitted the accused on the charge of abetment of forgery was not competent to try the offence under section 471, Indian Penal Code, inasmuch as at the time of the earlier trial no sanction for prosecution under section 471 had been given under section 195 of the Criminal Procedure Code. [p. 363, col. 1; p. 364, col. 1.]

In re Samsudin, 22 B. 711, referred to.

Criminal appeal from conviction and sentence passed by the Additional Sessions Judge at Ahmedabad.

Mr. T. R. Desai, for the Appellant.

Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.

BACHELOR, J.—This is an appeal from a conviction and sentence passed by the learned Additional Sessions Judge of Ahmedabad. The appellant has been convicted under section 471 of the Indian Penal Code of using as genuine a forged document. He was previously tried before the Court of Session in Ahmedabad under sections 467 and 109, that is to say, on a charge of abetment of forgery in relation to the same document, Exhibit 4, in respect of which he is now charged under section 471, and on the charges under sections 467 and 109 the appellant was acquitted by the Court of Session.

The first point taken in the appellant's favour is that this previous acquittal was a bar to the present trial under section 403 of the Criminal Procedure Code. The contention is that the appellant's case falls under the first sub-section of section 403. That sub-section provides that a person once acquitted shall not be liable to be tried again on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237. Now, sections 236 and 237 contemplate the case where it is doubtful upon the facts, which can be proved, which of several offences will be constituted by those facts. In illustration (a) is put the case where a person is accused of an act which, upon the facts provable, may amount to theft, or to receiving

stolen property, or to criminal breach of trust, or to cheating. Section 237 merely carries on the procedure applicable to cases provided for by section 236. It appears to me that the facts of the present appeal are wholly outside the scope of section 236. For, upon the facts which were capable of proof at the earlier trial, it could never, at any moment, have formed the subject of doubt what the particular offence was which could be established against the prisoner. The only facts appearing in proof at that trial were facts which went to establish the abetment of forgery: that offence, and no other, was the offence constituted by the facts then capable of proof. In the present prosecution, upon certain added facts, the evidence led goes to show that the prisoner committed the offence of dishonestly using a forged document, knowing that it was forged, and there can be no doubt but that if this evidence is believed, that is the particular offence constituted by the facts which can now be proved. We have not, therefore, before us such a case as section 236 contemplates, that is to say, a case where, upon the facts proved, it was doubtful what should be the true view of the offence constituted. It follows that the case is not governed by sub-section (1) of section 403.

In my opinion, the case falls under section 235, sub-section (1) of the Code, and if that is so, then admittedly under sub-section (2) of section 403, the accused's plea is unsustainable by virtue of the provisions of sub-section (2) of section 403. The series of acts beginning with the forgery and ending with the user of the forged document in the Civil Court to support the civil claim must, I think, be regarded as so connected together as to form the same transaction, or carrying through of a single pre-determined plan, so that under section 235 (1) it would have been competent to try the accused for both offences at the same trial. And I have no doubt that these two offences would be distinct offences within the meaning of section 403 (2), and not merely separable offences, as that term is explained in section 35 of the Code.

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Moreover, it appears to me that the appellant's plea is bad for another reason, namely, because the case falls also under sub-section (4) of section 403. For the Court which acquitted the prisoner on the charge of the abetment of forgery was, in my opinion, not competent to try the present offence under section 471, inasmuch as at the time of the earlier trial no sanction for the prosecution under section 471 had been given under section 195 of the Code. But section 195 (c) provides that in such a case as this, "no Court shall take cognizance" of any offence punishable under section 471 of the Indian Penal Code, "except with the previous sanction" of the Court in which the document was produced; in other words, as I understand it, the grant of such a sanction is a condition precedent to the Court's jurisdiction to try the offence under section 471, so that without that sanction the Court is not competent to undertake the prosecution. This view is, I think, supported by the decision in *In re Samsudin* (1) and though that ruling was delivered under the Code of 1882, the section of the old Code was worded in substantially the same terms as those employed in our present section 537. It was objected by Mr. Desai that section 537, clause (b), shows that a prosecution, though undertaken without the sanction prescribed by section 195, cannot be said to have been undertaken without jurisdiction. That, however, in my view, is not a legitimate inference from the section, which aims only at curing certain irregularities of procedure and to that end enacts that, "subject to the provisions hereinbefore contained", no finding is to be reversed by reason of the want of any sanction required by section 195. The very utmost that could be made of this provision would be an argument relevant only if the trial of the offence under section 471 had proceeded without a sanction and had resulted in a conviction. It might then have been contended, and contended against the appellant's interests, that the conviction was valid notwithstanding the want of the sanction. I say nothing of the merits of such an argument because, in truth, we

have nothing now to do with any consideration of this sort. It is enough to say that since there has been no conviction under section 471 without a sanction, those facts do not exist which alone can call section 537 (b) into operation. For these reasons I hold that the present plea is excluded by sub-section (4) of section 403.

On the merits there can, I think, be no question but that the learned Judge below is right and that the appellant had knowledge that this document was a forged document and used it dishonestly.

As to the question of sentence, it is true that the appellant is an old man and that he has been subjected to two criminal trials. At the same time, his offence is in itself a serious one, and he has had a specially light sentence awarded to him, no doubt, on a due consideration of these circumstances in his favour which I have noticed.

I think, therefore, that the sentence cannot be reduced, but that the conviction and sentence should be confirmed.

HAYWARD, J.—I concur as to the question of law. The first trial was for abetment of forgery and failed as the forgery was not proved to have been by the particular co-accused forger. The second trial was for knowingly using the forged document in a Civil Court.

It seems to me that no doubt could have arisen in the first trial as to the offence constituted by the facts which could have been proved so as to have justified an alternative charge or conviction under section 236 or section 237 of the Criminal Procedure Code. It was not a case like the illustration (a) to the former section, where the facts provable might have established either theft or receiving stolen property and where the necessary additional facts were not present to render possible a determination definitely whether the offence of theft or of receiving stolen property had been committed. The facts provable in the first trial, might have established that the accused had abetted the forgery by the particular co-accused forger. But they could not have established any other offence. It was not then alleged that he had used the forged document in the Civil

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Court. The facts were not the same in the two trials and recourse could not, therefore, in my opinion, be had to sub-section (1) of section 403 of the Criminal Procedure Code.

It seems to me that the abetment of the forgery was one offence and the using of the forged document in a Civil Court another and distinct offence committed in the same transaction, *viz.*, the endeavour to recover by forgery the money claimed through the Civil Court. The matter, therefore, fell within the first sub-section of section 235. The accused was only charged with abetment for forgery at the first trial, though he might, no doubt, apart from the necessity of previous sanction, have been charged with both offences, *viz.*, the abetment of forgery and the using of the forged document in the Civil Court. He was, therefore, liable to be charged at the second trial with this using of the forged document in the Civil Court under sub-section 2 of section 403 of the Criminal Procedure Code.

But it seems to me in any case that the Court at the first trial on the charge of abetment of forgery was not a Court of competent jurisdiction to try the subsequent charge of using the forged document in the Civil Court. For no Court shall take cognizance of such an offence without the previous sanction of such Civil Court under section 195. The second trial on the charge of using the forged document in the Civil Court was, therefore, legal under the fourth sub-section of section 403 of the Criminal Procedure Code. Nor could the Court at the first trial on the first charge be said, in my opinion, to have been a Court of competent jurisdiction to try the second charge of the second trial, by reason of the fact that proceeding illegally with that charge would not necessarily have vitiated the trial by virtue of section 537 (b) of the Criminal Procedure Code. Such proceeding would, in my opinion, nevertheless have been illegal, even though the illegality might have been subsequently condoned under certain circumstances under section 537 (b) by a superior Court.

I also concur on the question of fact, *viz.*, accused's guilty knowledge, and the propriety of the sentence.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 170B OF 1915.

August 23, 1915.

Present:—Mr. Justice Parlett.

N. M. DEY APPLICANT

versus

EMPEROR—RESPONDENT.

Poisons Act (I of 1904), s. 10 cls. (a), (b)—Retail sale by unregistered seller, legality of.

Retail sale of poison by a person is unlawful under section 10 of the Indian Poisons Act, unless exempted under clause (a) being a sale in exercise of his profession by a medical practitioner, or under clause (b) being a sale effected by a registered chemist or druggist. [p. 365, col. 1.]

The rules apply only to retail sales and wholesale sales are left uncontrolled. [p. 365, col. 1.]

Review of the order of the Western Sub-Divisional Magistrate of Rangoon, dated the 12th June 1915, passed in Summary Trial No. 184 of 1915.

JUDGMENT.—The petitioner was prosecuted for selling 1 lb. of cyanide of potassium in contravention of the rules made under section 2 of the Indian Poisons Act and published as Judicial Department Notification No. 24, dated 8th February 1909. He holds a diploma as qualified medical practitioner granted at Bombay, but he is also a chemist and druggist. It is quite clear he did not make the sale in exercise of his profession as a medical practitioner, so that the exemption granted by clause (a) of section 10 of the Indian Poisons Act did not apply. At the trial he also admitted that he was not duly qualified to act as a chemist and druggist under the law for the time being in force in the United Kingdom, and accordingly the exemption granted by clause (b) of the same section did not apply to him and he pleaded guilty and was convicted and fined Rs. 51.

His application for revision was admitted, because it was stated that the admission of his non-qualification as a chemist and druggist under the law in force in the United Kingdom was made under a misapprehension, and that he was in fact so qualified, and I allowed the matter to be argued so that it might be shown, if it could be that he was so qualified. Reference was made to 31 and 32 Vict., Chap. CXXI, and 32 and 33 Vict., Chap. CXVII. The general effect of those

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enactments appears to me to be that it is unlawful for a person in any part of Great Britain to sell poisons unless he is registered as a chemist and druggist under section 31 and 32 Vict., Chap. CXXI, or has been registered as legally qualified medical practitioner or falls into certain other clauses which have no application to the present case. The petitioner is admittedly not registered as a chemist and druggist under section 31 and 32 Vict., Chap. CXXI, nor is he registered as a legally qualified medical practitioner within the meaning of section 1 of 32 and 33 Vict., Chap. CXVII, but it is said that he possesses qualifications which would entitle him to be so registered. The provisions of the English Act, however, appear to me to be clear and to require the registration of a person in one or other capacity before he can sell poisons under the law in force in the United Kingdom. Not being so registered, petitioner is not qualified to act as a chemist and druggist under the law in force in the United Kingdom, and he cannot claim exemption under clause (b) of section 10 of the Indian Poisons Act.

A point was also raised in the argument that as the rules apply only to sales by retail, they were not infringed in the present sale as the sale in question was wholesale. The rules, it is true, only apply to retail sales, and apparently wholesale sales remain uncontrolled. The only ground suggested for holding the sale in this case to have been wholesale is that the bottle in which the poison was sold was unopened. That, however, is a manner in which ordinary retail sales of drugs are commonly made, and the argument has no force. The Acts and rules do not define retail and wholesale sales, but I feel no doubt whatever that the present sale was retail. It was of only 1 lb. of cyanide, and was combined with a sale of 1 lb. of nitric acid, certainly a small quantity for commercial purposes: it was for cash and was not made to an ostensible dealer who meant to retail it to others, but to some unknown person, evidently to the counterfeit coiner Ah Chaung himself, or an emissary of his. It was certainly retail.

As regards the sentence, I do not

consider it unduly severe. The facts of the case show the need of regulating such sales, and the fact that the rules have hitherto been commonly broken is no ground for special leniency.

The application is dismissed.

Application dismissed.

BOMBAY HIGH COURT.

CRIMINAL APPEAL NO. 294 OF 1915.

September 10, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

BASAPA NINGAPA—ACCUSED—APPELLANT
versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 342
(1)—*Duty of Court to question accused—Omission to do so, effect of—Procedure.*

The provisions of section 342 of the Criminal Procedure Code are imperative and must be strictly complied with. A failure to give the accused an opportunity of explaining the points against him is an illegality vitiating the whole trial. [p. 366, col. 1; p. 367, col. 1.]

Semle—In all criminal matters, the utmost strictness must be observed and forms must be clearly complied with where the liberty of the subject is at stake, when from the statute prescribing those forms it appears that they were presented by the Legislature in the interests of the accused. [p. 366, col. 2.]

Emperor v. Savatya Atma Pandya, 9 Bom. L. R. 356; 5 Cr. L. J. 332, followed.

Subramania Iyer v. King-Emperor, 3 Bom. L. R. 540; 11 M. L. J. 233; 5 C. W. N. 866; 25 M. G. 1; 28 L. A. 257 (P. C.); 2 Weir 271 and *Emperor v. Harischandra Talcherkar*, 7 Cr. L. J. 194; 10 Bom. L. R. 201, referred to.

Criminal appeal from conviction and sentence passed by the Sessions Judge of Bijapur.

Mr. Binning, with him Mr. K. H. Kelkar, for the Accused.

Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.

BATCHELOR, J.—This is an appeal by one Basapa Ningapa, who has been convicted by the learned Sessions Judge of Bijapur of the offence of using as genuine a forged document and has been sentenced to three years' rigorous imprisonment.

The Assessors agreed that the appellant was guilty of the offence charged.

The difficulty which confronts us in taking the view which was adopted by the learned Judge of trial arises from the manner in which the trial was conducted. There are

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several passages of importance in the judgment which we are unable to refer to any evidence upon this record. And though the learned Pleaders on both sides have done their best to assist us in this respect, none of them is able to justify these particular passages by reference to any recorded evidence. It would seem that the learned Judge allowed himself to refer to matters appearing in other litigation but not produced and proved upon the present record, as they should have been if they were to be used against the prisoner.

Apart from this generally unsatisfactory character of the trial, there has been, so far as we and the learned Pleaders can discover, a violation of the imperative provisions of section 342 of the Criminal Procedure Code, which enacts that for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, the Court may put such questions as it considers necessary, "and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." On the record before us it appears that the Court omitted to question the prisoner under this section. The case, therefore, in this respect resembles *Subramania Iyer v. King-Emperor* (1), where the Judicial Committee observed that "their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity." And if it was enough to vitiate the trial there that the accused was tried for more offences than the three offences which are permissible at one trial, then it seems to me *a fortiori* enough to vitiate this trial that the prisoner was convicted and sent to prison without being asked for his explanation of the matters appearing against him. That omission in my judgment goes deeper than the illegality which was committed in *Subramania Iyer's* case (1). For it is, I think, repugnant to one's natural sense of justice that a man should be convicted without being heard. It is no answer to that objection to say that the appellant had an opportunity of making a statement before the Committing Magis-

trate. For, first, he was entitled, if he chose, to reserve his statement until the Court of Session, and in any event, the law provides imperatively that before the Court of Session, he shall have an opportunity of making his statement. This view of the consequences of the violation of section 342 follows that which was taken by a Bench of this Court in *Emperor v. Savalya Atma Pasty* (2), where the conviction and sentence were reversed and a re-trial was ordered, the Court observing, in words which we commend to the attention of the learned Sessions Judge, that "in all criminal matters, the utmost strictness must be observed and forms must be closely complied with where the liberty of the subject is at stake, when from the Statute prescribing those forms it appears that they were prescribed by the Legislature in the interests of the accused." I may refer also to a similar case of *Emperor v. Harischandra Talcherkar* (3).

On these grounds, I am of opinion that this conviction and sentence should be set aside and that the accused should be re-tried before the Court of Session at Bijapur.

HAYWARD, J.—I concur that there must be a re-trial. There are two reasons: (1) the unsatisfactory state of the record, and (2) the omission to examine the accused as required by section 342 of the Criminal Procedure Code.

I have examined the record with care, but have found it difficult to ascertain whether all the documents therein contained were duly proved as required by law. Certain passages in the judgment moreover referred to facts drawn apparently from other documents not appearing upon the record.

It is difficult to ascertain from the judgment precisely what were the facts held established against the accused, and the difficulty has been enhanced by the omission to call on him to explain them. It is true, no doubt, that his examination before the Magistrate was formally recorded and that he was defended by a Pleader. But the examination before the Magistrate was but perfunctory, and the law requires that an opportunity shall be given to the accused himself to explain, and not that this important step in the procedure should

(1) 3 Bom. L. R. 540; 11 M. L. J. 233; 5 C. W. N. 866; 25 M. 61; 28 I. A. 267 (P. C.); 2 Weir 271.

(2) 9 Bom. L. R. 356; 5 Cr. L. J. 332.

(3) 10 Bom. L. R. 201; 7 Cr. L. J. 194.

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be left to his Pleader. It appears to me that failure to give the accused the opportunity himself of explaining the points against him, as required by section 342 of the Criminal Procedure Code, is more than a mere irregularity covered by the provisions of section 537 of the same Code. This view is confirmed by the decision of a Bench of this Court in the case of *Emperor v. Savalya Atma Pasty* (2) and is, in my opinion, the view which must be taken upon a consideration of the dictum of their Lordships of the Privy Council, viz., that "their Lordships are unable to regard the disobedience of an express provision as to a mode of trial as a mere irregularity," this dictum appearing in the case of *Subramania Iyer v. King-Emperor* (1).

Appeal accepted; Re-trial ordered.

MADRAS HIGH COURT.

CRIMINAL LETTERS PATENT APPEAL No. 68 OF 1915.

September 30, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

SUDALAIMUTHU CHETTIAR AND OTHERS

RESPONDENTS—APPELLANTS

versus

ENAN SAMBAN—PETITIONER—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 144, 147, 439—Revision—High Court, power of, to direct Subordinate Magistrate to take additional evidence—Jurisdiction—Order prohibiting use of public street, interference with Sentimental caste objections, if to be considered.

Per *Sadasiva Aiyar and Phillips, JJ.*—A High Court acting as a Court of Revision either under section 439 of the Code of Criminal Procedure or under section 15 of the Charter Act has power to direct a Subordinate Magistrate to take additional evidence, but it must on that evidence come to an independent finding itself and not accept the one arrived at by the Magistrate. [p. 367, col. 2; p. 370, col. 1.]

It is undesirable that orders passed under section 147 of the Code of Criminal Procedure should be interfered with in revision under section 439 of the Code of Criminal Procedure or section 15 of the Charter Act, unless they are made without jurisdiction or are obviously unreasonable and unjust. [p. 368, col. 1.]

Kamal Kuty v. Udaya Varma Raja Valia Raja of Chirakal, 17 Ind. Cas. 65; 12 M. L. T. 439; 23 M. L. J. 499; (1912) M. W. N. 1154; 13 Cr. L. J. 758; 36 M. 275, followed.

Per *Sadasiva Aiyar, J.*—A Magistrate has jurisdiction under section 147 of the Code of Criminal Procedure to pass orders even against the right

of passage through a public street. But he ought not to pass such a prohibitory order, unless it is clearly proved that there is a right by custom or by grant or by Statute in one section of the public to prevent another section of the public from using the public street on particular occasions or for particular purposes, when such use is ordinarily and *prima facie* lawful. [p. 370, col. 2.]

Koladai Nayakan v. Karabmba Saveli, 6 M. L. J. 193; *In re Narayana*, 7 M. 49; 2 Weir 115; *Karuppana Kovenden v. Kandaswami Kovenden*, 23 Ind. Cas. 730; 15 M. L. T. 230; (1914) M. W. N. 794; 15 Cr. L. J. 362; 26 M. L. J. 233; *Sawdhan v. Queen and Panchasani v. Queen*, 6 M. 233; 2 Weir 77 *Sabapada Chariar v. Krishnamoorthy Rao*, 30 M. 185; 9 Bom. L. R. 663; 5 C. L. J. 566; 17 M. L. J. 240; 4 A. L. J. 335; 11 C. W. N. 585; 20 I. A. 93; 2 M. L. T. 201, *Vijayacharya Chariar Emperor*, 26 M. 554; 13 M. L. J. 171; 1 Weir 260, followed.

Sentimental caste objections to the use of a public street should not be countenanced by Magistrates acting under section 147, Criminal Procedure Code, though they can in emergent cases pass temporary orders under section 144 when the preservation of the peace is required. Even in such cases, the temporary nature of the order cannot be attempted to be changed by continued renewals. [p. 369, col. 2.]

Gorinda Chetty v. Pecamal Chetty, 30 Ind. Cas. 453; 38 M. 489; 16 Cr. L. J. 629, followed.

Appeal, under clause 15 of the Letters Patent, against the order of Mr. Justice Tyabji, dated 25th March 1915, in Criminal Revision Case No. 467 of 1914, preferred against the order of the Court of the Sub-Divisional Magistrate of Tuticorin in the District of Tinnevely, in Miscellaneous Case No. 6 of 1914.

Messrs. V. C. Seshachariar and S. Krishnamachariar, for the Appellants.

Mr. M. H. Hakim, for the Government.

Messrs. E. S. Chidambaram Pillai and P. N. Marthandam Pillai, for the Respondent.

JUDGMENT.

PHILLIPS, J. The facts of the case are set out in my learned colleague's judgment. The points for consideration are

(1) whether the order of Tyabji, J., was correct;

(2) if not, what action should be taken by this Court in the question of revising the order of the Sub-Divisional Magistrate.

2. On the first point, I also think that section 439, Code of Criminal Procedure, even supposing that it is applicable to this case, does not give this Court power to call for a finding when exercising its powers of revision, although it does give power to call for additional evidence upon which this Court can itself come to a conclusion. I

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think, therefore, that the learned Judge's order, which apparently was based solely upon the finding submitted by the Sub-Divisional Magistrate, was not correct. The additional evidence must be weighed by the Court of Revision, and its decision based upon a consideration thereof. I agree, therefore, that the order appealed against cannot be supported.

3. In this view it is necessary to consider the second point and determine what action is to be taken on the revision petition. In *Kamal Kutty v. Udaya Varma Rayavalia Raja of Chirakal* (1) Ayling and Napier, JJ., have held in a carefully considered judgment that this Court has no power under section 439, Code of Criminal Procedure, to revise proceedings under Chapter XII of that Code, and support their conclusion by a consideration of the various authorities. Proceedings under Chapter XII are of a special nature and are such that the Magistracy may well be allowed greater liberty in carrying out those provisions than they are allowed in trying ordinary crime. The provisions of the Chapter are concerned with disputes relating to immoveable property which are likely to cause a breach of the peace, and give Magistrates power to deal with matters of a quasi-civil nature, because upon the Magistracy and Police is thrown the burden of maintaining the public peace. In this view I think it undesirable that such orders should be interfered with in revision, unless they are made without jurisdiction or are obviously unreasonable or unjust. I can, therefore, see no reason to differ from the conclusion arrived at in *Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal* (1), which is also the view of the other High Courts.

The power of revision in this case must be exercised, if at all, under section 15 of the Charter Act, and as pointed out by Ayling and Napier, JJ., in the same case, it has never been customary for this or other High Courts to interfere except where it can be said that the Magistrate's order was passed without jurisdiction. I will not deal with the one or two cases which have not followed this custom, such as *Reid v. Richardson* (2), for when a discretionary power is to be

exercised it may happen that certain circumstances exist in a particular case which would justify interference in revision on grounds which would not ordinarily justify such interference, and I am far from holding that the powers of this Court under the Charter Act should be construed in a limited manner. Can it be now said that the Magistrate's order was passed without jurisdiction or that it is such an exceptional case that it warrants a departure from the ordinary custom of this Court? The latter part of the question must certainly be answered in the negative. As regards the question of jurisdiction, the only contention raised is that an order under section 147, Code of Criminal Procedure, cannot be passed in respect of a public road or street and that, therefore the Magistrate's order was without jurisdiction. In support of this argument we are referred to the dictum of Subramania Aiyar and Davis, JJ., in *Kolandai Nayakan v. Karabudda Savudri* (3): "It is open to question whether section 147, Criminal Procedure Code, applies to a question like the present—the right to use a public highway." I see nothing in the language of section 147 which necessarily debar a Magistrate from passing an order with reference to a public street and in *Karuppana Kownden v. Kandasami Kownden* (4) it was expressly held that the terms of the section were wide enough to cover disputes when the right of way claimed is a right to a public path. Further, it does not appear certain that in this case the order does refer to a public street. No doubt the Sub-Divisional Magistrate has submitted a finding that A-B, B-C on the plan is a public street, but it was his predecessor that passed the order under section 147, Code of Criminal Procedure, in which he remarked: "Further the right is claimed for Sambans only and it is said that other castes higher than they, are not allowed to pass by the street." Such a prohibition is quite inconsistent with the view that it is a public street, over which the public generally has a right to pass. In the later finding also it is observed that the site of an oil mill in the middle of the street is private property, and on one side of the oil mill, there is a passage wide

(1) 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 49; 23 M. L. J. 499; (1912) M. W. N. 1154; 13 Cr. L. J. 753.

(2) 14 Q. 361.

(3) 6 M. L. J. 193.

(4) 23 Ind. Cas. 730; 15 M. L. T. 230; (1914) M. W. N. 394; 15 Cr. L. J. 362; 16 M. L. J. 233.

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enough to take two persons abreast, while on the other side, the passage is even narrower. The ground surrounding the oil mill is also claimed as private property. In these circumstances, I cannot hold that the passage in question has been proved to be a public street, although it is quite possible that the portion B-C may be a public street. Whether a portion of the prohibited area is public street or not, I am of opinion that the order passed was not made without jurisdiction and I would, therefore, allow the Letters Patent appeal and restore the order of the Sub-Divisional Magistrate.

SADASIYA AIYAR, J.—This Letters Patent appeal has been presented against the order of Mr. Justice Tyabji, passed on a revision petition preferred against the order of the Tuticorin Sub-Divisional Magistrate. The order of the Magistrate is dated 23rd April 1914 and was passed under section 147 of the Criminal Procedure Code. The order is to the effect that processions connected with weddings, funerals and festivals shall not be taken by Sambans residing in the Paracherry (past an oil mill along A-B) and then northwards from along the oil-mongers' street B-C, until the Sambans obtained the order of a competent Court authorising them to do so. (See the plan in the case.) The reason given for the order is that though the claim of the Sambans is supported by the oral evidence of the village officers, the Magistrate does not believe it because the Sambans have not exercised the right unchallenged to pass by the street of the oil-mongers. It seems clear that the Sub-Divisional Magistrate made no distinction between A-B and B-C. His reference to "other castes higher than" the Sambans not being allowed by the Chetties "to pass by the street" applies evidently to both A-B and B-C, and I think it very probable that the question of private or public street was not considered by him at all. The higher castes referred to in the Magistrate's order are two castes higher than "Sambans" (Pallars and Nadars) and not higher than the Chetties. (See paragraph 5 of the statement of the Chetties as counter-petitioners.) It is also clear from paragraphs 7 and 5 of the said statement that except

as regards the portion A-B (a comparatively small length of the whole disputed length of street), the Chetties did not claim private right of ownership over the Chetty street and based their claim to prohibit the Sambans on the ground of caste pollution by processions of Sambans being allowed to go through. I do not think that such sentimental caste objections should be countenanced by the Magistrates acting under section 147 of the Criminal Procedure Code, though of course they can, in emergent cases, pass *temporary orders* under section 144 (even if such orders encourage caste 'bigotry') when the preservation of the public peace is required. Even in such cases, the temporary nature of the order cannot be attempted to be changed by continued renewals [see *Govinda Chetti v. Perumal Chetti* (5)].

Mr. Justice Tyabji on revision held (a) that if the roads A-B and B-C in question are public roads, an order prohibiting certain members of the public from passing over such public roads until they established their right to do so in a competent Court was a "futile order" and should be set aside in revision; and (b) that as the Magistrate had not in his order dealt with the question whether the roads were public roads or not, the case should be remitted to the Magistrate to report on that question, the learned Counsel who appeared on both sides before Mr. Justice Tyabji having suggested that course.

On this first order of Mr. Justice Tyabji, the records were sent to the Magistrate who sent his report, in which he gave the following findings:—

(a) A-B in the plan is a passage used freely at all times by the people of all classes. "B-C is a public street in the fullest sense of the term, a fact which the Chetties themselves do not attempt to controvert."

(b) The mill marked 4 in the plan within the area A-B is the private property of the appellants (Vania Chetties).

(c) The whole area A-B, except the site of the mill 4 and the site of the temple

(5) 30 Ind. Cas. 453; 38 M. 489; 16 Cr. L. J. 629.

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5, is a public street, though the Chetties are entitled to obstruct the public from using the road to this extent, namely, that they could work the mill by yoking bullocks to a shaft attached to the mill and the public cannot at these times use that narrow fraction of the passage (varying in location) which is covered by the shaft and bullocks.

The report containing the above findings was accepted by Mr. Justice Tyabji, who in his second order on the revision petition set aside the Divisional Magistrate's order prohibiting the Sambans from using the paths A-B and B-C.

Mr. Seshachariar who appeared for the appellants (Chetties) before us contended, among other things, that the learned Judge erred in deciding the case upon the finding submitted by the Magistrate. I think there is some force in this contention. I shall take it that under section 15 of the Charter Act, this Court's power of revision can be exercised to the like extent (at least) to which the powers of revision can be exercised in a case coming under section 439, Criminal Procedure Code. Section 439 gives the High Court power to exercise all the powers of a Court of Appeal under section 428. Section 428 allows fresh evidence to be taken by the Appellate Court or by a Magistrate under the orders of the Appellate Court, but the Appellate Court has to come to its own conclusion upon the evidence so taken and there is no provision in section 428 allowing the Appellate Court to accept the finding of the Magistrate come to on such evidence. The gist of the evidence given in this case is fully set out by the Magistrate in his report and on that evidence I think the Magistrate was not justified in finding that the whole of the circle made by the round of the bullocks does not belong to the Chetties, but only the mill site. I think that the whole site included within the circumference trodden by the bullocks belongs to the Chetties.

It was contended further for the appellants that Mr. Justice Tyabji was in error in holding that the Magistrate had no jurisdiction to pass orders under section 147 where the right of way in question was through the public streets. It is doubtful whether Mr. Justice Tyabji in his first

order went so far as to say that the Magistrate had no jurisdiction to pass such orders even in cases where the order was an order of prohibition of the use of the right of public way. So long ago as in 1896, Subramania Aiyar and Davies, JJ., had no doubt said in the case reported as *Kolandai Nayakan v. Karabudda Saundri* (3): "It is open to question whether section 147, Criminal Procedure Code, applies to..... the right to use a public high way". In Criminal Revision Case No. 402 of 1908 also, Benson and Sankaran Nair, JJ., set aside the order of the Divisional Magistrate prohibiting the use of the public way under section 147 as made without jurisdiction. To support that conclusion they relied (among other grounds) upon an old case, *In re Narayana* (6), which was decided under section 532 of the old Code of 1872. In the case of *Karuppanna Kownden v. Kandasami Kownden* (4), Spencer, J., and myself held generally that the Magistrate had jurisdiction to pass orders in respect of public streets also under section 147, though that was a case where we interfered in favour of the right of passage. I shall, therefore, take it that the Magistrate had jurisdiction to pass orders even against the right of passage through a public street. But, in my opinion, he ought not to pass such a prohibitory order unless it is clearly proved that there is a right by custom or by grant or by a Statute in one section of the public to prevent another section of the public from using the public street on particular occasions or for particular purposes, when such use is ordinarily and *prima facie* lawful. In the case of *Sadagopa Chariar v. Rama Rao* (7), Davies and Benson, JJ., held [following the case of *Sundram v. Queen* and *Ponnusami v. Queen* (8)] that "every member of the public, and every sect, has a right to use the public streets in a lawful manner, and it lies on those who would restrain him in its exercise to show some law or custom having the force of law depriving him of the privilege" (page 384). This decision was confirmed by the Privy Council [in the case of *Sadagopa Chariar v.*

(6) 7 M. 49; 2 Weir 115.

(7) 26 M. 376.

(8) 6 M. 203; 2 Weir 77.

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Krishnamoorthy Row (9), notwithstanding the doubt thrown upon it by Justice Sir Subramania Aiyar, who sat in a Full Bench with Justices Davies and Benson, in another case reported in the same volume as the case of *Vijayaraghava Chariar v. Emperor* (10). In this case, no such custom having the force of law prohibiting the use of the public street (whether the public street is B-C alone or A-B and B-C together or B-C and a portion of A-B) by the Sambans was set up or proved. Even if the whole of the area A-B is private property, the Sub-Divisional Magistrate's order prohibiting the Sambans from going through even the portion B-C (an admitted public street) is clearly erroneous, the Sambans having public streets 15 and 2, 9, 7 in the plan through which they could come to point B besides the path A-B). On my finding that besides the greater length B-C which is admittedly public street, the remaining portion alone of the area A-B after excluding the area enclosed by the mill bullocks' round, forms the public street, I would modify the order of Mr. Justice Tyabji and pass an order that the respondents shall not use the area covered by the round of the oil mill bullocks, until they obtain the decision of a Civil Court and that in other respects the order of the Sub-Divisional Magistrate prohibiting the Sambans from taking processions even along the admittedly public street B-C and along the portion of A-B which I find to be the public street, should be set aside.

Under clause 36 of the Letters Patent, the order of Tyabji, J., will be modified as above mentioned.

Order modified

(9) 30 M. 185 (P.C.); 9 Bom. L. R. 663; 5 C. L. J. 566; 17 M. L. J. 240; 4 A. L. J. 333; 11 C. W. N. 585; 30 I. A. 93; 2 M. L. T. 204.

(10) 26 M. 554; 13 M. L. J. 171; 1 Weir 260.

BOMBAY HIGH COURT.

CRIMINAL APPEAL NO. 361 OF 1915.

August 26, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

SHANKAR RAMDAS—ACCUSED

—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1908), s. 370 (i).

—Duty of Presidency Magistrate to give reasons for convicting accused—Reasons not given—Judgment, effect of.

Section 370, clause (i), of the Criminal Procedure Code requires that there should be a statement of the reasons which induce a Presidency Magistrate to believe the evidence for the prosecution.

Natabar Ghose v. Prokash Chandra Chatterjee, 27 C. 461; 4 C. W. N. 467, followed.

Where, therefore, a Chief Presidency Magistrate convicted an accused, inflicting imprisonment and merely recording the following judgment:

"I convict accused. I believe the evidence of complainant and the witnesses for the prosecution."

Held, that the judgment did not satisfy the requirements of clause (i) of section 370 of the Code.

Criminal appeal from conviction and sentence recorded by the Chief Presidency Magistrate of Bombay.

JUDGMENT.—This is an appeal from a judgment of the learned Chief Presidency Magistrate who convicted the accused, Shankar, Ramdas under section 451 of the Indian Penal Code and, the accused having admitted certain previous convictions, passed a sentence of eighteen months' rigorous imprisonment.

We were compelled to call for the record and proceedings, as the learned Magistrate's judgment did not disclose to us any reasons why the evidence for the prosecution was accepted as sufficient. While we certainly have no wish to impose upon the Presidency Magistrate any further burden than is imposed by the express terms of the Criminal Procedure Code, we think his attention should be drawn to the requirements of clause (i) of section 370 of the Code and to the decision in *Natabar Ghose v. Prokash Chandra Chatterjee* (1) with which we agree. In the present case the learned Presidency Magistrate has written only: "I convict the accused. I believe the evidence of the complainant and the witnesses for the prosecution." That belief, however, is necessarily implied in the fact that the learned Magistrate convicted the accused. And in our opinion clause (i) of section 370 requires that there should be a statement of the reasons which induced the learned Magistrate to believe the evidence for the prosecution.

The appeal is dismissed.

Appeal dismissed.

(1) 27 C. 461; 4 C. W. N. 467.

In re SUBBARAYA PILLAI.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 262 OF 1915.

CRIMINAL REVISION PETITION No. 213
OF 1915.

October 27, 1915.

[Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Phillips.

In re SUBBARAYA PILLAI AND OTHERS—

ACCUSED—PETITIONERS.

*Cattle Trespass Act (I of 1871), s. 10—Trespass—
Watchman seizing cattle, legality of.*

Under section 10 of the Cattle Trespass Act, a watchman watching crops on the land on behalf of the cultivator or occupier is entitled to seize cattle trespassing on the land under his charge, when he is given general instructions to seize them while so trespassing.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1895, praying the High Court to revise the judgment of the Court of the First Class Sub-Divisional Magistrate of Kumbakonam Division, in Criminal Application No. 46 of 1915, preferred against the judgment of the Court of the third Class Magistrate of Tiru-wadamarudur, in Civil Case No. 443 of 1914.

Dr. S. Swaminadhan, for the Petitioners.

Mr. P. R. Grant, for the Government.

ORDER.—The only ground for revision argued before us is that the unpounding of the cattle by prosecution witness No. 1, who is a watchman employed by the owner of the seed bed, was not authorised by section 10 of the Act. The section says that the cultivator or occupier may "seize or cause to be seized any cattle trespassing;" and we do not think that it can be contended that he is not entitled to give general instructions to his watchman or other servants to seize all trespassing cattle or that if the watchman or servant so instructed seizes cattle, the cultivator or occupier does not cause them to be seized within the meaning of the section. In the present case the legality of the 1st prosecution witness's action in this respect was not attacked in the lower Courts. He deposed that he was employed to watch the crops and that he had impounded many cattle. We do not feel called upon to direct evidence to be taken on this point in view of the late stage at which it is raised and we can find no ground for interference with the conviction.

The criminal revision petition is dismissed.

Petition dismissed.

BECHAR ANOP v. EMPEROR.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 276 OF 1915.

August 19, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

BECHAR ANOP—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—DEFENDANT.

*Penal Code (Act XLV of 1860), s. 97—Voluntarily
and deliberately engaging in fighting—Private defence,
plea of.*

The right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them. [p 373, col. 2.]

Where, therefore, it appeared that a fight took place in a public street and both sides voluntarily engaged in it:

Held, that it was not open to the members of either party to claim the right of private defence. [p. 373, col. 1.]

Reg. v. Knock, (1877) 14 Cox. C. C. 1; *Kabiruddin v. Emperor*, 35 C. 368 at p. 376; 12 C. W. N. 384; 7 C. L. J. 359; 7 Cr. L. J. 256; 3 M. L. T. 385, referred to.

Criminal appeal from convictions and sentences recorded by the Sessions Judge of Broach

Mr. G. N. Thakor, for the Accused.

Mr. S. S. Patkar, Government Pleader,
for the Crown.

JUDGMENT.

BATCHELOR, J.—This is an appeal from a judgment of the learned Sessions Judge of Broach, who convicted the three appellants of voluntarily causing grievous hurt otherwise than on grave and sudden provocation, and under section 325 of the Indian Penal Code sentenced accused Nos. 1 and 2 to five years' rigorous imprisonment and accused No. 3 to one year's rigorous imprisonment.

The only contention advanced by the learned Pleader on behalf of the appellants was that the learned Judge below should have acquitted the appellants, on the ground that they were entitled by their right of private defence to use the violence which in fact they did use. The evidence, however, satisfies us that the fight which resulted in the death of one man and in injuries to one or two others, took place in the public street between the accused's party and the deceased's party, and that both sides voluntarily engaged in it. There is every reason to believe that both sides

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were more or less drunk on the occasion in question, the quarrel having arisen about a log of wood which was thrown into the Holi fire and the parties belonging to a caste in which it is usual to make the festival of Holi a pretext for intoxication and quarrelling. Now where both sides voluntarily and deliberately engage in fighting as in the circumstances now before us, it is not, I think, open to a member of either party to claim the right of private defence. In Russell upon Crimes (7th Edn., Vol. I, p. 810, Bk. IX, Chap. I), the law is stated in the following words:—"The law is that if the blow, from the effect of which the deceased died, was given purely in self-defence, as distinguished from a desire to fight, it is excusable, and it is a question for the Jury whether the prisoner struck the blow in self-defence, or whether he really desired to fight:" see *Reg. v. Knock* (1). And in India we have a similar decision by the Calcutta High Court in *Kabiruddin v. Emperor* (2), where Mr. Justice Rampini says:—

"I have no doubt that according to the Penal Code no right of private defence arises in circumstances such as those of the present case, when both parties armed themselves for a fight to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle, killing one man and wounding others...in the present case the appellants, if they had any right of private defence, which in the circumstances in my opinion they had not, did not act within the legal limits of such right. They did not restrict themselves merely to the use of such force as was necessary to resist trespass. On the contrary, they far exceeded their right, if they had any, for they killed a man and inflicted serious injuries on others."

So here, even if it could be shown by the appellants, on whom the onus lies, that they were entitled to the right of private defence—and in my opinion it cannot be so shown—yet it is manifest that they exceeded that right by causing the death of the deceased man on whom no less

than eleven injuries were found. But, as I have said in my judgment, this appeal fails because the right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them.

The convictions must, therefore, be confirmed. But in view of all the circumstances disclosed on the record, I think that the sentences passed upon accused Nos. 1 and 2 may safely be reduced to sentences of two years' rigorous imprisonment in the case of each.

HAYWARD, J.—I concur.

Convictions confirmed; Sentences reduced.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 487 OF 1915 AND
CRIMINAL REVISION CASE No. 514 OF 1915.
CRIMINAL REVISION PETITION No. 409
OF 1915.

October 26, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Phillips.

In re G. G. JEREMIAH—ACCUSED—
PETITIONER—APPELLANT.

Criminal Procedure Code (Act V of 1898), ss. 260, 530—District Magistrate not empowered to try European British subjects—Summary trial by such Magistrate, whether valid.

Where a European British subject was convicted by the District Magistrate of Bangalore, who was also a Justice of the Peace, of an offence under section 8 of the Municipal By-law 3 after a summary trial under section 260 of the Criminal Procedure Code:

Held, that inasmuch as the District Magistrate was not empowered to try a European British subject summarily, his proceedings were void under section 530 of the Criminal Procedure Code. [p. 375, col. 1.]

Appeal against the order of the Court of the District Magistrate and Justice of the Peace

(1) (1877) 14 Cox. C. C. 1.

(2) 35 C. 368 at p. 376; 12 C. W. N. 384; 7 C. L. J. 359; 7 Cr. L. J. 256; 3 M. L. T. 385.

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of the Civil and Military Station of Bangalore Division, in case No. 5 J. P. of the Calendar for 1915.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the said Magistrate in the said case.

FACTS.—Accused G. G. Jeremiah, a volunteer in the "G." Company, was prosecuted before the District Magistrate, Civil and Military Station, Bangalore, for the offence of failing to take out a license for his cycle, which he rode at 2-10 p. m. on the Residency Road with a military description on the 18th May last.

Accused while admitting the offence pleaded exemption as a cyclist volunteer. The Magistrate in his finding observed that the accused, who was previously a cyclist volunteer in the "G." Company, Bangalore Rifle Volunteers, was struck off the strength of the corps on the 3rd February 1915 by order of the Officer Commanding. Since that date, consequently, accused was not borne on the rolls of the corps. Accused asserted that the Colonel's order, which appeared in the Battalion Order Book under the Adjutant's signature, was illegal and void. He contended that if he had been wrongly removed, then he was still a volunteer.

In these circumstances, the Magistrate held that whether the order was legal or illegal the fact remained that since 3rd February 1915, accused was not borne on the rolls of the corps and was not recognized by the corps as a member thereof. Finding the accused not to be a *bona fide* Cyclist Member of the Volunteer Corps on the date of the offence, the Magistrate fined him Rs. 3. The present appeal revision petition to the High Court are against that order.

Mr. L. A. Govindaraghava Aiyar, for the Appellant-Petitioner:—Bangalore was no part of British India and the Criminal Procedure Code was made applicable to Bangalore by virtue of declarations made from time to time by the Governor-General, in virtue of the powers conferred upon him by the orders in Council of His Majesty the King-Emperor under Foreign Jurisdiction Rules.

The jurisdiction of the Magistrates in Bangalore over European British subjects was by virtue of special powers conferred

upon them, and there was no provision empowering them to try European British subjects summarily under section 260 of the Code of Criminal Procedure.

The Public Prosecutor, for the Government, submitted that he could not answer the objection raised by the Vakil for the appellant.

JUDGMENT.—Appellant (a European British subject) has been convicted by the District Magistrate of Bangalore, who is a Justice of the Peace, of an offence under section 8 of the Municipal By-law 3 after a summary trial under section 260 of the Code of Criminal Procedure.

Mr. Govindaraghava Aiyar argues in his behalf that the Magistrate's proceedings are void under section 530 of the Code of Criminal Procedure, inasmuch as the District Magistrate is not empowered to try a European British subject summarily. This appears to be so.

The Criminal Procedure Code does not apply primarily to Bangalore which is no part of British India, and is only in force there by virtue of the declarations of the Governor-General in Council in the exercise of powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902. The latest declaration is No. 732-D, dated 19th March 1913, but this provides with reference to the Code of Criminal Procedure: "Nothing in the Code as applied shall be deemed to apply to proceedings against European British subjects or persons charged jointly with European British subjects."

The effect of this is to refer us back to an earlier declaration under the same authority No. 680-2B, dated 19th March 1912, which is still in force and which regulates the powers of Justices of the Peace beyond the limits of British India in regard to European British subjects. This notification [issued subsequent to the decision of this Court in *In re Lawrence* (1)] confers on such officers certain specified powers, among which the power of trying offenders summarily under section 260 of the Code of Criminal Procedure is not included: and we must take it that the powers of the District Magistrate as Justice of the Peace as regards European

(1) 9 Ind. Cas. 255; 34 M. 346; 12 Cr. L. J. 42; 9 M. L. T. 322; (1911) 2 M. W. N. 193.

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British subjects are confined to those conferred on him thereunder.

It follows from that the trial of the appellant was void.

We set aside the conviction and direct the refund of the fine, if paid. In view of the petitioner of the case, we do not order retrial under the ordinary procedure.

Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 273 OF 1915.

April 17, 1915.

Present:—Mr. Justice Rattigan.

EMPEROR—PROSECUTOR—PETITIONER

versus

RAGHBIR SINGH—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 181, 1. (2)—Criminal breach of trust—Place of trial—Jurisdiction.

Where the complainant charged the accused under section 408, Indian Penal Code, alleging that the complainant had engaged the accused to manage a branch agency at Rurki, that accounts were sent by accused to Rawalpindi for some time but subsequently discontinued and that on inspection of the accounts it was found that the accused had made false entries in respect of certain items:

Held, that inasmuch as the allegations in the complaint referred distinctly to three or four specific items in respect of which the accused was charged with having committed the offence of criminal breach of trust at Rurki, the Rawalpindi Court had no jurisdiction to try the case. [p. 376, col. 2.]

Gokal Chand v. Phul Chand, 5 Ind. Cas. 850; 7 P. R. 1910 Cr.; 7 P. W. R. 1910 Cr.; 172 P. L. R. 1910; 11 Cr. L. J. 253, followed.

Case reported by the Sessions Judge, Rawalpindi Division, with his No. 114 of 3rd February 1915.

FACTS.—The accused was refused his application to be tried at Rurki (where the offence under section 408, Indian Penal Code, was alleged to have been committed) instead of Rawalpindi by order of Major T. O. Browning, Cantonment Magistrate, exercising the powers of a Magistrate of the First Class, Rawalpindi, dated 14th December 1914.

GROUND.—The statement on oath of the complainant in this case amounts to an accusation that the accused, who was his servant in Rurki, had embezzled and misappropriated Rs. 100 in that place. The

complaint is brought, therefore, under section 408, Indian Penal Code. The Cantonment Magistrate has taken cognisance of the offence and it is urged by the learned Advocate, who represents the accused, that the case is not cognisable in the Court of the Cantonment Magistrate, but should, under the provisions of the Criminal Procedure Code, section 181, be heard and tried in Rurki where the offence was committed.

I consider that this contention is correct and as the Cantonment Magistrate has continued hearing the case since I sent him a copy of my order, dated 22nd December 1914, I am constrained to report the case on the revision side to the learned Judges of the Chief Court, with a view to the proceedings being set aside and the case being tried in Rurki where the offence is alleged to have taken place and where the accused would be in a better position to defend himself.

The accused will in the meantime remain on the bail already ordered. Submitted with the record for orders.

Sirdar Sewa Ram Singh, for the Crown.

Dr. Shuja-ul-Din, for the Accused.

ORDER.—The question referred to this Court by the Sessions Judge, Rawalpindi, is whether the Court of the Magistrate, First Class, Rawalpindi, has jurisdiction to entertain the complaint preferred by Lala Bashambar Das, charging the accused, Raghbir Singh, with the commission of an offence under section 408, Indian Penal Code.

The allegations in the complaint are to the effect that the complainant, who is an Artillery Treasurer in the Rawalpindi Cantonment, about three years previously engaged the accused as his servant to carry on, and manage, a Branch Agency at Rurki; that accounts were sent by accused to Rawalpindi up to January 1904, when accused discontinued sending them; that complainant's suspicions were aroused and he sent for accused, who came to Rawalpindi and undertook in writing to render accounts and pay whatever might be due to the complainant; that accused thereafter never came to Rawalpindi; and that on inspection of his accounts it was found that he had made false entries in respect of three items of Rs. 400, Rs. 125 and Rs. 656, and probably also other false entries. Complainant charged the accused

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with having committed the offence of criminal breach of trust, punishable under section 408, Indian Penal Code, and prayed that he might be dealt with according to law.

Section 181, clause (2), of the Criminal Procedure Code provides that the offence of criminal misappropriation or of criminal breach of trust may be inquired into and tried by a Court within the local limits of whose jurisdiction any part of the property, which is the subject of the offence, was received or retained by the accused person or the offence was committed. Upon the allegations in the complaint, there can be no doubt that the Court at Rurki would have jurisdiction to deal with the offence with which the accused is charged.

The question, however, is whether the Court at Rawalpindi has also jurisdiction to deal with it. *Gokal Chand v. Phul Chand* (1), *Chint Singh v. Emperor* (2) (Criminal Miscellaneous No. 58 of 1900), and *Ganesh Lal v. Nand Kishore* (3) are authorities directly in point and in support of the contention that the Rawalpindi Court has not jurisdiction.

For the complainant, Mr. Sewa Ram Singh relies on *Uttam Chand v. Emperor* (4), *Ishar Das v. Emperor* (5), *Rajani Binode Chakravarti v. All India Banking and Insurance Company Limited, Lahore* (6), *Sucumathan Chettiar v. Annamalai Chettiar* (7) and *Ghulam Ali v. Queen-Empress* (8). I have considered the authorities cited and in my opinion the contention must prevail that the Rawalpindi Court has no jurisdiction to try the offence charged. The authorities cited on behalf of the accused are directly relevant, whereas those referred to by Mr. Sewa Ram Singh are distinguishable in various respects. *Ghulam Ali v. Queen-Empress* (8) deals with a case of cheating, and it was held that under section 179 of the Criminal

Procedure Code, the Court at Lahore had jurisdiction because the loss in freight would be caused to the North-Western Railway Administration at its head-quarters in Lahore. Similarly in *Rajani Binode Chakravarti v. All India Banking and Insurance Company Limited, Lahore* (6) and *Ishar Das v. Emperor* (5), the offences charged were not merely criminal breach of trust or criminal misappropriation, but also cheating and forgery and stress was laid upon section 179, Criminal Procedure Code. In *Uttam Chand v. Emperor* (4), there were three accused persons of whom two carried on business at Ferozepore, and the third accused was merely a purchasing agent at Sangla. It was held that it was the Ferozepore Branch which carried on the business of the Karachi firm, and that it was to that Ferozepore Branch that accused Nos. 1 and 2 had to render accounts. The judgment proceeds:—

"Now the conviction is with reference to the general balance of Rs. 12,362, not with reference to any specific items, and this balance was payable at Ferozepore, and if it had been paid there, there would have been no offence. This brings the offence within the provisions of section 181 (2) of the Criminal Procedure Code, for the money was retained by the accused in the Ferozepore District. This distinguishes the case from Criminal Miscellaneous Case No. 58 of 1900; there, certain specific items had been misappropriated, and accused was not being tried for a deficient balance."

So in the present case, the allegations in the complaint referred distinctly to three or four specific items in respect of which the accused is charged with having committed the offence of criminal breach of trust.

Swaminathan Chettiar v. Annamalai Chettiar (7) in no way helps Mr. Sewa Ram Singh's argument, but is rather an authority in support of the other side. As at present advised, therefore, I prefer to follow the most recent ruling of this Court [*Gokal Chand v. Phul Chand* (1)] and hold that the Rawalpindi Court has no jurisdiction to try the present charge.

I accordingly direct that the record be returned to the Magistrate, First Class, Rawalpindi, with the direction that the accused be discharged, the complainant being informed

(1) 5 Ind. Cas. 830; 7 P. R. 1910, Cr.; 7 P. W. R. 1910, Cr.; 172 P. L. R. 1910; 11 Cr. L. J. 253.

(2) 67 P. L. R. 1901.

(3) 15 Ind. Cas. 319; 34 A. 487; 13 Cr. L. J. 479; 10 A. L. J. 45.

(4) 2 P. R. 1902 Cr.; 9 P. L. R. 1902.

(5) 18 P. W. R. 1908 Cr. 8 Cr. L. J. 75.

(6) 22 Ind. Cas. 192; 17 G. W. N. 1207; 15 Cr. L. J. 48; 41 C. 305.

(7) 1 Ind. Cas. 796; 9 Cr. L. J. 92; 4 M. L. T. 491.

(8) 7 P. R. 1900 Cr.

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that, if so advised, he can prefer his complaint in the Court of the Magistrate at Rurki.

Revision accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 454 OF 1915

CRIMINAL REVISION PETITION NO. 367

OF 1915.

October 26, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Phillips.

N. C. WHITTON—PETITIONER

VERSUS

MAMMAD MAISTRY—RESPONDENT.

*Madras Planters Labour Act (I of 1903), ss. 24, 35—
Power of Magistrate to issue repeated directions—
Conviction for disobedience, whether bar to subsequent
action—"Failure to account for money advanced,"
meaning of.*

There is no limit to the number of repeated directions which may be issued under section 35 of the Madras Planters Labour Act or to the number of prosecutions and convictions which may follow in default. [p. 379, col. 2; p. 380, col. 1.]

[- Action taken under section 35 of the Madras Planters Labour Act does not put an end to the contract and is, therefore, no bar to a second trial and conviction for disobedience to a direction to fulfil it. [p. 380, col. 1.]

Ponga Maistry v. Emperor, 18 Ind. Cas. 415; 36 M. 497; 24 M. L. J. 186; 14 Cr. L. J. 79, dissented from

Unwin v. Clarke, 19 Q. B. 417; 35 L. J. M. C. 193; 12 Jur. (N. S.) 429; 14 L. T. 356; 14 W. R. 688 and *Cutler v. Turner*, 9 Q. B. 502; 43 L. J. M. C. 124; 30 L. T. 706; 22 W. R. 840, followed.

Per Ayling, J.—The words "fails to account for the money advanced to him" mean simply this: failure to either supply labour equivalent to the advance received or to refund any balance of the advance for which he is unable to supply labour or to prove that it has been legitimately expended. [p. 378, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the 2nd Class Magistrate of Vayitri, in his proceedings declining to give further directions to the respondent herein to complete the performance of his contract under section 25 of Act I of 1903.

FACTS.—One Mr. Whitton, a planter in Malabar, complained to a Magistrate that Mammad Maistry had committed breach of

a contract entered into by him in December 1912 in respect of work in the complainant's Company, known as, the Meppad Wynaad Tea Company, and prayed that the accused might be directed to complete the performance of his contract under section 35 of the Act. In 1913, one direction was given to the accused, but he did not comply with it and was convicted and sentenced to one month's rigorous imprisonment under section 24 of the Act. The complainant again applied to another Magistrate for another direction after the return of the accused from Jail, and he was again prosecuted, convicted and sentenced to two months' imprisonment. The complainant again applied to the same Magistrate for giving the accused a further direction. The Magistrate refused it on the ground that he had no jurisdiction to make successive directions. The present revision petition is against that order.

Mr. Barton, for the Petitioner.—A Magistrate has jurisdiction to make successive directions under section 35 of the Act and the language of the section is wide enough to cover any number of directions, so long as the contract exists, and there is nothing to prevent a subsequent direction being given. The decision in *Ponga Maistry v. Emperor* (1) is wrong. The decision in *Unwin v. Clarke* (2) and *Cutler v. Turner* (3) are clearly in point.

The Public Prosecutor, in reply:—The decision in *Ponga Maistry v. Emperor* (1) is right and must be followed

ORDER.

AYLING, J.—We are asked to revise an order of the 2nd Class Magistrate of Vayitri, dated 17th March 1915, refusing to direct counter-petitioner under section 35 of the Madras Planters Labour Act (1 of 1903) to complete the performance of the contract entered into by him with petitioner. The Magistrate's ground of refusal is that he had already issued one such direction on 18th November 1913, in default of compliance with which counter-petitioner had been convicted and sentenced to two months'

(1) 18 Ind. Cas. 415; 36 M. 497; 24 M. L. J. 186; 14 Cr. L. J. 79.

(2) 19 Q. B. 417; 35 L. J. M. C. 193; 12 Jur. (N. S.) 429; 14 L. T. 356; 14 W. R. 688.

(3) 9 Q. B. 502; 43 L. J. M. C. 124; 30 L. T. 706; 22 W. R. 840.

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rigorous imprisonment under section 24 (c) of the same Act. He had in addition been previously tried and convicted under the same section and clause on 28th March 1913 for failure in connection with the same contract. The Magistrate held, following *Ponga Maistry v. Emperor* (1), that he had no power to make more than one direction; and on this view dismissed petitioner's application.

Mr. Barton, who appears for petitioner, contends that the ruling above quoted is erroneous; and that apart from such special restrictions as may be involved in the particular contract, there is no limit to the number of successive directions which may be issued under section 35 or to the number of prosecutions and convictions which may follow in default.

He has been at pains to explain that his client is prosecuting this petition simply as a test case and is only anxious to have the law on the matter determined. The counter-petitioner is not represented; but the learned Public Prosecutor has been instructed to oppose the petition and support the Magistrate's order. He has done so not with reference to the abstract question of law on which the order is based; but by arguing that the two previous convictions of counter-petitioner and the previous direction have all been illegal and that for this reason the direction now applied for should not be granted. We do not think we should be justified in ignoring such points when asked to interfere in revision to counter-petitioner's detriment.

We have, therefore, to consider the facts of the present case as well as the bearing of the Act upon them.

The contract itself is Exhibit A. Disregarding superfluous detail it may be said to provide as follows:—

Counter-petitioner (called the contractor) in consideration of an advance of Rs. 50 undertakes to work, with 25 coolies, whom he is to procure on petitioner's estate for six months from 20th December 1912 to 19th June 1913 at fixed rates of wages; if he makes default in such work, in whole or in part, petitioner has the option of calling on him to complete the performance of the work in default at any time up to 20th December 1915,

His subsequent conduct is not in dispute. He failed to appear till 13th February 1913, when he brought not 25 coolies but 8; these worked till 28th February 1913, when they began to absent themselves and were all gone by 16th March 1913. After that, no more work was done. Counter-petitioner returned to the estate after his first imprisonment and the first direction; and promised to pay the balance due by him. He has not, however, done so.

On these facts, I can find nothing illegal in the first conviction which is dated 28th March 1913. We have heard some discussion of the meaning of clause (c) of section 24; but I take it that the words "fails to account for the money advanced to him" mean simply this: failure to either supply labour equivalent to the advance received or to refund any balance of the advance for which he is unable to supply labour or to prove that it has been legitimately expended.

On this reading, the conviction was justified and also the direction which was passed on 18th November 1913 under section 35 on counter-petitioner's apprehension after release from the first term of imprisonment.

Admittedly this direction was not complied with. Counter-petitioner promised to return the balance of money due, but failed to do so, or to do any more work.

Now, what was the effect of this? The Act nowhere makes non-performance of a contract punishable in itself. Section 24 renders punishable three specified failures in connection with a contract. It says:

"Any maistry who

(a) fails without sufficient cause to present himself at an estate upon the date specified in his contract; or

(b) having contracted to remain upon an estate for a specific time, fails without sufficient cause so to remain; or

(c) fails to account for the money advanced to him by a planter in consideration of his contracting to supply labourers to work on an estate;

shall be punishable with imprisonment which may extend to three months or with fine which may amount to five hundred rupees or with both; and the Magistrate may award to the planter out of the fine such compensation as he may deem fit."

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Section 35 runs thus:

"On the expiry of any sentence of imprisonment on a maistry or labourer for an offence under this Act, the maistry or labourer shall, if the planter or employer so requests, be produced before the Magistrate, who shall direct such maistry or labourer to complete the performance of his contract on pain of further prosecution and punishment in case of his refusal to do so, and no conviction under this Act or imprisonment under such conviction shall have the effect of releasing any maistry or labourer from the terms of his contract or labour contract, as the case may be.

"Provided that no such direction shall be given, in the case of a labourer, if more than 12 months have elapsed since the date on which his original labour contract would have determined."

We cannot take this as constituting disobedience of the contract, a distinct offence, if only for the simple reason that no punishment is specified for it. Mr. Barton admits that the words "on pain of further prosecution" can only be taken to refer to a fresh prosecution under section 24.

This is the view taken by the Magistrate, who in Calendar Case No. 580 of 1914 has convicted counter-petitioner of the same offence under section 24 (c), failure to account for the advance. The question is whether this was legal—or whether counter-petitioner was entitled to plead "*autrefois acquit*."

That the contract was still in force cannot, I think, be disputed. As already pointed out, petitioner had the option of extending the period for performance up to 20th December 1915; and section 35 itself provides that the previous conviction should not operate as release.

Mr. Barton, in supporting the legality of the second conviction, relies on two English cases, *Unwin v. Clarke* (2) and *Cutler v. Turner* (3).

Both these cases are of workmen absenting themselves from work contrary to the terms of the contract, and it is held that in such circumstances although the workman did not return to work after his first conviction and imprisonment, yet as the

contract continued he was guilty of a fresh offence, and could be again convicted. The question is whether the principle of these rulings applies to a case of failure to account for an advance. After careful consideration, I am inclined to think it does. The contract and with it, the liability to account for the advance is still in force: and counter-petitioner is by the option of the employer given a fresh chance of accounting for it, in either of the ways in which he could have accounted for it originally. His failure to do so is just as much a fresh offence as the workman's failure to resume work in the English cases. I can find no valid ground of distinction.

No argument has been addressed to us to the contrary.

The conviction in Calendar Case No. 580 of 1914 was, therefore, correct; and there only remains the question of whether the Magistrate was justified in refusing the second direction. The wording of the section appears to leave him no option; and I can see nothing in the Act which is opposed to the issue of repeated directions. I have carefully considered the judgment in *Ponga Maistry v. Emperor* (1). I am not without some sympathy for the view which the learned Judge seems to have taken: but we have to construe the Statute as it stands, and with all respect, I am unable to agree that the Magistrate can issue only one direction. It seems to me unfortunate that the Magistrate is given no discretion regarding the issue of directions and in this, as in other respects, the Act seems to call for amendment. The Magistrate has, of course, discretion as to the imposition of punishment on conviction: and would presumably exercise it where the Act was being vindictively used. But this is only a partial safeguard against the possibility of oppressive use of the section. As the law stands, in the present case, the Magistrate should have issued the direction, and I would now direct under section 423, Code of Criminal Procedure, that a direction should issue.

PHILLIPS, J.—I need only add that I agree in the view taken by my learned brother of the meaning of section 35 of the Act. The section itself does not limit the

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number of directions to fulfil the contract that can be made, but it does say that action taken under the section does not put an end to the contract. If the contract is still in force, there can undoubtedly be a fresh breach of such contract and for each breach (coming within the provisions of section 24) the offender renders himself liable under section 35. This view is in accordance with the interpretation put upon similar Statutes in England *Unwin v. Clarke* (2) and *Cutler v. Turner* (3).

I, therefore, concur in the order proposed.

Petition allowed; Application granted.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 430 OF 1915.

June 9, 1915.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge, and Mr. Justice Rattigan.

EMPEROR—APPELLANT

versus

TEK CHAND—CONVICT—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 361, 363—Kidnapping—Lawful guardianship—Lawful guardianship of Hindu minor widow—Deceased husband's mother, whether lawful guardian—Hindu Law.

The husband's relations, if any exist within the degree of a *sapinda*, are the guardians of a minor widow in preference to her father and his relations. [p. 381, col. 1.]

Khudiram Mookerjee v. Bonwari Lal Roy, 16 C. 584, referred to.

Where a minor Hindu widow takes up her residence with her deceased husband's mother with the consent, express or implied, of her husband's brother, the husband's mother is the lawful guardian of the girl for the purposes of section 361, Indian Penal Code. [p. 381, col. 1.]

Emperor v. Miran Bakhsh, 60 P. R. 1905 Cr.; 21 P. L. R. 1906; 3 Cr. L. J. 296, referred to.

Appeal from an order of the Sessions Judge, Rawalpindi Division, dated the 18th December 1914.

Mr. Broadway, Additional Government Advocate, for the Appellant.

JUDGMENT.—The respondent, Tek Chand, was convicted by a Magistrate of the First Class of having kidnapped *Musammât Karam Devi*, a minor girl under the age of 16, from the lawful guardianship of her mother-in-law, *Musammât Bhari*; and under

section 363, Indian Penal Code, was sentenced to 1½ years' rigorous imprisonment and a fine of Rs. 50, and in default, to 6 months' further rigorous imprisonment. He appealed to the Sessions Judge, Rawalpindi, and on his behalf it was urged (1) that the girl in question was over the age of 16; (2) that the girl, being the widow of a Hindu, had no lawful guardian; and (3) that "no taking from lawful guardianship had been proved."

According to the judgment of the learned Sessions Judge, the Public Prosecutor was "constrained to admit that the lawful guardianship was doubtful" and that there was "no evidence of the girl having been taken, beyond her own statement." Upon these admissions, the Sessions Judge accepted the appeal and acquitted Tek Chand.

From this order of the Sessions Judge, the Local Government have preferred an appeal under section 417, Criminal Procedure Code, to this Court and notice of the hearing of the appeal was duly given to respondent who has not, however, appeared either in person or by any authorized agent or Pleader. We have accordingly heard the appeal *ex parte*, and after consideration of Mr. Broadway's arguments and of the evidence on the record, we are of opinion that the acquittal of respondent was erroneous and that this appeal must be allowed. It is, we think, to be regretted that the Public Prosecutor, before making his admission before the Sessions Judge, did not more carefully master the facts of the case and the law upon the subject.

As regards the facts, there is in the first place the clear and detailed evidence of the girl herself and we see no reason why, in the absence of any rebutting evidence to the contrary, it should not be accepted as true. The Sessions Judge assigns no other reason for throwing it aside than that it stands by itself, and this to us appears a somewhat inadequate ground when there is no reason apparent on the record for the girl to make a false charge against respondent. As a matter of fact, however, the girl's story is amply corroborated by the evidence of the witness, Santokh Singh, who deposes that respondent brought her to his house on the 1st November 1914 and falsely represented her to be his wife. In the circumstances there was no justification for discrediting the

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girl's evidence and we accordingly find, in agreement with the Magistrate, that Tek Chand actually took the girl from the guardianship of Musammât Bhari.

The Sessions Judge gives no decision with regard to the age of the girl, but as to this we have the evidence of her mother, Musammât Manaki, and the entry in the birth register which shows that Musammât Manaki gave birth to twin daughters on the 17th September 1899. No attempt was made by Tek Chand to disprove this evidence and we, therefore, find that the girl was under 16 years of age when she was kidnapped in November 1914.

The only question that remains for consideration is, whether Musammât Karam Devi was in lawful guardianship of her mother-in-law, Musammât Bhari, when Tek Chand and his brother, Lachman Singh, took her away. The parties are Hindus and Musammât Karam Devi was married to one Bhagat Singh, who died some 9 or 10 years ago. After his death, she lived with her deceased husband's brother, Nand Lal, for some 8 or 9 years and then, according to Nand Lal, went to live with Musammât Bhari, the mother of Bhagat Singh and Nand Lal. Nand Lal does not in express terms state that he agreed to her doing this, but it is quite clear from his evidence that she went to reside with Musammât Bhari with his consent, implied if not express. According to Mayne's Hindu Law (paragraph 211), "the husband's relations, if any exist within the degree of a *sapinda*, are the guardians of a minor widow, in preference to her father and his relations," and the same rule is laid down in *Khudiram Mookerjee v. Bonwari Lal Roy* (1). Upon these authorities it is clear that Nand Lal, the brother of the girl's deceased husband, was her guardian, and as we have already observed, she was at the time of the offence residing with Musammât Bhari, with the consent, express or implied, of Nand Lal. In these circumstances, *Emperor v. Miran Bakhsh* (2) is authority for holding that Musammât Bhari was "the lawful guardian" of the girl for the purposes of section 361, Indian Penal Code, and it follows that in taking her away from the guardianship of Musammât Bhari, the

(1) 18 C. 584.

(2) 60 P. R. 1905 Cr.; 21 P. L. R. 1906; 3 Cr. L. J. 296.

respondent committed the offence punishable under section 363, Indian Penal Code.

We, therefore, accept this appeal, and setting aside the order of the Sessions Judge, we restore the conviction of the respondent, Tek Chand, of an offence punishable under section 363, Indian Penal Code. We consider, however, that a sentence of 6 months' rigorous imprisonment will meet the ends of justice and we direct accordingly.

Appeal accepted.

BOMBAY HIGH COURT.

CRIMINAL REVIEW NO. 1 OF 1915.

August 19, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

EMPEROR—PROSECUTOR

versus

RAMJAN DADUBHAI AND ANOTHER—
ACCUSED.

*Criminal Procedure Code (Act V of 1898), s. 562—
Offences of cheating and using as genuine a forged document, whether covered by the section.*

Section 562 of the Criminal Procedure Code is not in terms applicable to convictions of cheating and thereby dishonestly inducing delivery of property under section 420 or of using as genuine a forged document under section 471 of the Indian Penal Code. [p. 381, col. 2; p. 382, col. 1.]

Criminal review from conviction and sentence passed by the City Magistrate of Sholapur.

JUDGMENT.—In this cases the two accused were convicted by the First Class City Magistrate of Sholapur, Mr. Poredi, under sections 420 and 471 of the Indian Penal Code. By way of punishment, the accused were merely directed to be released on their entering into bonds for Rs. 50 and one surety for Rs. 100 each to keep the peace and be of good behaviour for six months. That order was made under section 562 of the Criminal Procedure Code. The conviction was had in October 1914, so that the bonds executed have now expired. In these circumstances, we think it unnecessary to pursue these proceedings further. But it should be pointed out to the learned Magistrate for his future guidance that section 562 is not in terms

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applicable to convictions of cheating and thereby dishonestly inducing delivery of property under section 420 or of using as genuine a forged document under section 471 of the Indian Penal Code.

With these observations the papers should be returned, the Rule being discharged.

Rule discharged.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 2186 OF 1914.

March 19, 1915.

Present:—Sir Alfred Kensington, Kt.,
Chief Judge.

SIKANDAR—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 326—Nose-cutting—Sentence.

Where the accused cut off his wife's nose and was convicted under section 326, Indian Penal Code, and sentenced to rigorous imprisonment for four years, but on appeal, the Sessions Judge while maintaining the conviction reduced the sentence to imprisonment for two years:

Held, enhancing the sentence to the full period of four years, that nose-cutting was an offence for which leniency was, ordinarily speaking, quite out of place. [p. 383, col. 1.]

Petition for revision from the order of the Sessions Judge, Hissar, dated the 24th October 1914.

Mr. Taj-ud-Din, for the Petitioner.

JUDGMENT.—The District Magistrate convicted the petitioner, Sikandar, a *Pachada*, aged 27, under section 326, Indian Penal Code, and sentenced him to imprisonment for four years. The offence found to have been committed was the cutting off of his wife's nose. On appeal to the Sessions Court, the conviction was maintained, but the sentence was reduced to imprisonment for two years. The petitioner then moved the Chief Court on revision, and as the reason given for reduction of sentence appeared insufficient, it was directed that notice should issue to him to show cause why his reduced sentence should not be enhanced.

Having examined the record I have no doubt that Sikandar was rightly convicted. The evidence against him is quite clear and there is nothing to be said for his petition, which is rejected.

Counsel has been further heard on the notice to show cause and urged that consideration should be given to the feelings of a husband outraged by his wife's misconduct.

The wife, a young woman of 18 or 20, admitted having misconducted herself some time before, but this had been condoned by her husband who brought her back to his house, and they had been living together for some four months before the present affair. There is no trustworthy evidence of further misconduct, though the petitioner may have continued to suspect his wife or may have been simply nursing a jealous grudge against her. Whatever his motive may have been, he carried out his design in the most brutal manner.

Having made an excuse for a change of home, he induced his wife to accompany him on foot through the night to a railway station some miles away. At midnight, when they had gone about 7 miles, he made a further excuse for tying her hands, and then deliberately cut off with a razor her nose, part of the cheek and most of the upper lip, the portion of the face removed measuring $3\frac{1}{2}$ by $2\frac{1}{2}$ inches. He at the same time formally pronounced her divorce and left her to find her way to the station as best she could.

It is difficult to understand how any Sessions Court could consider the District Magistrate's sentence excessive for such an act of savagery to a young woman, causing her frightful disfigurement for life. I am inclined to say that the District Magistrate might well have given a heavier sentence, especially as he noted that cases of nose-cutting were becoming far too frequent among the *Pachadas* of his district. I can only suppose that the Sessions Court misunderstood and misapplied the orders passed by this Court on a case of the same nature, from the same district, reported for enhancement as Criminal Revision No. 1308 of 1914 and referred to prominently in the lower Appellate Court's judgment. The learned Judge who dealt with that case declined to enhance a very light sentence,

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mainly on the ground that the sentence had already expired before the case was reported, and in doing so he was following the usual practice of the Chief Court in such matters. It must also be observed that there was this material difference in the facts of the reported case that the person then mutilated in a similar manner was not the wife but a man who had abducted her immediately after her marriage, under circumstances which grossly aggravated the offence to the enraged husband.

Lest, there should be any further misunderstanding of the effect of the orders passed in the reported case, I desire, after consultation with my learned colleague who dealt with it, to make it perfectly clear that nose-cutting is an offence for which leniency is, ordinarily speaking, quite out of place.

The petitioner's existing sentence is enhanced on revision to the full period of rigorous imprisonment for four years, including three months in solitary confinement, which was originally awarded by the District Magistrate. His own petition for revision is dismissed.

Petition dismissed.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 214
OF 1915.

September 1, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

In re PANDHARINATH PUNDLIK
REVANKAR—APPLICANT.

*Criminal Procedure Code (Act V of 1898), s. 517—
Orders under section, nature of—Discretion—Power
of High Court to interfere.*

Orders under section 517 of the Criminal Procedure Code are discretionary, but the discretion is open to correction where it has been exercised in violation of accepted judicial principles.

Where, therefore, in a trial for a criminal breach of trust, it appeared that the accused had transferred one of the misappropriated currency notes to the petitioner, and on the conviction of the accused the trying Magistrate ordered the note to be returned to the Crown.

Held, that this was a case for the application of the general rule that property in a currency note passes by mere delivery and that there being no

allegation of fraud or bad faith on the part of the petitioner, he was entitled to retain it.

In the matter of the petition of Collector of Salem, 7 M. H. C. R. 233; 2 Weir 664, Empress v. Joggessur Mochi, 3 C. 379, referred to.

Criminal application for revision from an order passed by the Fourth Presidency Magistrate, Bombay.

Mr. A. A. Pais, for the Applicant.

Mr. S. S. Patkar (Government Pleader),
for the Crown.

JUDGMENT.—This is an application for revision of an order passed under section 517 of the Criminal Procedure Code by the learned Fourth Presidency Magistrate, who convicted one Peter George of criminal breach of trust in respect of a bundle of currency notes and ordered that one of the notes now in dispute should be returned to the Crown, the notes having been misappropriated from the Presidency Magistrate's Court. The note now in dispute had been transferred to the possession of the present petitioner in this way: Peter George made a purchase from a neighbouring jeweller and tendered in payment the Rs. 100 note. The neighbouring jeweller was unable to cash the note at the moment, and, therefore, took it over to the present petitioner who supplied the cash. There is no allegation of any bad faith or fraud on the part of the present petitioner. That being so, it seems to us a case for the application of the general rule that property in a currency note passes by mere delivery: see the cases of *In the matter of the petition of Collector of Salem* (1) and *Empress v. Joggessur Mochi* (2). The petitioner consequently obtained a good title to the note, notwithstanding that Peter George had no title. The order under discussion is, therefore, in our opinion, unsustainable. It is true that orders under section 517 of the Criminal Procedure Code are discretionary, but the discretion is open to correction where, as here, it has been exercised in violation of accepted judicial principles.

We, therefore, set aside the order and direct that the currency note be returned to the petitioner.

Order set aside.

(1) 7 M. H. C. R. 233; 2 Weir 664.

(2) 3 C. 379.

EMPEROR V. SHEODAN.

PUNJAB CHIEF COURT.

CRIMINAL REVISION CASE NO. 247 OF 1915.

April 23, 1915.

Present:—Mr. Justice Shah Din.

EMPEROR—PROSECUTOR

versus

SHEODAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 107—Security to keep the peace—Order, whether can be passed without evidence—Person proceeded against having no objection to give security, effect of.

An order for taking security under section 107 Criminal Procedure Code, without evidence to prove that the petitioner was likely to commit a breach of the peace or to do any other wrongful act that might occasion a breach of the peace, is illegal and should not be passed simply on the petitioner's own statement before the Magistrate that he had no objection to giving security.

Ram Chandra Halder v. Emperor, 8 C. L. J. 68; 35 C. 674; 8 Cr. L. J., 128 referred to.

Case reported by the District Magistrate, Rohtak, with his No. 124 G. of 4th February 1915.

FACTS.—Musammatt Manbhari, complainant, filed a complaint under section 107, Criminal Procedure Code, against Sheodan, accused, to the effect that she caused the accused to be imprisoned on a charge under section 354, Indian Penal Code, and he is not on very friendly terms with her and wants to outrage her modesty and threatens to kill her.

The accused on conviction by E. J. Stephens, Esquire, exercising the powers of a Magistrate of the 1st class, in the Rohtak District, was sentenced, by order dated 19th December 1914, under section 107 of the Criminal Procedure Code, to enter into a bond in the sum of Rs. 300 (three hundred) with two sureties to keep the peace for twelve months, failing bail the man shall suffer simple imprisonment for one year.

The case came up to the Chief Court for revision on the following

GROUNDS.—I am referred to *Ram Chandra Halder v. Emperor* (1), and on the strength of that decision I am asked to exercise my powers under section 125, Criminal Procedure Code. That decision, with all respect, I believe to be unsound. The procedure in cases under section 107, Criminal Procedure Code, is to be as near as may be to that prescribed in summons cases, 117

(2), Criminal Procedure Code. And, therefore, when the respondent admits on appearing before the Court that security is required, there is no need to take evidence—*vide* section 243, Criminal Procedure Code. An order may be passed on the answer given by him. *Sher Singh v. Hari Singh* (2), however, appears to favour the view that evidence is necessary. Out of respect for that decision I forward the case under section 438, Criminal Procedure Code, for the orders of the Hon'ble Judges. I do not think that section 125, Criminal Procedure Code, authorises me to direct further enquiry into this case. That is really what petitioner wants.

ORDER.—(February 13th, 1915.)—Notice to the petitioner and to the District Magistrate. The matter can be decided here once for all and in my opinion the order requiring security is improper. The petitioner's statement before the Magistrate is not covered by analogy by section 243, Criminal Procedure Code, on which the District Magistrate relies. The petitioner did not admit that he was likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace. *Ram Chandra Halder v. Emperor* (1) is in point.

ORDER.—See my order dated the 13th February 1915. No one has appeared to show cause why the order of the Magistrate, dated the 19th December 1914, directing the petitioner, under section 107, Criminal Procedure Code, to execute a bond to keep the peace, should not be set aside. Admittedly, no evidence was given in this case to prove that the petitioner was likely to commit a breach of the peace or to do any wrongful act that might occasion a breach of the peace; and the petitioner's own statement before the Magistrate that he had no objection to giving security did not justify an order being passed against him under section 107.

For these reasons, I set aside the order of the Magistrate and direct him to proceed according to law.

Revision accepted.

(2) 16 Ind. Cas. 528; 34 P. W. R. 1912 Cr.; 195 P. L. R. 1912; 13 Cr. L. J. 720.

MAMMU V. MUHAMMAD KUTTI.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 148 OF 1911.

August 30, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Seshagiri Aiyar.MAMMU AND OTHERS—DEFENDANTS NOS. 1,
7 AND 8—APPELLANTS

versus

MUHAMMAD KUTTI, KARNAVAN AND

OTHERS—PLAINTIFFS AND DEFENDANTS

NOS. 2 TO 6 AND 9 TO 19—RESPONDENTS.

Malabar Law—Muhammadans following Marumakkattayam Law—Custom of affiliating strangers to tarwad, whether valid.

The custom of affiliation prevalent among Hindus, who follow the Marumakkattayam Law, if proved to exist among the Muhammadans, following the same law, must be upheld.

Bai Machhbai v. Bai Hirbai, 10 Ind. Cas. 816; 13 Bom. L. R. 251; 35 B. 264, followed.

Kunhacha Umma v. Kutti Mammi Haji, 16 M. 201; 2 M. L. J. 226, *Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veetil Chakkara Kannan v. Varayalankandi Kunhi Pokker*, 30 Ind. Cas. 755; 18 M. L. T. 255; 29 M. L. J. 481, referred to.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Original Suit No. 15 of 1909.

This appeal coming on for hearing on the 15th September 1914, the Court delivered the following

JUDGMENT.—We have heard a very full argument in this case both on the facts and on the law. As regards the facts the evidence is altogether insufficient to show that the mother of the sisters, Athavi and Kuttiyacha, who is said to have borne the name of Veerayi, was the sister of Mukkilakath Kadirkutti, the last survivor of the tarwad. They did not, therefore, belong to his tarwad by birth. We think, however, that the evidence shows that they were affiliated to it. See Exhibit A executed by the son of Kadirkutti and the admissions in Exhibits B, C, D and E by Kammukutti, who was the son of Kuttiyacha and the father of defendants Nos. 1 and 2, that the two sisters and their children were members of a tarwad of which he claimed to be the karnavan. As early as 1858 the two sisters in Exhibit H claimed to hold some of the plaint properties as members of a tarwad. There is also oral evidence to the same effect. All these documents show that they considered themselves to belong to the same tarwad as Kadirkutti from whom they derived the properties, and we accept the oral evidence of this affiliation as most in

accordance with the established facts of the case with reference to the evidence, showing that these properties have been in possession of the father of defendants Nos. 1 and 2 and of the father of defendants Nos. 7 and 8; we think the admissions already referred to, taken with the oral evidence, show that Kammukutti held possession as karnavan and that his brother, the father of defendants Nos. 7 and 8, was permitted to manage under him. A question has, however, been raised whether the affiliation of the two sisters to the tarwad is valid, having regard to the fact that the parties are Muhammadans. As pointed out in *Bai Machhbai v. Bai Hirbai*, (1), this must depend on usage and, before disposing of the case, we have determined to call for a finding whether the usage of affiliation to the tarwad prevailing among Hindus who follow the Marumakkattayam Law on the west coast, has been accepted by the Muhammadans who follow the same law.

The finding should be submitted within two months and seven days will be allowed for filing objections. Fresh evidence may be taken.

In compliance with the above order of this Court the Subordinate Judge of South Malabar at Calicut submitted his finding on the issue in the affirmative.

This appeal and the memorandum of objections filed by respondents Nos. 1 to 6 coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We are not satisfied with the evidence of custom, but in view of the recent Full Bench decision in *Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veetil Chakkara Kannan v. Varayalankandi Kunhi Pokker* (2), which has removed the doubt cast upon the decision in *Kunhacha Umma v. Kuti Mammi Hajee* (3), we think there is now no objection to our holding, and we do hold, that the suit properties were taken and enjoyed by the two sisters, being daughters of a common mother, and their children as tarwad property, and on these findings the defendants, who do not belong to the tarwad and have not acquired any title by adverse possession, have no claim and the appeal must be dismissed with costs.

(1) 10 Ind. Cas. 816; 35 B. 264; 13 Bom. L. R. 251.

(2) 30 Ind. Cas. 755; 18 M. L. T. 255; 29 M. L. J. 481.

(3) 16 M. 201; 2 M. L. J. 226.

NUR ALI P. BAHAWAL.

The memorandum of objections is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 165 OF 1913.

November 8, 1915.

Present:—Mr. Justice Chevis and

Mr. Justice LeRossignol.

NUR ALI AND OTHERS, REPRESENTATIVES OF
MUHAMMAD BAKHSH, DECEASED,
AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

BAHAWAL AND OTHERS—DEPENDANTS—

RESPONDENTS.

Practice—Gift by widow—Suit for declaration by reversioners—Decision on point not raised in pleas, legality of—*Second appeal*—Custom, validity of, question of, propriety of—Certificate, necessity of—Punjab Courts Act (XVIII of 1884), s. 40 (3)—Punjab Courts (Amendment) Act (I of 1912), s. 2.

In a suit for a declaration that a gift by a widow of certain ancestral land should not affect the rights of the plaintiffs, who were collaterals of the last male holder, the donee only pleaded that he was the appointed heir of the deceased male holder and though the property after the death of the male holder was mutated in the name of his widow, she was entitled to rectify the erroneous mutation by making the gift. The Court below, however, held that the donee was not the appointed heir, but that the widow was entitled to make the gift in favour of the donee for services rendered:

Held, that the general question of gift by a widow was not properly before the lower Court and, therefore, the Court had no power to decide the case on that point. [p. 387, col. 1.]

Where the question raised in a second appeal is not the validity or existence of a custom but whether the validity or existence of a custom was a question properly before the lower Appellate Court, a second appeal lies without the certificate of such Court under section 40 (3) of the Punjab Courts Act (XVIII of 1884) as amended by Punjab Courts (Amendment) Act (I of 1912), section 2. [p. 386, col. 2.]

Santa Singh v. Waryam Singh, 24 Ind. Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914, followed.

Second appeal from the decree of the Divisional Judge, Rawalpindi, dated the 4th November 1912, reversing that of the Subordinate Judge, second Class, Gujrat, dated the 18th of May 1911, decreeing suit.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellants.

Messrs. Beechey and Muhammad Sharif, for the Respondents.

JUDGMENT.—This was a suit for a declaration that a gift of 476 kanals of

ancestral land should not affect the rights of the plaintiffs who are collaterals of Karam Bakhsh, the last male holder. The gift was effected by registered deed on 30th January 1911 by Musammat Gauhar Bibi, the widow of Karam Bakhsh.

The deed recites that the reason and justification for the gift was the adoption of the donee by Karam Bakhsh, some time before 1868, the approximate date of Karam Bakhsh's demise, that for some unknown reason mutation on his death was made in favour of his widow and not in favour of the appointed heir and the widow now made the gift in furtherance and completion of (*taid afa'l*) her husband's acts.

The defence was simply that the donee was the appointed heir and that in the circumstances, the widow was entitled to rectify the erroneous mutation made at her husband's death by making the gift.

Both Courts below have found that the donee was not appointed his heir by the late Karam Bakhsh and the first Court decreed for plaintiffs; the Divisional Judge, however, though agreeing as to the appointment with the first Court, dismissed the suit on the ground that the donee had rendered services to the widow, who was consequently justified by custom in making the gift by way of compensation for services rendered.

In second appeal before this Court it is contended that the Divisional Judge has decided the case on a point entirely outside the pleadings, that the only plea for the defence was that the gift was justified by the adoption and that there was no defence that the gift was warranted by a widow's general right to gift for services rendered.

For the respondents it is urged that no appeal lies without a certificate and that the fifth issue covered the general custom, on which moreover the plaintiffs adduced evidence.

As to the competency of the appeal, we hold following *Santa Singh v. Waryam Singh* (1) that the question raised in this appeal is not the validity or existence of a custom, but whether the validity or existence of a custom was a question properly before the lower Appellate Court and we find that the appeal does lie.

(1) 24 Ind. Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914.

NAINA PILLAI MARACAYAR v. ARUMUGA MUDALY.

Having carefully scrutinized the pleadings, statements of parties and the statement of defendants' Pleader, we find that there was no plea that the widow had a general right of gift for services rendered. The sole plea was the alleged appointment, and though defendants' Pleader stated that the gift was warranted by custom, it is clear that he used the word '*riwajan*' as signifying solely that the widow was by custom justified in rectifying the error of mutation by which she had been preferred to the appointed heir.

It is true that the plaintiffs put in three copies of judgments, but they were intended to show that a widow could not gift even in favour of a *khana damad* or even a daughter's son and may have been intended merely to show that a widow could not make a gift even in favour of an appointed heir, who had slept on his rights for nearly 50 years.

We find then that 'services rendered' and a general right of gift by a widow for services rendered were never mentioned in the pleas, that the sole question properly before the Courts was the alleged appointment. That question, we have no manner of doubt whatever, has been rightly answered in the negative and that concluded the case.

We find, therefore, that the general question of gift by a widow was not properly before the lower Appellate Court and we accept this appeal and decree for the plaintiffs with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 351 OF 1914.

October 15, 1915.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Spencer.

NAINA PILLAI MARACAYAR—

DEFENDANT NO. 15—APPELLANT

versus

ARUMUGA MUDALY—DECREE-HOLDER—

ASSIGNEE—PETITIONER—RESPONDENT.

Mesne profits—Decree for possession with mesne profits—Possession delivered late in season—Judgment-debtor, liability of—Interest on mesne profits after three years—Discretion.

In a decree for possession with mesne profits, if the judgment-debtor surrenders possession, he can claim non-liability for mesne profits only if such possession was given up sufficiently early in the season to enable the decree-holder to

cultivate the land and raise crops thereon. [p. 387, col. 2.]

It is discretionary with a Court to award interest on mesne profits beyond three years from the date of the decree. [p. 388, col. 1.]

Grish Chauder Lahiri v. Shoshi Shikharaswar Roy, 27 C. 931; 27 I. A. 110; 4 C. W. N. 631; *Grish Chandra Lahiri v. Sasi Sekharaswar Roy*, 33 C. 329; *Ijtulla Bhugan v. Chandra Mohan Banerjee*, 12 C. W. N. 285; 7 C. L. J. 197, followed.

Appeal against the order of the Court of the Subordinate Judge of Tanjore in Execution Petition No. 109 of 1913, in Original Suit No. 13 of 1903.

Mr. S. Muthiah Mudliar, for the Appellant.

Messrs. S. Subramania Aiyar, T. Narasimha Aiyangar and S. Ramachandra Aiyar, for the Respondent.

JUDGMENT.—In this suit, a decree for possession and past mesne profits was passed on the 30th March 1904. There are a number of defendants in the suit and the 15th defendant was in possession of the land to which the appeal relates. On the 1st August 1904, he gave notice to the plaintiff that he was willing to surrender possession of the land. The plaintiff said that it was too late for purposes of its cultivation, and that she would not then take possession. Thereupon the 15th defendant made an application to the Court and plaintiff took possession in October, but the land remained uncultivated. The question we are asked to deal with is whether, as a matter of fact, when the 15th defendant was willing to surrender possession or rather gave notice to the plaintiff, it was not too late for cultivation. The learned Subordinate Judge has come to the conclusion that it was rather late in the year for that purpose. We have heard full arguments on the point, but are not prepared to differ from that conclusion. It was possible that the plaintiff by making some special effort could have got something out of the land even after that date, but apparently she would not have been able to obtain full crops, and the order that has been passed by the Subordinate Judge in this respect is equitable in the circumstances of the case. This was the only point urged before us in the appeal, and that failing, the appeal is dismissed with costs.

There is only one point in the memorandum of objections that has been urged before us and that relates to interest on mesne profits. The Subordinate Judge has allowed mesne profits for three years and in calculating mesne profits he has, as the law directs, taken into

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account the interest on the profits for those three years, but has refused to allow interest for the period beyond three years. It is now contended before us that he is wrong and that he was bound to give interest up till the date of payment. The main decision on the point is that of the Privy Council reported as *Girish Chunder Lahiri v. Shoshi Shikhareswar Roy* (1), but what we gather from the heading is (and there is nothing in the judgment inconsistent with it) that mesne profits include interest, but that it can be given only three years after the decree and not any further. But it appears that when the case was remitted to this country the learned Judges of the Calcutta High Court gave mesne profits up to the date of delivery of possession [see *Girish Chandra Lahiri v. Sasi Sekhareswar Roy* (2)], but the question, however, does not appear to have been raised before them, nor is it discussed in the judgment. There is also a decision of the Calcutta High Court reported as *Ijatulla Bhuyan v. Chandra Mohan Banerjee* (3). That would rather support the view which has been taken by the learned Subordinate Judge in this case. What we find here that the decree provides for interest on past mesne profits, but does not provide for any interest on mesne profits after the date of the decree. It is quite clear from the very decisions cited before us that the Court has discretion in a matter like this whether to allow interest after three years or not.

We are unable to say that the discretion has been wrongly exercised in this case. The memorandum of objections also fails and is dismissed with costs.

Appal and memorandum of objections dismissed.

(1) 27 C. 951 (P. C.); 27 I. A. 110; 4 C. W. N. 631.

(2) 33 C. 329.

(3) 12 C. W. N. 265; 7 C. L. J. 197.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 988 OF 1914.

July 26, 1915.

Present:—Mr. Justice Batchelor and Mr. Justice Hayward.

KASTURCHAND LAKHMAJI AND OTHERS
—DEFENDANTS—APPELLANTS

versus

JAKHIA PADIA PATIL AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 68 (c)—

Sale-deed—Price treated as continuing debt—Property made security for re-payment of debt—Agreement to reconvey—Transaction, nature of—Construction of documents—Mortgage or sale.

Where in a suit for a declaration that a certain apparent sale was in reality a mortgage and for redemption of the mortgage, it appeared that plaintiffs executed a sale-deed in favour of the defendants giving them certain property in lieu of a total debt of Rs. 2,00 and contemporaneously with it two other documents were executed, one, an agreement by the defendants to reconvey the property to the plaintiffs on payment within a specified time of the total amount due as well as of any moneys the defendants may spend on the lands, and the second, a rent note passed by the plaintiffs to the defendants providing for the payment to the defendants annually for ten years of a rental of Rs. 287, an amount which was made up of Rs. 62 on account of the Government assessment and Rs. 225, on account of interest on the principal sum of Rs. 2,500 at 9 per cent:

Held, that, inasmuch as the apparent price of Rs. 2,500 was treated and regarded as a continuing debt between the parties and the property was made security for the re-payment of that debt, the deed in question was a deed of mortgage and the plaintiffs were entitled to redeem. [p. 390, col. 2.]

A mere agreement to reconvey does not necessarily signify that the transaction is a mortgage. [p. 389, col. 2.]

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. [p. 390, col. 1.]

Hunoomanpersaud Panday v. Musammat Babooee Muncaj Koonverree, 6 M. I. A. 393 at p. 411; 18 W. R. 51n.; *Sevestre* 253n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147, followed.

Second appeal from the decision of the District Judge of Thana, in Appeal No. 167 of 1913, reversing the decree passed by the Subordinate Judge at Alibag, in Civil Suit No. 29 of 1912.

Messrs. Jayakar and G. S. Rao, for the Appellants.

Messrs. Coyji and A. G. Desai, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought for a declaration that a certain apparent sale, dated the 14th August 1902, was in reality a mortgage and for an order allowing the plaintiffs to redeem the property on payment to the defendants of any sum that might be found due to them on accounts taken under the Dekkhan Agriculturists' Relief Act.

The question, which has divided the learned Judges below, was whether the transaction of the 14th August 1902 was

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an out and out sale or a mortgage by conditional sale. The learned trial Judge was of opinion that it was a sale, while the learned District Judge held that it was a mortgage by conditional sale.

It may be observed that whether the transaction be regarded as a sale or a mortgage, the plaintiffs are still within time to recover their land. For, on the footing that the transaction was a sale with a right of re-purchase in the plaintiffs, the plaintiffs are still entitled to re-purchase. The object of the suit, therefore, seems to be on the plaintiffs' part to obtain a decree for redemption under the Dekkhan Agriculturists' Relief Act which would enable them to open their accounts with their creditors from the beginning, and it is this re-opening of the accounts which the defendants resist.

The question of the true character of this transaction must be answered by reference to the three contemporaneous documents, Exhibits 55, 32 and 56, in which the transaction is embodied. Exhibit 55 is the sale-deed by the plaintiffs to the defendants. Exhibit 32 is the defendants' agreement to reconvey to the plaintiffs, and Exhibit 56 is the rent note passed by the plaintiffs to the defendants. All three documents were admittedly executed on the same day at the same sitting. The important recital in the sale deed, Exhibit 55, is couched in the following words:—"After making up accounts of the above bouds (mortgage bonds) and after giving credit for the receipt given to you by us, the amount due to-day is Rs. 2,125, and the amount received to-day for making payments to other people and for house expenses is Rs. 375. Thus the total amount due to you is Rs. 2,500. In lieu of this we give to you by a sale-deed" property, which the instrument thereafter specifies. In the agreement, Exhibit 32, it is provided as follows:—"This property (described) we have purchased from you for a sum of Rs. 2,500. The property purchased will be sold to you on the following terms only. The terms are: (1) If at any time between *Shake* 1824 and *Shake* 1833 in the month of *Margashirsha* you pay us the sum of Rs. 2,500, we shall receive it and pass a sale-deed of the property

in your favour at your cost. (2) The above property you have taken from us on a lease of ten years and have agreed to pay us every year Rs. 257. A separate lease has been taken for that. This sum you must pay to us from year to year in the month of *Margashirsha* from *Shake* 1824 to *Shake* 1833. (3) The right which you have obtained from us in virtue of this writing of purchasing the above property is given by us to yourselves alone. You are not to transfer it to anybody. In case you do transfer it, the transfer will not be valid and we shall not acknowledge it. (4) With respect to the above property if we are obliged by any means to spend any sum upon it, or if you hereafter borrow moneys from us, we shall receive all these amounts with interest first, and then only shall we pass to you a sale-deed of the above property." The rent note, Exhibit 56, provides that annually for the ten years mentioned the plaintiffs shall pay to the defendants rent of Rs. 257.

It remains to determine, what is the true contract to be collected from these documents. Was it a contract of sale or a contract of mortgage by conditional sale? In the course of the argument numerous cases were cited to us, but they were, we think, all decided on their own particular facts. The only case where the facts were substantially similar to those now before us is *Maruti v. Balaji* (1), where the Court pronounced in favour of a mortgage. The principle which governs the cases seems to be clear enough. The Court has to decide between an out and out sale for an agreed price and a mere transfer of the property, the subject of the sale-deed, as security for a loan. Thus the principal point to be cleared up is, whether the apparent price, in this case Rs. 2,500, was the real price of a sale or was treated and regarded as a continuing debt between the parties, the property being made security for the re-payment of that debt. The three documents must, of course, be read as a whole and the intentions of the parties must be gathered from the provisions of the documents. We begin with this that the mere agreement to reconvey does not necessarily signify that the transaction is a mortgage. It seems to us, however, that

(1) 2 Bom. L. R. 1058,

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two things must be remembered in this context. One of them is the notorious reluctance of Indian peasants to sell their land, a reluctance which is judicially noticed and historically explained by Sir Michael Westropp in *Bapuji Apaji v. Senavaraji Marvadi* (2). And the second thing to be remembered is that, in the case now before us, on the assumption that the parties intended an out and out sale, there is no assignable reason why the defendants should have promised the plaintiffs to reconvey the property to them if they repaid the purchase-money. That is a point which, we think, is not without importance, and it was, we observe, allowed to weigh with the Court in *Patel Ranchod Morar v. Bhikhabhai Devidas* (3).

As is said there by Mr. Justice Ranade, so we may say here, that on the case made by the defendants there was no occasion for the covenant to reconvey on the re-payment of the money within a given time. It may also be remarked that though the parties must of course be held to the contract which they have made, and the Court cannot make a new contract for them, yet in ascertaining the true nature of the contract the Court must follow the injunction so frequently laid down by the Privy Council that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses": *Hunoomanpersaul Panday v. Musammatt Babooee Munraj Koonwera* (4).

Now from the documents which we have read it is clear, in the first instance, that although the sale-deed recites that the property was sold in lieu of the payment of the debt due, the sum of Rs. 2,500, which formed the purchase price, was in its origin a debt; and that it continued as a debt seems to us to be indicated by clause 4 of Exhibit 32 which we have quoted. For that clause, as we understand it, shows that the re-payment of the Rs. 2,500 and the re-payment of any fresh advances which the plaintiffs might take from the defendants were to be on one and the same footing; in other words, the

old relation of debtor and creditor was continued, and the Rs. 2,500 was regarded as an outstanding loan to be reckoned with any other new loans which might thereafter be made to the plaintiffs. It is also, we think, material to note that by the terms of the agreement it was provided that, within the stipulated period of ten years, whensoever the plaintiffs might elect to make to the defendants the payment due to them, the defendants would reconvey to the plaintiffs. That provision seems to us to suggest the inference that the defendants-creditors were looking only to the recovery of their money, not to the ownership of the land. It was sufficient to provide for the recovery of the principal sum, Rs. 2,500, without interest; because the interest due on that sum was already provided for under the guise of rent reserved by Exhibit 56. That rent was in the aggregate Rs. 287. It is found by the lower Court, and the finding has not been challenged, that this aggregate was made up of Rs. 62 on account of the Government assessment and Rs. 225 net rent. Now, the Rs. 225 reserved as rent work out to exactly nine per cent on the principal sum of Rs. 2,500, and it was not contested before us that that was the principal upon which the sum of Rs. 225 was fixed. That circumstance seems to us to furnish yet another indication that the transaction with which we are dealing was a transaction of mortgage in which the mortgagee was interested only in securing a sufficient interest on his investment. And strong corroboration of that conclusion is supplied by the fact that the assessment due to Government on the land continued to be paid by the plaintiffs as well after as before this transaction of apparent sale.

The learned Judge of the lower Appellate Court thus had good reason for his finding that the Rs. 2,500 was and continued to be a debt. We have given our reasons for adopting the same conclusion, because it seems to us that the question, depending as it does on the construction of documents, is open in second appeal, though we notice that in *Maruti v. Balaji* (1) it was said that "a finding on such a point would ordinarily be a finding of fact which would be binding on this Court in second appeal."

Two other circumstances may be alluded to as strengthening the conclusion which we

(2) 2 B. 231.

(3) 21 B. 704.

(4) 6 M. I. A. 383 at p. 411; 18 W. R. 81n.; *Sevestre* 253n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

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have reached. One of them is that, in spite of the terms of the deed of sale, the possession remained with the plaintiffs, the vendors, and was not made over to the defendants. And the second circumstance is that the lower Appellate Court finds, as a matter of fact, that the value of the mortgaged properties was Rs. 5,000, that is, exactly double the sum fixed as the consideration of the apparent sale.

In view of all these *indicia* of a mortgage we do not think that the learned Judge's conclusion is displaced by the argument that the documents, which we have before us, do not disclose any such mutuality of remedies as the Courts have held to be ordinarily characteristic of the relation between mortgagor and mortgagee. This requirement was considered by a Full Bench of this Court in *Tukaram v. Ramchand* (5), and it was there observed that "the dictum is often cited in our Courts without precise appreciation of its meaning, and in any case it has a very limited application to the ordinary mortgages with which we are familiar in the *mofussil* in India." These words are, we think, apt to the circumstances of the present appeal where the mortgage, if we are right in regarding it as a mortgage, falls under section 58 (c) of the Transfer of Property Act, being a mortgage by conditional sale. In other words, the transaction was *ex facie* a sale, and a deed of sale would clearly be an inappropriate place in which to embody the reciprocal remedies of a mortgagee as mortgagee.

Lastly, it was contended that the transaction could not be regarded as a mortgage, because there was no provision for accountability. There is, however, provision for accountability by the mortgagor as we have already noticed, and the circumstances of the case leave no room for accountability by the mortgagee, inasmuch as the mortgagee never went into possession of the mortgaged property, but received an annual rent in lieu of the rents and profits.

These are all the considerations which have been advanced to us on the one side and the other, and on a review of all of them we are satisfied that the weight of evidence is in favour of the view which com-

mended itself to the learned Judge of the lower Appellate Court. His decree must, therefore, be affirmed and this appeal dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2077 OF 1911.

September 3, 1914.

Present: Sir Asutosh Mookerjee, Kt., and Mr. Justice Benchcroft.

KALI MOHAN TRIPURA AND ANOTHER—
DEFENDANTS APPELLANTS

versus

Maharaja BIRENDRA KISORE
MANIKYA BAHADUR—

PLAINTIFF—RESPONDENT.

Landlord and tenant—Grant, rent-free, to excavate tank—Long possession—Rent neither claimed nor paid—Presumption—Suit, if can be dismissed on ground of right to have rent assessed not accrued—Late stage of suit—Plaintiff, if can put forward inconsistent case—Pleadings.

A plaintiff cannot be permitted to turn round at the final stage of the litigation and put forward a case inconsistent with the allegation in the plaint, which have been found to be untrue. [p. 392, col. 2.]

Where a land was given rent-free by an ancestor of the plaintiff to the grand-father of the defendant in 1837 in order that a tank might be excavated thereon and the tank was excavated at the expense of the grantee, and although the grantee and his descendants were in occupation for over 60 years no rent was ever claimed or paid:

Held, that the legitimate inference was that the defendants held the land under a rent-free grant; [p. 392, col. 2.]

Held, further, that assuming that the defendant did not hold the land under a rent-free grant, the claim for rent was barred by limitation; [p. 392, col. 2.]

Held, also, that the suit could not be dismissed on the ground that the right to have rent assessed on the disputed land had not accrued at the date of suit, inasmuch as no grant was produced and there was nothing to show that liability to pay rent had been suspended and would be revived in a particular contingency. [p. 392, col. 1.]

Birendra Kisore Manikya Bahadur v. Akram Ali, 13 Ind. Cas. 513; 15 C. L. J. 194 at p. 198; 16 C. W. N. 304 at p. 308; 39 C. 439, referred to.

Appeal against the decree of the Officiating District Judge of Noakhali, dated the 3rd May 1911, reversing that of the Munsif, second Court, at Feni, dated the 3rd August 1910.

Babu Bipin Chunder Bose, for the Appellants.

KALI MOHAN TRIPURA V. BIRENDRA KISORE.

Babu Birendra Chunder Das, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit for assessment of rent. The plaintiff came into Court on the allegation that the defendant, a tenant within his estate, had encroached upon the land in dispute and was consequently liable to pay rent in respect thereof. According to the plaintiff, he became aware of the encroachment by the defendant in the course of settlement proceedings in 1897. The defendant resisted the claim on the ground that he held the land under a rent-free grant, made to his ancestor in order that a tank might be excavated thereon. He denied that he had encroached on the disputed land and further pleaded that if his rent-free title was not established, the claim for assessment of rent was barred by limitation. The Court of first instance found that the defendant had a rent-free title and dismissed the suit. Upon appeal the District Judge has reversed that decision and assessed rent on the disputed land.

It is plain that this decision cannot be possibly supported.

It has been argued on behalf of the plaintiff in this Court that we should adopt the course which was pursued in the case of *Birendra Kishore Manikya Bahadur v. Akram Ali* (1), namely, dismiss the suit on the ground that the right to have rent assessed on the disputed land had not accrued at the date of suit. That decision is clearly distinguishable. In that case, the original grant was produced and the Court held, upon a construction of its terms, that the proprietor would have a right to assess rent on the property only after it had ceased to be a tank and that consequently the suit was premature. In the present case, the grant has not been produced, and there is nothing to show that liability to pay rent had been suspended and would be received in a particular contingency. Besides, the view suggested is absolutely inconsistent with the assumption on which the suit was instituted. The plaintiff now contends that the defendant has not encroached upon this land which was granted to him under an agreement to ex-

cavate a tank, and that his right to have rent assessed thereon would accrue only if the tank ever silted up and became unfit for use. The plaintiff cannot be permitted to turn round at this the final state of the litigation and put forward a case inconsistent with the allegations in the plaint, which have been found to be untrue.

Then, again, when we look to the merits of the case, it is perfectly plain that the plaintiff cannot succeed in his claim for assessment of rent. The defendant contends that the land was given rent free by an ancestor of the plaintiff to his grandfather in 1837 in order that a tank might be excavated thereon. The tank was excavated at the expense of the grantee, and although the grantee and his descendants have been in occupation for more than 60 years, no rent has ever been claimed or paid. The legitimate inference, in these circumstances, is that the defendant holds the land under a rent-free grant. But even if it be assumed that the defendant does not hold the land under a rent-free grant, it is plain that the claim for assessment of rent is barred by limitation. The defendant asserted to the knowledge of the plaintiff, in the course of settlement proceedings, on the 7th April 1897, that he was under no obligation to pay rent and that the claim then put forward by the plaintiff for assessment of rent was entirely unfounded. This suit was not instituted till the 8th September 1909. It is thus clear from every point of view that the plaintiff cannot succeed.

The result is that this appeal is allowed, the decree of the lower Appellate Court set aside and the suit dismissed with costs in all the Courts.

Appeal allowed

(1) 13 Ind. Cas. 518; 15 C. L. J. 194 at p. 108; 18 C. W. N. 304 at p. 308; 39 C. 439.

PEETIKAYILAKATH MAHMMAD HAJI v. ALAM IBRAN HAJI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 944 OF 1913.
APPEAL AGAINST APPELLATE ORDER No. 95
OF 1913.

September 27, 1915.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Spencer.

PEETIKAYILAKATH MAMMAD HAJI—

DECREE-HOLDER—RESPONDENT—

PETITIONER AND APPELLANT

versus

ALAM IBRAN HAJI—PETITIONER—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—Judgment-debtor, death of—Legal representative—Title of third person set up—Order—Appeal.

Where on the death of a judgment-debtor, his legal representative is brought on the record, and such legal representative sets up in execution proceedings, title on behalf of a person not a party to the suit, the order on such a petition is not one coming within section 47 of the Code of Civil Procedure but is within the purview of Order XXI, rule 58, and is not appealable. [p. 394, col. 1.]

Ramanathan Chettiar v. Levrar Marakayar, 23 M. 195; 10 M. L. J. 64; *Kartick Chandra Ghose v. Ashutosh Dhara*, 12 Ind. Cas. 163; 14 C. L. J. 425; 16 C. W. N. 26; 39 C. 298, followed.

Kuriyali v. Mayan, 7 M. 255, dissented from.

Petition, under section 115 of Act V of 1908, and appeal preferred against the decree of the Court of the Subordinate Judge of North Malabar, in Appeal Suit No. 111 of 1912, preferred against the decree of the Court of the District Munsif of Badagara, in Miscellaneous Petition No. 895 of 1911, in Execution Petition No. 261 of 1911, in Original Suit No. 573 of 1908.

FACTS.—A obtained a decree against the Anandravan of a Malabar *tarwad* and in execution thereof attached certain immoveable property in possession of the judgment-debtor. He died, and on his death, the *karnavan* of the *tarwad* was brought on the record as his legal representative. He set up the claim of the *tarwad* to the property, and contended that the judgment-debtor had no partible interest in the property and it was not attachable. The District Munsif dismissed the petition and upheld the attachment. The *karnavan* appealed and the lower Appellate Court set aside the attachment. Against that order the decree-holder filed the present revision petition to the High Court.

Mr. K. P. M. Menon, for the Appellant:—

The lower Appellate Court had no jurisdiction to entertain an appeal. The question might not have been raised in the lower Court, but being one of jurisdiction could be raised at any stage, even in the High Court. The petitioner, though he was the legal representative of the judgment-debtor was not making any claim "as such", but was basing it on a different title, *viz.*, on behalf of the "*tarwad*" which was not a party to the suit. Therefore, his claim fell under the scope of Order XXI, rule 58, and not under section 47 of the Code of Civil Procedure. *Ramanathan Chettiar v. Levrar Marakayar* (1) and *Kartick Chandra Ghosh v. Ashutosh Dhara* (2). Decrees falling under section 47 were, no doubt, appealable, but the Munsif's order herein being one under Order XXI, rules 58 and 63, not appealable and was "final" as far as the present proceedings were concerned.

Mr. C. Madhavan Nair, for the Respondent:—Whatever be the nature of the claim it was a "question relating to execution between the decree-holder and the legal representative of the judgment-debtor", and as such, the order of the District Munsif fell "also" under section 47 of the Code and was appealable. Moreover the cases cited for the decree-holder were not applicable, because the claims therein were made on behalf of temples by trustees who were not the legal owners. There were other decisions more in point, and in his favour. *Kuriyali v. Mayan* (3), *Prosunno Kumar v. Kali Das* (4) and *Bhagaratulu Sanyanarayana v. Yelasturapu Venkata Subarayudu* (5).

JUDGMENT.—In this case, the question argued was whether an appeal lay to the Subordinate Judge from the order of the District Munsif. The point is covered by the principle of the rulings in a Full Bench decision, *Ramanathan Chettiar v. Levrar Marakayar* (1), and a very recent decision of a Full Bench of the Calcutta High Court, *Kartick Chandra Ghosh v. Ashutosh Dhara* (2). In these cases the person who was

(1) 23 M. 195; 10 M. L. J. 64.

(2) 12 Ind. Cas. 163; 39 C. 298; 14 C. L. J. 425; 16 C. W. N. 26.

(3) 7 M. 255.

(4) 19 C. 683; 19 I. A. 166.

(5) 9 Ind. Cas. 648; (1911) 1 M. W. N. 198; 9 M. L. T. 481.

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brought on record as the representative of the judgment-debtor in the first case or was a party to the suit itself as in the Calcutta case claimed the property, in one case as a trustee and in the other case as *shebait* of a temple, and it was held that such matters were not covered by section 244 of the old Code corresponding to section 47 of the present Code. In his counter-petition, the respondent before us claims the property as *karnavan* of a *tarwad*. The judgment-debtor, Seeyali, and his brother formed a *tavazhi*. The judgment-creditor obtained a money decree in which he attached the property alleged to belong to Seeyali and on the latter's death, the present respondent was brought on the record as his legal representative. The claim he put forward in respect of the property was that it belonged not to the judgment-debtor, but to the *tarwad*. There seems to us no distinction in principle between this case and the cases in which the person who was a party to the suit or was brought on record as representative of the judgment-debtor claimed the property as trustee for certain other persons or as *shebait* of a temple. Our attention was drawn to the ruling of *Kuriyali v. Mayan* (3), but that ruling was considered by a Full Bench decision of this Court in *Ramanathan Chettiar v. Levvai Marakayar* (1), where it appears to have been dissented from. It seems to us that the rulings in 23 Madras and in 39 Calcutta lay down the correct law. In this case, therefore, no appeal lay to the Subordinate Judge. The petition must be allowed and the decree of the Subordinate Judge set aside and that of the District Munsif restored. The respondent will pay the costs of the petitioner. The Civil Miscellaneous Second Appeal No. 95 of 1913 is dismissed with costs.

Petition allowed; Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3929 OF 1913.

August 17, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice N. Chatterjee.

BOUWANG RAJA CHALLAPPHROO
CHOWDHURY—DEFENDANT—APPELLANT

versus

BANGA BEHARY SEN—PLAINTIFF—

RESPONDENT.

Contract—Bond, suit on—Contract in writing registered, not signed by both parties—Limitation Act (IX of 1908), Sch. I, Art. 116, applicability of—Interest—High rate—Court, power of, to grant relief—Contract, unenforceable—Party, if can set up other reasonable terms.

A contract in writing in India does not necessarily imply that the document must be signed by both the parties thereto. [p. 395, col. 2.]

Therefore, a bond executed by a party and delivered to the other party and accepted by him completes the agreement between the parties and in law this amounts to a contract in writing. [p. 395, col. 2.]

Article 116 of Schedule I to the Limitation Act, 1908, applies to cases of bonds not signed by both the parties. [p. 395, col. 2.]

A Court is competent to grant relief whenever the rate of interest appears to the Court to be penal. The fact that the rate of interest is excessive is sufficient by itself to justify the inference that the rate is penal and unenforceable. [p. 396, col. 1.]

Once a contract between the parties is deemed unenforceable, the plaintiff is entirely in the hands of the Court, he is not entitled to substitute for the original contract another contract which may appear to him to be reasonable. [p. 396, col. 2.]

Where the plaintiff was by contract entitled to interest on his loan at the rate of 5858 per cent. a year and sued to recover interest at the rate of 40 per cent. a year:

Held, that no Court of Justice will enforce such a contract and in the opinion of the Court the plaintiff was entitled to 1 per cent. per annum simple interest by way of damages for the detention of the money. [p. 396, col. 2.]

Appeal against the decree of the District Judge of Chittagong, dated the 30th June 1913, affirming that of the Subordinate Judge of Chittagong, dated the 6th May 1912.

Babu Probodh Chunder Roy, for the Appellant.

Babus Kshitish Chunder Sen and Pares Chunder Sen, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit for recovery of money. On the 16th January 1895, the defendant borrowed from the plaintiff Rs. 400 on interest at 4 per cent. per mensem, with six-monthly rests; the money was made re-payable at the end of a year. These terms were in-

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not entered by this Court in the schedule. It was entered, subsequently registered and delivered to the plaintiff. On the 25th December 1901, the defendant paid the plaintiff Rs. 20 by way of interest, and on the 22nd December 1901, he made a similar payment of Rs. 30. These payments were duly endorsed on the back of the bond and the v. Petition were signed by the defendant. On the 15th December 1901, the plaintiff instituted this suit for recovery of his dues on the bond. The schedule to the plaint set out the defendant's statement of accounts which were shown that on the date of the commencement of the suit, a sum of Rs. 3,500-5-0 was found due by the defendant to the plaintiff. In the third paragraph of the plaint, however, the plaintiff stated that he could not possibly realise this large sum from the properties of the defendant and he consequently confined his claim to the modest sum of Rs. 3,000. The defendant pleaded in answer to the suit, first, that the claim was barred by limitation; second, that the rate of interest was unreasonable and should not be enforced by a Court of Justice. The Courts below have overruled these contentions and have

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accordingly that Article 116 is applicable to cases of the description now before us, and this view has been followed by implication in a long series of decisions of this Court, such as *Nobocomar Mookhopadhaya v. Siru Mullick* (7) and *Ethel Georgina Kerr v. Clara B. Rutton* (8).

As regards the second ground the appellant has argued that the provision for interest contained in the bond is in the nature of a penalty and is not enforceable in a Court of Justice. In support of this view reliance has been placed upon the decisions in *Abdul Majid v. Ksheroode Chandra Pal* (9) and *Khagaram Das v. Ram Sankar Das* (10). In the case last mentioned, it was pointed out upon a review of the earlier authorities on the subject that the more modern decisions recognised the rule that the Court is competent to grant relief whenever the rate of interest appears to the Court to be penal. It was further explained that the fact that the rate of interest was excessive, might be sufficient by itself to justify the inference that the rate was penal and unenforceable. In support of this view, reliance may be placed on *Webster v. Bosanquet* (11) and *Clydebank Engineering and Shipbuilding Co. v. Yzquierdo Castaneda* (12). Reference may also be made to the observations of Lord Loreburn, Lord Macnaghten and Lord James in *Samuel v. Newbold* (13). Lord Loreburn said:—"We are asked to say that an excessive rate of interest could not be of itself evidence, that the transaction was harsh and unconscionable. I do not accept that view. Excess of interest or charges may of itself be such evidence and particularly if it be unexplained. If no justification be established, the presumption hardens into a certainty." Lord Macnaghten was still more emphatic: "The rate of interest may be so monstrous as to show of itself that the transaction is harsh and unconscionable. There

may be, as Lord Thurlow said in the case of *Gwynne v. Heaton* (14), an inequality so strong, gross and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it." Lord James added: "Excessive interest of itself is sufficient to render a contract harsh and unconscionable. Proof of excessive interest may of itself, therefore, be sufficient to entitle the debtor to relief. What amounts to excessive interest is to be determined by the Tribunal in each case, the question of risk being a material matter for consideration. When excessive interest is apparently established, any facts that tend to show that such excess does not render the contract harsh and unconscionable, should be proved in evidence by the lender. The burden is on him." In the case before us, the result of the contract is that the plaintiff has become entitled to interest on his loan at the rate of 5858 per cent. a year; no Court of Justice will enforce such a contract. The respondent argues, however, that the modest sum he now claims gives him interest at the rate of 40 per cent. a year. But this contention entirely overlooks the fundamental fact that once the contract between the parties is deemed unenforceable, the plaintiff is entirely in the hands of the Court: he is not entitled to substitute for the original contract another contract which may appear to him to be reasonable. The Court has now to consider what sum should be decreed to the plaintiff by way of damages for the detention of his money. We are of opinion that the plaintiff should not have more than 12 per cent. per annum simple interest on the sum advanced by him.

The result is that this appeal is allowed, and the decree of the District Judge varied. A decree will be made in favour of the plaintiff for Rs. 400 with interest thereon at the rate of 12 per cent. per annum from the date of the loan to the date of the institution of this suit, that is, from the 16th January 1895 to the 15th December 1910. Allowance will be made in the accounts for the two sums admitted to have been paid towards interest. The sum thus determined will carry interest at 6 per cent. per annum from the date of the institution of the suit to the date of realisation. Each party will pay his own costs in all the Courts.

Appeal allowed; Decree varied.

(14) (1778) 1 Bro. C. C. 1; 28 E. R. 949,

(7) 6 C. L. R. 579; 6 C. 94.

(8) 4 C. L. J. 510.

(9) 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809.

(10) 27 Ind. Cas. 815; 21 C. L. J. 79; 42 C. 652; 19 C. W. N. 775.

(11) (1912) A. C. 334; 106 L. T. 337; 28 T. L. R. 271; 81 L. J. P. C. 205.

(12) (1905) A. C. 6; 74 L. J. P. C. 1; 91 L. T. 666; 21 T. L. R. 58.

(13) (1906) A. C. 461; 75 L. J. Ch. 705; 95 L. T. 209; 22 T. L. R. 703.

GANAPATHI ASARI V. SUNDARAM CHETTI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 698 OF 1915.

CIVIL MISCELLANEOUS PETITION No. 2779
OF 1915.

October 27, 1915.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Spencer.GANAPATHI ASARI AND OTHERS—
PLAINTIFFS—PETITIONERS

versus

SUNDARAM CHETTI—DEFENDANT—
RESPONDENT.*Civil Procedure Code (Act V of 1908), s. 92—Court of original jurisdiction—Subordinate Judge empowered to try suits under s. 92—Transfer of case from District Court—Subsequent notification limiting jurisdiction of Subordinate Judge to specified area, effect of.*

Where a suit instituted under section 92 of the Code of Civil Procedure in a District Court was transferred by the latter to the Court of a Subordinate Judge empowered by the Local Government to try suits under that section but where by a subsequent notification the Local Government confined the original jurisdiction of that Subordinate Judge to a specified local area:

Held, that the Subordinate Judge, having derived his power to try such a suit by an order of transfer, made by the District Judge and under the prior Notification of the Local Government, did not cease to be "a principal Civil Court of original jurisdiction" within the meaning of section 92 of the Code of Civil Procedure by the latter notification, and his power to try the suit was not taken away by it. [p. 397, col. 2.]

Muhammad Musa v. Abul Hassan Khan, 22 Ind. Cas. 951; 18 C. W. N. 612; 41 C. 866, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Salem, in Original Suit No. 4 of 1915.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the stay of further proceedings in Original Suit No. 4 of 1915 on the file of the Court of the Temporary Subordinate Judge of Salem, pending disposal of the said Civil Revision Petition No. 698 of 1915 preferred therefrom to the High Court.

Mr. J. S. Veeraraghava Aiyar, for the Petitioners.

Mr. T. M. Krishnaswami Aiyar, for the Respondent.

JUDGMENT.—This application is made to us with a view to have the question decided whether the Subordinate Judge's Court at Salem has jurisdiction to try the suit

which is instituted under section 92 of the Civil Procedure Code, that is to say, with respect to the public charity. What happened was the suit was originally instituted in the District Court of Salem. At that time the District Court alone had jurisdiction to try such suits as the principal Civil Court of original jurisdiction in the district. The Local Government, however, on the 17th October 1910, invested all Courts of Subordinate Judges in this Presidency with jurisdiction under the Civil Procedure Code in respect of suits relating to trusts created for public purposes of a charitable and religious nature and the Temporary Subordinate Judge's Court, by a notification throughout the District of Salem; but by a subsequent notification dated 13th July 1915, the order was modified to this extent, that the Court should have and exercise original jurisdiction over the village of Mastampath. The result of the later order is that for the purpose of institution of suits, the Temporary Subordinate Judge at Salem will have local jurisdiction only over the village of Mastampath, but it is empowered, like other Subordinate Judges' Courts in the district, to try any suit which the District Judge is empowered to make over to it. This suit being instituted originally in the District Court, the only question that has to be decided is whether it having transferred the suit to the Temporary Court, this Temporary Court has the power to try it. It apparently derived its power from the notification of the 17th October 1910, and it is difficult to see what difficulty there is in the way of the Subordinate Judge exercising powers which the Local Government was competent to confer under the provisions of section 92 of the Code and which it did as a matter of fact confer on all Subordinate Judges in this Presidency. A ruling reported in *Muhammad Musa v. Abul Hassan Khan* (1) has been cited before us, but that case is quite distinguishable from the present one. There the Additional Judge to whom the case was transferred by the District Judge was not empowered by the Local Government to try suits under section 92 of the Civil

(1) 22 Ind. Cas. 951; 18 C. W. N. 612; 41 C. 866.

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Procedure Code, as the Subordinate Judge in this case has been.

We hold that the Subordinate Judge is competent to try and dispose of the suit.

The petition is dismissed. Costs will abide the result.

Civil Miscellaneous Petition No. 2779 of 1915 is also dismissed.

Petitions dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 70 OF 1914.

September 23, 1915.

Present:—Mr. Justice Seshagiri Aiyar and

Mr. Justice Kumaraswami Sastri.

VELAYUTHAM PILLAI—DEFENDANT

NO. 3—APPELLANT

versus

SUBBAROYA PILLAI AND OTHERS—

PLAINTIFF AND DEFENDANTS NOS. 2, 4 AND 5—

RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 134, 144—

Adverse possession—Co-parceners, possession of one, possession of others—Possession hostile at commencement—Accrual of peaceful title before completion of adverse possession, effect of—Possession—Title.

On the suit of one of two reversioners, a sale was declared to be a mortgage in 1885 and the plaintiff was given a decree to redeem the property after the death of the widow in case she died without redeeming it. In 1893, the purchaser, whom the decree had declared to be a mere mortgagee, sold the property to the other reversioner and put him in possession. On the widow's death in 1900, the said two reversioners were the only heirs of her husband. When in 1912 the former sued for redemption of the property, the latter pleaded adverse possession from the date of his purchase:

Held, (1) that although the possession of the defendant reversioner when it commenced in 893 was hostile, yet it ceased to be so in 1900 when on the widow's death succession opened to both the reversioners; [p. 400, col. 1.]

(2) that on the death of the widow, the defendant must be deemed to have held the property on behalf of the plaintiff as well; [p. 400, col. 2.]

The possession of one co-parcener or co-owner cannot be adverse to the other until the latter is notoriously excluded by the former. [p. 400, col. 2.]

The possession should be *prima facie* attributed to a lawful title. [p. 400, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Cuddalore, in Appeal Suit No. 20 of 1913, preferred against that of the Court of the District Munsif of Vriddhachalam, in Original Suit No. 910 of 1912.

This second appeal coming on for hearing on 21st December 1914, the Court made the following

ORDER.—Without deciding at present whether notice, actual or constructive, which the purchaser had, will affect his right under Article 134 of the Limitation Act we think it necessary to call for a finding upon the following issue:—

"Had the 3rd defendant's adoptive father any actual or constructive notice of the decree obtained by the plaintiff in Original Suit No. 371 of 1885 against the widow or of the nature of the right of his vendor under the sale and the counter-agreement referred to in the pleadings in this case?"

Parties may adduce fresh evidence.

The finding should be submitted within two months from this date and the parties will be at liberty to file objections to the said finding within ten days after notice of the return of the same shall have been posted up in this Court.

In compliance with the above order, the Temporary Subordinate Judge of Cuddalore submitted the following

FINDING.—Plaintiff says that V. Palamala Pillai was examined as a witness in Original Suit No. 371 of 1885 and his deposition is filed as Exhibit E. It is clear from this that no questions were put to him about this property. Plaintiff says that after the death of Meenatchi Ammal, he asked V. Palamala Pillai to receive Rs. 75 and give back this property to him and he promised to do so. If this statement is true, surely plaintiff would have stated it in his deposition when he was examined as a witness in this suit. When he was asked about it, he says that he mentioned this in Court, but he does not know whether the Court took it down in his deposition or not. I think this is a gross falsehood. I do not believe his present statement. It is clear he never mentioned it in his deposition when he was examined in the lower Court in this suit.

2. Plaintiff's second witness is his son's *sagalan*. He says that he was present at the time of the sale by S. Palamala Pillai to V. Palamala Pillai and he says that it was sold for Rs. 75 as there were litigations about this property. But he has not attested the sale-deed. I do not believe

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his present statement that he was present at the time of the sale. Nor do I believe his statement that the purchasers said that they should not buy it owing to Subbaraya Pillai's litigations. Plaintiff's third witness is a co-trustee of a temple with plaintiff. He says that he used to go to the Court when that suit was pending and he used to see V. Palamala Pillai attending the Court for that suit. It is clear that V. Palamala Pillai was examined as a witness in that suit on some other matter and so must have attended the Court. From this we cannot draw the inference that he was going there regularly or knew the judgment and decree in that case.

3. Plaintiff's witnesses say that the property was worth Rs. 300 and was sold by S. Palamala Pillai to V. Palamala Pillai for Rs. 75. It is admitted that Chella Pillai, the original owner of this property, sold it to S. Palamala Pillai for Rs. 75 only and so he sold it to V. Palamala Pillai for Rs. 75. There is nothing strange in this. As plaintiff's Pleader says it is possible that V. Palamala Pillai might have had notice of this decree or the nature of the right of his vendor. But with the evidence of plaintiff and that of his two interested witnesses who were examined just now, I cannot come to the conclusion that V. Palamala Pillai had any actual or constructive notice of the decree in Original Suit No. 371 of 1885 or of the nature of the right of his vendor under the sale and the counter of the agreement referred to in the pleadings.

4. I, therefore, find that V. Palamala Pillai had no such notice.

This second appeal came on for final hearing on the 17th of September 1915 after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial.

Mr. C. Padmanabha Iyengar, for the Appellant:—The 3rd defendant's father having purchased the properties from Palamalai without notice of the decree in Original Suit No. 371 of 1885 and the 3rd defendant, having enjoyed it for over 12 years from the date of his purchase adversely to the plaintiff, has perfected his title under Article 134, Limitation Act.

Mr. C. V. Anantakrishna Iyer, for the 1st Respondent:—It is quite true that possession under the sale could have been perfected if it had only continued for 12 years. This was not so in the present case, as, before the 12 years expired, the succession opened and the 3rd defendant became a co-owner with the plaintiff. There is no evidence that after this event, the 3rd defendant openly set up his adverse title as against the plaintiff. Possession must *prima facie* be attributed to lawful title; in this case it was not exclusive, but on behalf of plaintiff as well. Article 134 does not, therefore, apply. See *Tarubai v. Venkatrao* (1), *Asansab Ravuthan v. Vamana Rau* (2), *Moidin v. Oothumanganni* (3) and *Ponnusaiamy Iyer v. Permaye* (4).

JUDGMENT—The properties in suit belonged to one Chella Pillai. He sold the properties to one Palamalai and obtained an agreement to reconvey the properties. After the death of Chella Pillai, the plaintiff, as one of the reversioners, sued his widow and the purchaser, Palamalai, in 1885 for a declaration that the property was only subject to a mortgage and that the alleged sale did not pass an absolute interest to the purchaser. The decree in that suit was that the plaintiff was entitled to redeem the properties after the death of the widow in case she did not redeem the properties herself. After this decree, Palamalai sold the properties in 1893 to the father of the 3rd defendant and put him in possession. The widow died in 1900. On her death, the heirs of her husband were the plaintiff and the 3rd defendant. Plaintiff instituted this suit for redemption. The 3rd defendant pleaded among other things that as he and his father were in possession since 1893 under a sale from a mortgagee, they had perfected their title by prescription against the plaintiff at the date of the suit. Article 134 of the Limitation Act was relied on. The District Munsif dismissed the suit

(1) 27 B. 43; 4 Bom. L. R. 721.

(2) 2 M. 223.

(3) 11 M. 416.

(4) 26 Ind. Cas. 346; 16 M. L. T. 530.

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on the ground that the legal representative of the original mortgagee was not impleaded. On appeal, the Subordinate Judge differed from the lower Court on this question and decreed the claim, holding that the suit was not barred by limitation. In second appeal, we called for a finding whether the father of the 3rd defendant had knowledge of the decree obtained by the plaintiff in 1885. The finding is in the negative.

We agree with the lower Appellate Court that the suit is not barred by limitation. It is true that the possession taken by the father of the 3rd defendant could have been perfected under Article 134, as the property was sold to him by a mortgagee. But before 12 years were over, a new right accrued to the 3rd defendant. He became the heir to the property with the plaintiff in 1900. From the point of view of the plaintiff, he is entitled to say that when succession opened to him, a co-parcener of his was in possession and that that possession was not adverse to him unless and until he was excluded notoriously. If the 3rd defendant wanted to rely upon his right as a purchaser from the mortgagee, he should have put that forward to the knowledge of the plaintiff. There are not many authorities bearing on the question.

In *Tarubai v. Venkatrao* (1), Batty, J., says:—"In the second when there has been no such ouster as to give notice of the adverse nature of the possession, it is incumbent on the person alleging that the title set up against him is barred by twelve years' adverse possession, to show, not only that his possession has lasted for twelve years, but that it has *all the time* been in open conflict with the title on which the plaintiff relies. The result is, as above indicated, if there has been no ouster or open and notorious act of taking possession, then the person relying on his possession to defeat title must show that it was of such a nature, and involved the exercise of rights so irreconcilable with those claimable by the plaintiff, as to give the plaintiff occasion to dispute that possession (or, in other words, that it was such as to give a cause of action or right to sue for possession) throughout the twelve years next preceding the suit."

The language of Article 144 which speaks of possession 'becoming adverse' supports this view. Reference may also be made to *Asansab Ravathan v. Vamana Rau* (2) and *Moidin v. Oothumangauni* (3). The decision in *Ponnusawmy Iyer v. Permaye* (4) is in favour of this position. There is no doubt that possession held by one of the co-owners will not be adverse to the others until they have notice of the hostile claim. The difficulty in this case arises from the fact that possession was hostile when it commenced. We have not been referred to any authority which shows that such a possession continues to be hostile notwithstanding the accrual of a peaceful title before the completion of the adverse possession. Possession should be *prima facie* attributed to a lawful title; we think the third defendant on the death of the widow must be deemed to have held the property on behalf of the plaintiff as well.

The decision of the Subordinate Judge is right and we dismiss the second appeal with costs. Time for redemption is extended to three months from this date.

Appeal dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION PETITION No. 85 of 1914-15.

May 7, 1915.

Present:—Mr. Fenton, F. C.
VIR SINGH AND ANOTHER—
PLAINTIFFS—PETITIONERS

versus

KALA SINGH—DEPENDANT—RESPONDENT.

Government Tenants (Punjab) Act (III of 1893), s. 8—Agreement to allow others to occupy land granted by Government, whether binding.

Where a Government tenant executed a deed of agreement in favour of his three brothers whereby he let them occupy one-half of the land included in the Government grant and on his subsequently seeking to eject them, the brothers sued to have the notice of ejectment cancelled:

Held, that the agreement admitting the plaintiffs to a share in the tenancy without the previous consent in writing of the Financial Commissioner was void, as being in contravention of section 8 of the Government Tenants (Punjab) Act, 1893, and could not be relied on. [p. 403, col. 1.]

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Revision from the order of the Commissioner, Lahore Division, dated the 6th January 1913.

Sardar Kharak Singh, for the Petitioners.

ORDER.—The defendant, Kala Singh, is tenant under Government of a colony grant of $1\frac{1}{2}$ squares in the Chunian Colony. The plaintiffs in this case, Vir Singh and Samand Singh, are his brothers. The plaintiff in Revision Case No. 86 is a third brother, Chanda Singh. The facts in the two cases are the same and will be dealt with in one order.

The defendant, Kala Singh, associated his three brothers with him in the breaking up and cultivation of the land included in the Government grant. He now seeks to eject his brothers and the present suit is brought by the latter to have the notice of ejectment cancelled. The first Court decreed cancellation. The Assistant Commissioner of Kasur, exercising the powers of a Collector, accepted defendant's appeal and set aside the decree of the first Court. He also remanded the case to the first Court for a decision as to the amount of compensation on ejectment to be awarded to plaintiffs. The plaintiffs appealed to the Commissioner, who declined to interfere with the Collector's order. They now apply to this Court on the revision side.

The plaintiffs, apart from a point as to the existence of the relationship of landlord and tenant between the parties, which will be dealt with below, rely chiefly on a deed of agreement executed in their favour by defendant shortly after the land had been allotted to the latter by the Colonization Officer. The following is a translation of this deed of agreement which was executed on 8th July 1905:—

"I, Kala Singh, son of Amir Singh, caste Kambo Mutti, resident of Mauza Killa Ganja, Tahsil Chunian, do hereby declare that in Chak No. 41 of Rakh Shaikhoo I have been granted one square of land and half a square divided diagonally measuring about 58 *ghumaons*. I had promised to my full brothers, Chanda Singh, Samand Singh and Vir Singh, of Mauza Killa Ganja of the Chunian

Tahsil that when I should be granted land by Government, I would occupy one-half of the grant and the other half would be occupied by all the three persons, Chanda Singh, etc. I have now executed this deed of agreement to the effect that the said Chanda Singh, Samand Singh and Vir Singh will be considered as entitled to one-half of the grant by Government in the same way as I would be. In short, they shall pay all the cesses in respect of their half share and shall receive the produce thereof. I will not object to it in any way. If I should try to eject them for any reason, the said persons will be at liberty to take from me their damages in respect of half the land at the rate of...per *ghumaon*. I will have no objection to it. I have, therefore, executed this agreement so that it may serve as authority. Dated 8th July 1905 corresponding to 25th *Har Sambat* 1962.

Witnesses—

(Sd.) Chuha, son of Thumb impression of Kisheu of Khudian. Kala Singh, aged 45."

(Sd.) Sham Singh,
son of Lal Singh of Khudian."

The Collector has held this agreement to be invalid with reference to the terms of the Government Tenants Act, 1893, section 8 of which provides as follows:—

"The rights or interest vested in a tenant by or under this Act shall not be capable of being attached or sold in execution of a decree or order of any Court or in any insolvency proceedings, nor shall they or any of them, without the previous consent in writing of the Financial Commissioner, be transferred or charged by any sale, gift, mortgage or other private contract"

As no written consent of the Financial Commissioner was given to the alienation which the agreement of 8th July 1905 was intended to effect, Mr. Harcourt holds that it is invalid and cannot be recognised.

Now, if the case is to be governed by the ruling of the Chief Court in *Hussain Khan v. Jalau Khan* (1) it must be admitted that the agreement under consideration,

(1) 18 Ind. Cas. 5; 58 P. R. 1913; 48 P. L. R. 193; 36 P. W. R. 1913.

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in a suit between the parties to the agreement (Government not being a party), cannot thus be treated as invalid. In that case also, section 8 of the Government Tenants Act, 1893, was pleaded as a bar, but Mr. Justice Robertson held that the agreement was valid and that as between the parties section 8 of the Act mentioned was no bar. It was added, however, that the decision was not binding upon the Financial Commissioner.

This ruling, if it is to be generally followed, will have a far-reaching effect. Not only in the Chunan Colony, but in the Chenab and Jhelum Colonies, and in the new Colonies of the Triple Canal Project, Government has created and is creating tenancies which are subject to the prohibitions against transfer contained in section 8 of the Government Tenants Act, 1893, and the corresponding section (section 19) of the Colonization of Government Lands Act, 1912. The object and intention of such a prohibition are obvious. On the one hand, Colonists are selected individuals possessing certain qualifications. If a selected Colonist were, without permission, to transfer his land to a person not possessing the requisite qualifications, the policy governing colonization operations might be defeated. Again, it is part of the policy governing colonization to allot holdings of a certain minimum size. The evils of small holdings in the more congested districts of the Province were very present to Government at the time it was decided to allot only holdings of a fairly large size. In time, sub-division of holdings will come in consequence of successions by inheritance, but this evil will be retarded for a generation or more if, to start with, the unit of allotment is a large one. A few exceptions occurring in the practical operation of the foregoing prohibitions against transfer might not have any material effect upon the general policy, but it is obvious that a ruling such as that in *Hussain Khan v. Jahan Khan* (1) must stimulate transfers in contravention of the statutory provisions of the Acts of 1893 and 1912, and that upon the Executive Officers of Government will be thrown the invidious and burdensome task of stepping in and ejecting the alienees,

who ought not to be in possession if the prohibitions against transfer contained in the two Acts, are observed.

It becomes very necessary, therefore, to examine the grounds upon which Mr. Justice Robertson's ruling is based. The learned Judge refers to section 23 of the Indian Contract Act, but he does so only in connection with a contention advanced in the suit before him that an agreement of the nature therein propounded was fraudulent. He did not notice the grounds mentioned in the same section, which really operate to invalidate any agreement of the kind. Section 23 provides that every agreement of which the object or consideration is unlawful is void. And it further provides that the object or consideration is unlawful if, *inter alia*:—

It is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law; or
the Court regards it as opposed to public policy.

The following illustration is appended to the section as a sample of an agreement which would "defeat the object of the law":

"A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A, upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law."

Now we are not without guidance in the rulings of the High Courts as to the scope and meaning of these clauses of section 23 of the Contract Act, which operate to safeguard the objects of statutory enactments. Agreements which have been held to be void under this section include a sub-lease of an excise contract [*Debi Prasad v. Rup Ram* (2)], a transfer of a share in an excise contract [*Hormasji Motabhai v. Pestonji Dhanjibhai* (3)], a transfer of occupancy

(2) 10 A. 577; A. W. N. (1888) 215.
(3) 12 B. 422.

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rights declared by Statute to be non-transferable [*Durga v. Jhinguri* (4), *Jhinguri Tewari v. Durga* (5) and *Kashi Prasad v. Kedar Nath Sahu* (6)] and a transfer by a disqualified proprietor in contravention of section 8 of the Jhansi Encumbered Estates Act, 1882 [*Radha Bai v. Kamod Singh* (7)]. In all these cases, the agreements were, in suits between transferees and transferors, held to be void as defeating the object of the law. It is impossible not to regard a transfer in contravention of section 8 of the Punjab Tenants Act, 1893, or section 19 of the Colonization Act, 1912, as void on similar grounds. On a similar ground I held in *Mohammad Nasir Khan v. Farid* (8) that an agreement providing for the sale of canal water in contravention of the provisions of Act VIII of 1873 was void under section 23 of the Contract Act.

In *Hussain Khan v. Jahan Khan* (1), Mr. Justice Robertson founds an argument on the analogy of transfers by occupancy tenants. But there is in reality no analogy. The Punjab Tenancy Act does not enact that transfers by occupancy tenants without the consent of the landlord shall be void. It only provides (section 60) that such transfers shall be voidable. They are voidable only at the instance of the landlord. As between the parties, therefore, they hold good and are valid, unless and until they are invalidated by the landlord. An agreement, on the other hand, of which the object is unlawful as explained in section 23 of the Contract Act is void *ab initio*.

It is hardly necessary to notice the ruling in *Ali Mardan v. Bakur Khan* (9), which is referred to by Mr. Justice Robertson in *Hussain Khan v. Jahan Khan* (1). That ruling amounts to nothing more than that there is no special procedure open to the Revenue Authorities, corresponding to section 21A of the Land Alienation Act, whereby the Civil Appellate Courts can be moved by the Deputy Commissioner for the revision of a decree which gives effect to an agreement in

contravention of section 8 of the Government Tenants Act, 1893.

Holding, therefore, as I do, that the agreement of 8th July is void and was void from the start, it is necessary to determine the question as to the status of the parties.

Plaintiffs would in a suit for the cancellation of a notice of ejectment be entitled to succeed if they could show that the relationship of landlord and tenant did not exist between the parties, and that the issue of a notice of ejectment by a Revenue Officer was, therefore, without jurisdiction. Plaintiffs cannot be regarded as trespassers because they first occupied the land with the permission of defendant. They cannot be regarded as co-sharers, because to give them such a status would be to give effect to a void agreement. The mere fact that they paid no rent to defendant—they paid their share of Government dues—does not exclude them from the definition of "tenant" [section 4 (5), Tenancy Act]. Indeed the agreement itself contemplates a contingent ejectment. On all grounds, therefore, I must hold that the relationship of landlord and tenant does exist between the parties. Although under section 8 of the Government Tenants Act of 1893, it is doubtful whether Government tenants could sub-let without permission, there is no doubt as to the existing law on the subject under the Act of 1912, which allows sub-letting. There is, therefore, now no statutory bar to plaintiffs being regarded as tenants of the defendant.

The order of the Collector, which it is sought to revise, directed that the case be remanded to the first Court for determination of the question of compensation. This order will now be carried out. Revision rejected.

Revision rejected

(4) 7 A. 511; A. W. N. (1885) 135.

(5) 7 A. 878; A. W. N. (1885) 200.

(6) 20 A. 219; A. W. N. (1898) 47.

(7) 4 A. L. J. 696; 30 A. 38; A. W. N. (1907), 276.

(8) 22 Ind. Cas. 398; 8 P. R. 1913 Rev.

(9) 17 Ind. Cas. 680; 13 P. R. 1913; 7 P. W. R. 1913; 27 P. L. R. 1913.

NARASAMMAL V. SECRETARY OF STATE.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1617 OF 1914.

September 28, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.

NARASAMMAL—PLAINTIFF—APPELLANT
versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL, REPRESENTED BY
THE COLLECTOR OF TRICHINOPOLY—
DEPENDANT—RESPONDENT.

*Income Tax Act (I of 1886), s. 3 (5)—Annuity
grant in Mysore—Receipt in British India through
agent, if income.*

A lady was enjoying an annuity in Mysore
Province, instalments of which were remitted to her
in British India by her agent in Mysore:

Held, that it was income received in British India
within the meaning of section 3, clause (5), of the
Income Tax Act and was taxable.

Second appeal against the decree of the
Court of the Subordinate Judge of Trichi-
nopoly, in Appeal Suit No. 296 of 1913,
preferred against that of the Court
of the District Munsif of Srirangam, in
Original Suit No. 86 of 1912.

Messrs. C. S. Venkatachariar, K. Bashyam
Aiyangar and N. C. Vijayaraghavachari, for
the Appellant.

Mr. U. Madhavan Nair, for the Respond-
ent.

JUDGMENT.—This appellant was enjoy-
ing an annuity in Mysore Province,
instalments of which were remitted by her
agent to her while she was resident in
British India.

We agree with the Subordinate Judge
that these remittances were "income"
under Part IV of Schedule II of the Income
Tax Act.

It is argued that after collection by the
agent, the money ceased to be income, that
the act of the agent in receiving the
money in Mysore was tantamount to an
act of the principal; and that having once
been received in Mysore, it could not
again be received in British India when the
agent sent it on to his principal "Income"
means "what comes in", a definition which
will clearly embrace sums derived from a
source like this; and it is incontestable
that in this case these sums were "received
in British India" within the definition
in section 3, clause (5), of the Income Tax
Act and were, therefore, taxable.

This second appeal is dismissed with costs.

Appeal dismissed.

JIBAN KUAR V. GOVIND DAS.

ALLAHABAD HIGH COURT.

FULL BENCH.

CIVIL MISCELLANEOUS CASE No. 183
OF 1915.

October 29, 1915.

Present:—Justice Sir George Knox, Kt., Mr.
Justice Rafique and Mr. Justice Piggott.

Musammal JIBAN KUAR—APPLICANT
versus

GOVIND DAS—OPPOSITE PARTY.

*Stamp Act (II of 1899), Sch. I, Arts. 45, 55—
Compromise—Partition—Release, deed of.*

Where each of the two rival claimants to a pro-
perty claims to be the sole and full owner of the
property but in order to avoid litigation agrees to
release in favour of the other a certain portion of
it, the deed executed by either of them is a deed of
release and not a deed of partition and is liable to
a stamp duty under Article 55 of Schedule I of the
Stamp Act. [p. 405, col. 1.]

Eknath S. Gownde v. Jagannath S. Gownde, 9 B. 417,
followed.

Stamp reference made by the Board of
Revenue, United Provinces.

The Hon'ble Dr. Tej Bahadur Sapru, for
the Applicants.

Mr. Sital Prasad Ghose, for the Opposite
Party.

JUDGMENT.—The following case has been
stated by the Chief Controlling Revenue
Authority of these Provinces to this Court
under section 57 of the Indian Stamp Act
of 1899. The case stated runs as follows: On
the 23rd of August 1914, one Mathura
Das died childless, leaving property of the
estimated value of Rs. 2,25,000. The sister
of the deceased applied for Letters of Ad-
ministration. Gobind Das, a collateral of
of Mathura Das, disputed her claim. Eventual-
ly the two claimants effected a compromise,
and to give effect to this compromise both
the parties executed separate instruments of
even date on the 14th of September 1914.
Each instrument was treated as a deed
of release and was stamped with a stamp
Rs. 5. The instrument executed by Gobind
Das was presented for registration and was
impounded by the Sub-Registrar, who con-
sidered it to be an instrument of partition
chargeable with a duty of Rs. 375. The
instrument was sent to the Collector, who
considered it to be a release and referred
the case to the Board of Revenue under
section 56 (2) of the Act. The Chief
Controlling Revenue Authority give it as

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their opinion that the two deeds read together constitute an instrument of partition liable to a duty of Rs. 375 under Article 45, Schedule I, of the Stamp Act. But as they consider the question as one of some difficulty, the case has been referred to this Court. No one appears on behalf of the Chief Controlling Revenue Authority. The lady is represented in this Court by the Hon'ble Dr. Tej Bahadur Sapru, and Mr. Sital Prasad Ghose appears for Gobind Das. We have heard the former Advocate. The deeds have been read over to us. We have carefully considered their contents and we are satisfied that as the deeds stand, they are instruments of release within the meaning of Article 55, Schedule I, of the Stamp Act. The case as put by the lady in her deed is that under the Mayukha Law, she is the owner of the property left by the deceased Mathura Das. The case as put by Gobind Das in the document executed by him is that under the Mitakshara Law, he is the sole owner of the property in question. Neither of them states himself or herself as co-owner with the other, nor can they do so rightly. We, therefore, have not a case of persons purporting to be co-owners of the property and agreeing to divide the same. Each party before us claims to be the sole and full owner and in order to avoid litigation agrees to release in favour of the other a certain portion of the property which he or she claims to be his or her property in full. The Board of Revenue has cited *Reference under Stamp Act, section 46 (1)* as applicable to this case. But that was a case in which the parties purported to be the co-owners of the property. The view which we take is supported by *Eknath S. Gownde v. Jagannath S. Gownde* (2) and *Reference under Stamp Act, section 46(3)*. We direct that this be returned to the Chief Controlling Revenue Authority as our decision in this case. The deeds will be returned with the decision.

- (1) 12 M. 198.
 (2) 9 B. 417.
 (3) 15 M. 233.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL NO. 191 OF 1913.

August 30, 1915.

Present:—Justice Sir Asutosh Mookerjee,
 Kt., and Mr. Justice Roe.

SURES CHANDRA PALIT AND ANOTHER—
 PLAINTIFFS—APPELLANTS

versus

LALIT MOHAN DUTTA CHAUDHURI

AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of—"Malik"—"Nir-buyadha malik"—Will by husband in favour of his wife—Absolute interest given—Gift over, provision for, validity of—Construction of Will—Plain meaning—Language clear and unequivocal—Rules of law, harsh consequences of.

The use of the term "malik" may not by itself necessarily create an absolute interest, but the term when qualified by the word "nirbuyadha" indicates absolute ownership. [p. 407, col. 1.]

A Hindu testator appointed his wife as his executrix. A clause in the Will vested in her whatever might remain, after the payment of debts and expenses, absolutely and with complete power of alienation. Other clauses provided for the adoption of sons and in case of there being no adopted son or no son or wife of the adopted son at the time of the death of the widow, the heir, according to the Hindu *Shastras* who should be alive at the time, should get the properties which should remain after disposal by the widow by way of gift or sale.

Held, that the testator gave an absolute interest in his estate to his widow with full powers of alienation; [p. 412, col. 1.]

that the gift over of what might remain undisposed of by her was void and inoperative in law. [p. 412, col. 1.]

Semble.—If an estate is given in terms which confer an absolute estate to a named donee, and, then, further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not cut down and the further interests fail. [p. 408, col. 2.]

A gift over, if a devisee or legatee to whom an absolute interest is given does not dispose of his interest or dies intestate or dies before selling his interest, is void both as regards realty and personalty. [p. 409, col. 1.]

When an absolute interest has been given to the first taker, followed by a gift over of what may not be required by him, the gift over, though couched in the most direct and precise words, is void for uncertainty. [p. 410, col. 2.]

An instrument must receive a construction according to the plain meaning of the words and sentences therein contained; that is, the words are to be first read in their grammatical and ordinary sense, unless the context shows otherwise. [p. 411, col. 2.]

Where the language is clear and unequivocal, the construction cannot be altered or wrested to something different from the plain meaning for the purpose of escaping from what may seem to be the harsh consequences of rules of law. [p. 412, col. 1.]

SURES CHANDRA PALIT v. LALIT MOHAN DUTTA.

Appeal against the decree of the Subordinate Judge of Sylhet, dated the 17th February 1913.

Babu *Rishindra Nath Sarkar*, for the Appellants.

Babus *Tarakishore Chaudhuri* and *Gobinda Chunder Dey Roy*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation, which has culminated in this appeal, originally formed the estate of one Sarat Chandra Datta Chaudhuri, who made a testamentary disposition on the 2nd April 1899, and died on the 7th November 1901. He left a childless widow, *Girija Sundari Chaudhuri*, who died on the 21st November 1903. After the death of the widow, a dispute arose as to the devolution of the estate of her husband which had vested in her. The sons of the sister of the widow contended that the estate had vested in her absolutely and on her death, had devolved upon them as her heirs. The son of the sister of the testator contended, on the other hand, that the widow took nothing beyond a life-interest and that upon her death, the estate had devolved upon him as the reversionary heir to the estate of her husband. The result was that on the 11th September 1911, the sons of the sister of the widow instituted this suit against the son of the sister of the testator for construction of his Will and for recovery of possession of his estate on declaration of title thereto. Three other persons, with whom we are not now concerned, were also joined as defendants. The Subordinate Judge dismissed the suit, on the ground that the widow took only a life-interest and that upon her death, the estate vested in the first defendant as reversionary heir. The plaintiffs have now appealed to this Court and have contended, *first*, that the widow took an absolute estate under the Will of her husband, and, *secondly*, that the gift over of what might remain undisposed of by her, was repugnant and void.

The rights of the litigants depend upon a true construction of the Will of the testator and the determination of the legal effect of the disposition made by him. The material clauses of the Will, after the usual prefatory words, are as follows:—

"2. If, at the time of my death, no son is born of my loins or no son exists, and I die

childless, then in respect of my aforesaid moveable and immoveable properties which shall be rightfully owned by me, at the time of my death, by virtue of purchase, gift, inheritance or by any other right, I appoint my wife, *Srimati Girija Sundari Chowdhury*, to be the *achhi* or executrix after my death.

3. Immediately after my death, my executrix, *i.e.* *achhi*, shall defray the expenses, etc., of my cremation ceremony with the income of my property and shall pay my just debts, etc., if there be any, and shall meet other necessary expenses. If the expenses cannot be met with the income of the aforesaid properties, the said *achhi*, *i. e.*, executrix, if necessary, shall be competent to sell some portion of my aforesaid properties.

4. After the performance of what should be done, according to the purport of the foregoing paragraph, my widow, *Srimati Girija Sundari Chowdhury*, shall obtain whatever moveable and immoveable properties shall be left by me and she shall be the absolute owner, with the rights of gift, sale and all other kinds of transfer.

5. If no son is born of my loins, or there be no son, my widow, *Srimati Girija Sundari Chowdhury*, if she wishes, shall be competent to adopt a son; if she wishes, she shall be competent to adopt three sons in succession, but she shall not be competent to adopt another son during the life-time of one, or if such son does not forsake his adoptive mother, or if any of them dies leaving a male child, then during the life-time of such male child.

6. If I adopt a son, during my life-time or after my death, my widow adopts a son, in that case, after her, *i. e.*, my widow's death, the said adopted son shall get such properties as shall remain after sale or gift by my widow; and he shall be the absolute owner, with the rights of gift, sale and all other kinds of transfer; but the said adopted son shall not be competent to go away to the house of his natural father and mother, that is, he shall dwell in my own house or in a separate house erected by him in our own village. If he does not do so, he

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shall be fully deprived of the said properties. During the life-time of my widow, the said adopted son shall not have any right over the aforesaid properties.

7. If the said adopted son shall have no son or if he dies before a son is born to him, his widow shall be in enjoyment and possession of the said properties, provided my widow or her husband has not conferred on her any special right in respect of the said properties. But if she does not live in my own house, or in the house erected by her husband or that erected by her in my own village, she shall be deprived of the right of enjoyment and possession of the said properties.

8. If, at the time of death of my widow, there be no adopted son or if no son or wife of the adopted son be alive, then, my heir, according to the Hindu *Shastras*, who shall be alive at the time, shall get the properties which shall remain after disposal by my wife by way of gift or sale of the same."

The second clause appoints the widow as executrix. The third clause authorises her to meet the expenses and pay the debts by sale, if necessary, of a portion of the estate. The fourth clause vests in her, whatever might remain after the payment of debts and expenses, absolutely and with complete power of alienation. It cannot be disputed that the effect of this clause, taken by itself, is to constitute the widow the absolute proprietor of the estate. Her status is described, not merely as that of *malik*, but as that of *nirbuyadha malik*. The use of the term *malik* may not by itself necessarily create an absolute interest, as explained in the cases of *Surajmani v. Rabi Nath* (1); *Punchoo Money v. Troylucko Mohiney* (2); *Shib Lakshau Bhakat v. Srimati Tarangini* (3); *Padam Lal v. Tek Singh* (4). But, in the case before us, the term *malik* is qualified by the word *nirbuyadha* which, as is clear from the Sanskrit lexicons of Wilson,

Bohtlingk and Roth and Monier Williams signifies 'completed' or 'finished'. In fact, the well-known expression *nirbuyadha malik* is the strongest and most unequivocal phrase employed in the vernacular to indicate absolute ownership. In addition to this, we have two important facts; first, that as pointed out in *Kollany Kooer v. Luchmee Pershad* (5); *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (6) and *Rajnarain Bhaduri v. Katyayani Dabee* (7), affirming *Rajnarain Bhaduri v. Ashutosh Chuckerbutty* (8), the effect of the word *malik* is to confer on the donee a heritable and alienable estate; and secondly, that the fourth clause itself expressly confers on the widow full power of alienation of all kinds. As explained in *Toolsi Dass Kurmookar v. Madan Gopal Dey* (9); *Amarendra Nath Bose v. Shuradhany Dasi* (10); *Seth Mulchand Badharsha v. Bai Mancha* (11) and *Jogeswar Narain v. Ram Chandra Dutt* (12), when a power of absolute disposition is conferred on the donee, the provision indicates that the testator intended to create an absolute interest in favour of the donee. No doubt, there may be cases where, as in *Hara Kumari Dasi v. Mohim Chandra Sarkar* (13) and possibly in *Saroda Sundari v. Kristo Jiban Pal* (14), all the provisions of a Will taken together may indicate that the widow took only a life-interest coupled with a power of appointment to alienate by gift or sale the property passing by the Will; but this doctrine cannot be applied if there is in so many words a clear and absolute gift to the widow, as in the case before us. We thus start with the fundamental position that by the fourth clause the widow took an absolute interest in the estate devised. Is there, then, any provision in the Will which restricts the clear and unambiguous effect of this clause. The Subordinate Judge, in

(5) 24 W. R. 395.

(6) 24 I. A. 76; 24 C. 834; 1 C. W. N. 327.

(7) 27 C. 649; 4 C. W. N. 337.

(8) 27 C. 44.

(9) 28 C. 499.

(10) 5 Ind. Cas. 73; 14 C. W. N. 455.

(11) 7 B. 491.

(12) 23 I. A. 37; 23 C. 670.

(13) 7 C. L. J. 510; 12 C. W. N. 112.

(14) 5 C. W. N. 309.

(1) 30 A. 84; 7 C. L. J. 131; 35 I. A. 17; 18 M. L. J. 7; 5 A. L. J. 67; 12 C. W. N. 231 P. C.; 10 Bom. L. R. 59; 3 M. L. T. 144.

(2) 10 C. 342.

(3) 8 C. L. J. 20.

(4) 23 A. 217; A. W. N. (1907) 10; 4 A. L. J. 65.

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support of his view, relied upon the clauses which authorise the widow to adopt and prescribe the devolution of the estate in the event of such adoption. In our opinion, these provisions do not qualify the effect of the fourth clause. In fact, even the later clauses explicitly provide that the widow would have absolute interest notwithstanding the adoption, that the adopted son would not have any right over the estate during her life-time and that after her death, he should get only such properties as might remain after sale or gift by the widow, so that it is conceivable that the widow might alienate the entire estate and leave nothing for the adopted son to take. The case is thus very different from that before the House of Lords in *Comiskey v. Bowring-Hanbury* (15), where, although an absolute gift was made to the widow, there was clear indication that the estate was to be kept intact by her for transmission to the nieces of the testator, in whose favour, there was an executory gift to take effect on her death. The Subordinate Judge also relied upon the decision of the Judicial Committee in *Mahomed Shamsul Huda v. Sheikram* (16) in support of the view that in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, namely, that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family, and also that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. This is indisputable and has been re-affirmed by the Judicial Committee in *Radha Prasad Mullick v. Runimani Dassee* (17); but where, as here, the terms are perfectly clear, we cannot assume, contrary to the plain meaning thereof, that the testator intended to create estates of a particular description and then bend and twist the language in favour of the assumption so

made. In our opinion, there is nothing in any of the later clauses of the Will which cuts down the absolute estate created in favour of the widow in the fourth clause in the most unequivocal terms conceivable. It is possible that the testator has, in the later clauses of the Will, made provisions repugnant to what is contained in the fourth clause, but that cannot affect the meaning of what is contained therein. As was observed by the Judicial Committee in *Tripurari Pal v. Jagat Tarini Das* (18), where an absolute interest is given, the Court will not cut it down by subsequent words, unless they clearly have an effect to restrict it. To the same effect is the principle repeatedly recognised by the House of Lords as a settled rule of construction, namely, that if there is a clear gift, it is not to be cut down by anything subsequent in the Will, which does not, with reasonable certainty, indicate the intention of the testator to cut it down: *Thornhill v. Hall* (19); *Featherston v. Featherston* (20); *Abbott v. Middleton* (21); *Randfield v. Randfield* (22); *In re Freeman, Hope v. Freeman* (23). Thus, if an estate is given in terms which confer an absolute estate to a named donee, and, then, further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not cut down, and the further interests fail: *Hoare v. Byng* (24); *Hyndman v. Hyndman* (25).

The question next arises, is the gift over contained in the eighth clause valid and operative in law? The appellants have contended that as an absolute interest was conferred on the widow, the gift over was void for repugnancy. This argument

(18) 17 Ind.Cas. 696; 40 I. A. 37; 40 C. 274; 17 O. L. J. 159; 17 C. W. N. 145; 13 M. L. T. 1; (1913) M. W. N. 34; 15 Bom. L. R. 72.

(19) (1834) 2 Cl. & F. 22 at p. 36; 8 Bligh (n. s.) 88; 6 E. R. 1065; 37 R. R. 1.

(20) (1835) 3 Cl. & F. 67 at pp. 73, 75; 6 E. R. 1363; 39 R. R. 1.

(21) (1858) 7 H. L. C. 68 at p. 84; 28 L. J. Ch. 110; 5 Jur. (n. s.) 717; 11 E. R. 28; 115 R. R. 38.

(22) (1860) 8 H. L. C. 225 at pp. 235, 238; 30 L. J. Ch. 177; 6 Jur. (n. s.) 501; 9 W. R. 1; 125 R. R. 124; 11 E. R. 414.

(23) (1910) 1 Ch. 681 at p. 691; 79 L. J. Ch. 678; 102 L. T. 516; 54 S. J. 443.

(24) (1844) 10 Cl. & F. 508; 8 Jur. 563; 8 E. R. 835; 59 R. R. 122.

(25) (1995) 11 Ir. R. 179; 1 Irish Law Reports 697.

(15) (1905) A. C. 84; 74 L. J. Ch. 263; 92 L. T. 241; 53 W. R. 402; 21 T. L. R. 252.

(16) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 409.

(17) 35 I. A. 118; 35 C. 896; 5 C. L. J. 48; 12 C. W. N. 729; 10 Bom. L. R. 604; 5 A. L. J. 460; 18 M. L. J. 287; 4 M. L. T. 23.

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is supported by the well-settled rule of English Law that a gift over, if a devisee or legatee to whom an absolute interest is given does not dispose of his interest or dies intestate or dies before selling his interest, is void both as regards realty and personalty. This is clear from a long line of authorities: *Lightburne v. Gill* (26); *Ross v. Ross* (27); *Green v. Harvey* (28); *Yalden, In re* (29); *In re Mortlock's Trust* (30); *Bowes v. Goslett* (31); *Henderson v. Cross* (32); *Gulliver v. Vaux* (33); *Holmes v. Godson* (34); *Barton v. Barton* (35); *Perry v. Merritt* (36); *Wilcock's Settlement, In re* (37); *Percy, In re* (38); *In re Dixon, Dixon v. Charlesworth* (39); *Jones, In re, Richards v. Jones* (40); *Comiskey v. Bowring Hanbury* (15); *Bull v. Kingston* (41); *Cuthbert v. Purrier* (42); *Bourn v. Gibbs* (43); *Phillips v. Eastwood* (44); *Watkins v. Williams* (45); *Weale v. Ollive* (46); *Shaw v. Ford* (47); *In re Jenkins's Trusts*

(48); *Stretton v. Fitz Gerald* (49); *Parnell v. Boyd* (50); *In re Walker, Lloyd v. Tweedy* (51).

The decisions in *Upwell v. Halsey* (52) and *Doe, d. Stevenson v. Glover* (53) to the contrary effect cannot be treated as good law; the first of these cases was treated as overruled by Loughborough, L. C., in *Malim v. Keighley* (54) and by Sugden, L. C., in *Phillips v. Eastwood* (44); the second case was decided in ignorance of the decision in *Gulliver v. Vaux* (33), which, though decided in the Common Pleas in 1746, was brought to light in 1856, after a century's repose; it was with reference to this case that Holmes, J., observed in *Parnell v. Boyd* (50): "It will be recorded for a precedent. And many an error, by the same example, will rush into the State." The rule thus steadily applied in England and Ireland is, however, different from that recognised by the Law of Scotland, for, as pointed out by the House of Lords in *Baratow v. Black* (55), the position of an absolute unlimited owner subject to a conditional gift over, though unknown to the law of England, is well known to the Scotch Law.

The rule of English Law has been adopted almost universally in the Courts of the United States, and is thus formulated by Chancellor Kent in his Commentaries (Vol. IV, 270): "if there be an absolute power of disposition given by the Will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over the property which he, dying without heirs, should leave, or without selling or devising the same, in all such cases, the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or neces-

- (26) (1764) 3 Brown. P. C. 250.
 (27) (1819) 1 J. & W. 154; 20 R. R. 263; 37 E. R. 334.
 (28) (1842) 1 Hare 428; 11 L. J. Ch. 290; 6 Jur. 704; 66 E. R. 1100; 58 R. R. 127.
 (29) (1851) 1 DeG. M. & G. 53; 42 E. R. 471; 91 R. R. 24.
 (30) (1856) 3 K. & J. 456; 26 L. J. Ch. 671; 5 W. R. 748; 69 E. R. 1189; 112 R. R. 230.
 (31) (1857) 27 L. J. Ch. 249; 4 Jur. (N. S.) 17; 6 W. R. 8.
 (32) (1861) 29 Beav. 216; 7 Jur. (N. S.) 177; 9 W. R. 263; 54 E. R. 610; 131 R. R. 532.
 (33) (1746) 8 DeG. M. & G. 167n.; 44 E. R. 353; 114 R. R. 83.
 (34) (1856) 8 DeG. M. & G. 152; 25 L. J. Ch. 317; 2 Jur. (N. S.) 383; 4 W. R. 415; 44 E. R. 347; 114 R. R. 73.
 (35) (1857) 3 K. & J. 512; 3 Jur. (N. S.) 808; 69 E. R. 1212; 112 R. R. 266.
 (36) (1874) 18 Eq. 152; 43 L. J. Ch. 608; 22 W. R. 600.
 (37) (1876) 1 Ch. D. 229; 45 L. J. Ch. 163.
 (38) (1883) 24 Ch. D. 616; 53 L. J. Ch. 143; 49 L. T. 554.
 (39) (1903) 2 Ch. 458; 72 L. J. Ch. 642; 88 L. T. 862; 51 W. R. 652.
 (40) (1898) 1 Ch. 438 at p. 441; 67 L. J. Ch. 211; 78 L. T. 74; 46 W. R. 313.
 (41) (1816) 1 Mer. 314; 35 E. R. 690.
 (42) (1822) Jac. 415; 23 R. R. 104.
 (43) (1831) 1 Rus. & My. 614; Tam. 414; 8 L. J. (O. S.) Ch. 151; 39 E. R. 236; 32 R. R. 300.
 (44) (1835) L. & G. Temp. Sugden 270 at p. 297; 46 R. R. 226.
 (45) (1851) 3 Mac. & G. 622 at p. 629; 87 R. R. 228; 21 L. J. Ch. 601; 16 Jur. 181; 42 E. R. 400.
 (46) (1863) 32 Beav. 421; 55 E. R. 165; 138 R. R. 793.
 (47) (1877) 7 Ch. D. 669 at p. 674; 47 L. J. Ch. 531; 87 L. T. 749; 26 W. R. 235.

- (48) (1889) 23 L. R. Ir. 162.
 (49) (1889) 23 L. R. Ir. 310, 466.
 (50) (1896) 2 Ir. R. 571; 2 Irish Law Reports 923.
 (51) (1898) 1 Ir. R. 5; 3 Irish Law Reports 580.
 (52) (1720) 1 P. Wms. 651; 10 Mod. 44; 24 E. R. 554; 2 Eq. Cas. Ab. 325, pl. 28.
 (53) (1845) 1 C. B. 448; 14 L. J. C. P. 169; 135 E. R. 615.
 (54) (1795) 2 Ves. 529 at p. 532; 2 R. R. 229; 30 E. R. 760.
 (55) (1868) 1 Sc. & Div. 392.

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sarily implied by the Will." *Jackson v. Bull* (56); *Jackson v. Robins* (57), *Id. v. Id.* (58); *Attorney General v. Hall* (59). The rule formulated by Kent has been twice approved by the Supreme Court of the United States, *Smith v. Bell* (60); *Howard v. Carusi* (61).

The rule enunciated above has been recently adopted by the Judicial Committee of the Privy Council without discussion in *Tripurari Pal v. Jagat Tarini Dasi* (18). There the testator directed, with regard to a *debttar* estate, which he had dedicated and religious ceremonies which he had established during his life-time, that his son, Mukunda Murari, would be the *shebait*. He appointed the mother of the boy to be *shebait* as guardian during his minority. He next proceeded to provide that, if during his life-time or after his death the said Mukunda Murari died, his widow would be *shebait*, and after her death her two daughters would be *shebait*. After the death of the testator, the widow, during the minority of the boy acted as *shebait* and conducted the worship. Mukunda, on attainment of his majority, took possession and acted as *shebait*; he died in 1900, leaving a minor son and widow. His mother then resumed possession under the gift over in her favour. The infant son of Mukunda, through his mother, sued the widow and daughters of the testator for a declaration that he had the sole right to the *debttar* estate of his grandfather as the heir of his father, in whom it had previously vested absolutely on his attaining majority. The Subordinate Judge decreed the suit. This Court on appeal reversed that decision and held that the *shebaitship* devolved, upon the death of Mukunda, upon his mother, and that upon the death of the latter, it devolved on her daughters. The plaintiff appealed to the Privy Council and contended before the Judicial Committee that his father, Murari, took an absolute estate in the *shebaitship*, which on his death devolved on the plaintiff by right of inheritance; the

contention was that the gift over was contrary to law, and reference was made to section 111 of the Indian Succession Act and the decision of the Judicial Committee in *Narendra Nath Sirkar v. Kamalbasini Dasi* (62). The Judicial Committee accepted the contention and held that, as there was an absolute gift to Mukunda on his attaining his majority, the plaintiff was entitled to succeed. This fits in exactly with the rule enunciated by Sir Arthur Hobhouse in *Mussoorie Bank v. Rayner* (63), *Mussoorie Bank, Limited v. Rayner* (64) namely, that when an absolute interest has been given to the first taker, followed by a gift over of what may not be required by him, the gift over, though couched in the most direct and precise words, is void for uncertainty, according to a very well-known and well-established class of cases. Much stress has been laid in this Court on the decision of the Judicial Committee in *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (65). That case is, in our opinion, clearly distinguishable and its precise effect was stated by Lord Hobhouse in *Kristoromoni Dasi v. Narendra Krishna Bahadur* (66); "there was no gift over in that case: *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (65). The donor made a gift to his sister, Kasiswari, in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well known and often used by Hindu donors who intend to pass the whole inheritance, though they mention only children or issue. Then he said, 'no other heir shall be entitled.' This was held to mean that if Kasiswari died leaving no issue then living, her interest was to cease. In effect, the construction was that if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life-interest. In the latter case, nothing had passed from the donor but the life-interest, and when that was spent, he or his heir would lawfully re-enter." This principle clearly does not avail

(62) 23 L. A. 18; 23 C. 563.

(63) 7 A. C. 321; 51 L. J. P. C. 72; 46 L. T. 633; 31 W. R. 17.

(64) 4 A. 500; 9 A. 70; 4 Saraswati's P. C. J. 346.

(65) 5 L. A. 133; 4 C. 23; 3 C. L. R. 339; 3 Sar. P. C. J. 815; 3 Suth. P. C. J. 537; 2 Ind. Jur. 430; 1 Shome L. R. 241.

(66) 16 L. A. 29; 16 C. 383; 13 Ind. Jur. 90; 5 Sar. P. C. J. 285.

(56) (1813) 10 Johnson 19.

(57) (1819) 16 Johnson 537.

(58) (1809) 5 Mass. 500.

(59) (1731) Filtz. 314; W. Kel. 13; 2 Eq. Cas. Abr. 93, pl. 21; 94 E. R. 772.

(60) (1832) 6 Peter 68; 8 Law. Ed. U. S. 322.

(61) (1883) 109 U. S. 726; 27 Law. Ed. 725.

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the respondents, nor can they derive any assistance from the rule laid down in *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (67), *Sreemutty Soorjmoney Dossee v. Denobundo Mullick* (68) as to the defeasance of a prior absolute interest by a subsequent event. That rule has no application where, as here, there is an absolute gift of property to a person, followed by a gift over in the event of his dying intestate or not disposing of it. There is, in our opinion, no substantial answer to the contention that where a devisee takes an absolute interest, a gift over, on his failure to dispose of the property or of whatever part of the property he does not dispose of, is void.

An ingenious attempt has been made to criticise the rule enunciated and recognised in the law of England, and we are not unmindful that the rule has been the subject of unfavourable comment by text writers [see, for instance, Gray on Restraints on the Alienation of Property, sections 57—74]. For all practical purposes, however, it is fruitless to seek the logical justification of a principle which has been recognised or approved twice by the House of Lords [*Lighthburne v. Gill* (26), *Comiskey v. Bowring-Hanbury* (15)], twice by the Judicial Committee [*Tripurari Pal v. Jagat Tarini Dasi* (18); *Mussoorie Bank v. Raynor* (63)] and twice by the Supreme Court of the United States [*Smith v. Bell* (60); *Howard v. Carusi* (61)]. Reference may be made, however, to the judgments of Grant, M. R., in *Bull v. Kingston* (41), of Truro, L. C., in *Watkins v. Williams* (45), of Burnett, J., in *Gulliver v. Vaux* (33), of Turner, L. J., in *Holmes v. Godson* (34), of Fry, J., in *Shaw v. Ford* (47) and of Kent, C., in *Jackson v. Robins* (57), where the rule is defended on the grounds of uncertainty, repugnancy to the prior gift, and of public policy. As Turner, L. J., said in *Holmes v. Godson* (34), the law has said that if a man dies intestate, the real estate shall go to the heir and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make, is against the policy of law and, therefore, void. Lord Macnaghten emphasised this when he said in *Attorney*

General v. Ailesbury (69): "Real estate must descend according to the ordinary rules of real property. You cannot give real estate in fee and say that on the death of the owner intestate it shall go to his next of kin".

We may add that in cases of this description, the rule of construction formulated by Tindal, C. J., in *Scarborough v. Savile* (70) applies: "not only ought we to look to the words of the Will alone, to determine the operation and effect of the devise, but that we ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate, when such estate is once collected from the words of the Will itself." The instrument must receive a construction according to the plain meaning of the words and sentences therein contained: that is, the words are to be first read in their grammatical and ordinary sense, unless the context shows otherwise: *Hamilton v. Ritchie* (71); *Gordon v. Gordon* (72); *Seale-Hayne v. Jodrell* (73). As Knight Bruce, L. J., points out in *Low v. Thomas* (74), this rule comes from the Digest (lib. 32, tit. 1, section 69) where Marcellus says: "*Non aliter a significatione verborum recedi oportet quam cum manifestum est aliud sensisse testatorem*," (a departure from the literal meaning of the words used is not justifiable, unless it be clear that the testator himself intended something different therefrom). But as Halsbury, L. C., said in *Leader v. Duffey* (75), we shall be arguing in a vicious circle if, apart from the language of the instrument, we start with the assumption that the testator intended to create such estates only as the law allows, and then read into his words a meaning they will not legitimately bear. To the same effect are the observations of Cairns, L. C., in *Coltsmann v. Coltsmann* (76). As Buller, J., said in *Hodgson v.*

(69) (1857) 12 A. C. 672 at p. 694; 57 L. J. Q. B. 53; 54 L. T. 192; 36 W. R. 737.

(70) (1836) 3 A. & E. 897 at p. 962; 111 E. R. 653; 42 R. R. 306 at p. 313.

(71) (1894) A. C. 310 at p. 313.

(72) (1871) 5 H. L. 254 at p. 271.

(73) (1891) A. C. 304 at p. 306; 61 L. J. Ch. 70; 65 L. T. 57.

(74) (1854) 5 DeG. M. & G. 315 at p. 317; 2 Eq. R. 742; 23 L. J. Ch. 616; 18 Jur. 563; 2 W. R. 499; 43 E. R. 891; 104 R. R. 141.

(75) (1888) 13 A. C. 294 at p. 201; 58 L. J. P. C. 13; 59 L. T. 9.

(76) (1868) 3 H. L. 121 at p. 130; 10 W. R. 943.

(67) 6 M. I. A. 526; 1 Ind. Jur. (n. s.) 37; 4 W. R. P. C. 114; 1 Boulr. Rep. 223; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583; 19 E. R. 198.

(68) 9 M. I. A. 123; 1 Sar. C. J. 837; 19 E. R. 683.

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Ambrose (77), the question whether the intention is consistent with the rules of law or not, can never arise till it is settled what the intention was. Where there is no obscurity or ambiguity, there is no room for application of the doctrine that it is better to effectuate than to destroy the intention, for as Lord Coke quaintly puts it, "whosoever the words of a deed or of the parties without deed may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken": 1 Co. Lit., 42 a, b, *Christie v. Gosling* (78). Where, however, the language is clear and unequivocal, the construction cannot be altered or wrested to something different from the plain meaning for the purpose of escaping from what may seem to be the harsh consequences of rules of law: *Dungannon v. Smith* (79), *Pearks v. Mosley* (80), *DeBeauvoir v. DeBeauvoir* (81), *Abbott v. Middleton* (21), *Bathurst v. Errington* (82), *Martin v. Holgate* (83). We are of opinion that upon a true construction of the Will before us, the following positions are incontestable, namely, first, that the testator gave an absolute interest in his estate to his widow with full powers of alienation; and, secondly, that the gift over of what might remain undisposed of by her, was void and inoperative in law. There is thus no escape from the position that after the death of the widow, the estate has devolved upon the plaintiffs as her heirs, and not upon the first defendant as the reversionary heir to the testator.

The result is that this appeal is allowed and the decree of the Subordinate Judge

set aside. The plaintiffs will have a decree for possession of the properties in suit, exclusive of the properties mentioned in the two schedules attached to the written statement of the third defendant dated the 20th February 1912, but inclusive of one half of property 14 of the second schedule of that written statement. The plaintiff will also be entitled to costs in both the Courts and to mesne profits from the first defendant.

Appeal allowed.

MADRAS HIGH COURT. FULL BENCH.

SECOND CIVIL APPEAL No. 19 OF 1913.

August 31, 1915.

Present:—Sir John Wallis, Kt., Chief Justice
Mr. Justice Sadasiva Aiyar and Mr. Justice
Srinivasa Aiyangar.

VIYAPURI AND ANOTHER—DEFENDANTS
Nos. 1 AND 2—APPELLANTS

versus

SONAMMA BOI AMMANI—PLAINTIFF—
RESPONDENT.

Mortgage—Simple mortgagee, rights of—Trespasser dispossessing mortgagor—Possession, whether adverse to mortgagee.

The possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is not adverse to the simple mortgagee and his rights as mortgagee do not become extinguished by the trespasser's possession for more than twelve years. [p. 418, col. 2; p. 419, col. 1; p. 421, col. 1.]

Parthasarathi Naikan v. Lakshmana Naikan, 9 Ind. Cas. 791; 35 M. 231; (1911) 1 M. W. N. 201; 9 M. L. T. 396; 21 M. L. J. 469, followed.

Nandan Singh v. Jumman, 17 Ind. Cas. 632; 10 A. L. J. 276; 34 A. 640; *Raj Nath v. Narain Das*, 24 Ind. Cas. 997; 12 A. L. J. 982; 36 A. 567; *Aimadar Mandal v. Makhan Lal Dey*, 10 C. W. N. 904; 33 C. 1015; *Nandkumar Dohay v. Ajodhya Sahu*, 11 Ind. Cas.

(77) (1780) 1 Douglas 337 at p. 342; 3 Bro. P. C. 416; 99 E. R. 216.

(78) (1866) 1 H. L. 279 at p. 290; 35 L. J. Ch. 667; 15 L. T. 40.

(79) (1846) 12 Cl. & F. 546 at 599; 10 Jur. 721; 8 E. R. 1523; 69 R. R. 137.

(80) (1880) 5 A. C. 714 at pp. 719, 733; 50 L. J. Ch. 57; 43 L. T. 449; 29 W. R. 1.

(81) (1852) 3 H. L. C. 524 at p. 545; 16 Jur. 1147; 10 F. R. 206; 88 R. R. 191.

(82) (1877) 2 A. C. 698 at p. 709; 46 L. J. Ch. 748; 37 L. T. 338; 25 W. R. 908.

(83) (1866) L. R. 1 H. L. 175 at p. 189; 35 L. J. Ch. 729; 15 W. R. 135.

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465; 16 C. W. N. 351; 14 C. L. J. 292; *Bireswar Samanta v. Periya Sakhi Debi*, 28 Ind. Cas. 917; *Ramasami Chetti v. Ponna Padayachi*, 9 Ind. Cas. 28; (1911) 1 M. W. N. 209; 21 M. L. J. 397; 9 M. L. T. 264; 36 M. 87, referred to.

Prannath Roy Chowdry v. Rookea Begum, 7 M. L. A. 323; 4 W. R. P. C. 37; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 692; 19 E. R. 331; *Karan Singh v. Bakar Ali Khan*, 5 A. 1; 9 I. A. 99; 4 Saraswati's P. C. J. 382; *Deo d. Roylance v. Lightfoot*, 5 M. & W. 553; 11 L. J. Ex. 151; 5 Jur. 966; 151 E. R. 1158; 58 R. R. 813; *Keech v. Hall*, 1 Dougl. 21; 1 Sm. L. C. 511; 99 E. R. 17; *Pugh v. Heath*, 7 A. C. 235; 51 L. J. Q. B. 367; 46 L. T. 321; 30 W. R. 553; *Nisbet & Pott's Contract, In re*, (1906) 1 Ch. 386; 75 L. J. Ch. 238; 54 W. R. 286; 94 L. T. 297; 22 T. L. R. 234; *Chetti Goundan v. Sundaram Pillai*, 2 M. H. C. R. 51; *Surwan Hossein v. Shahazadah Golam Mahomed*, 9 W. R. 170; *Juneswar Dass v. Mahabeer Singh*, 1 C. 163; 25 W. R. 84; 3 I. A. 1; 3 Sar. P. C. J. 58; 3 Suth. P. C. J. 222; *Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*, 14 M. I. A. 144; 16 W. R. P. C. 33; 8 B. L. R. 104; 2 Suth. P. C. J. 480; 2 Sar. P. C. J. 711; 20 E. R. 740; *Ram Coomar Sein v. Prosunno Coomar Sein*, W. R. (1884) 375; *Sheoumber Sahno v. Bhowaneedeen Kulwar*, 2 N. W. P. H. C. R. 223; *Vasudeva Mudaliar v. Srinivasa Pillai*, 30 M. 426; 17 M. L. J. 444; 4 A. L. J. 625; 9 Bom. L. R. 1104; 6 C. L. J. 379; 11 C. W. N. 1005; 34 I. A. 187 (P. C.); 2 M. L. T. 333; *Peria Aiya Ambalam v. Shunmugasundaram*, 22 Ind. Cas. 615; 16 M. L. T. 112; 1 L. W. 119; 26 M. L. J. 140, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Appeal Suit No. 223 of 1911, preferred against that of the District Munsif of Tiruvadi, in Original Suit No. 131 of 1910.

Mr. G. S. Ramachandra Aiyar, for the Appellants.

Mr. C. Padmanabha Aiyangar, for Mr. A. K. Madhava Rao, for the Respondent.

This second appeal coming on for hearing on the 27th August 1914, the Court (Oldfield and Seshagiri Aiyar, JJ.), made the following

ORDER.—The learned Subordinate Judge has dealt with the case in the alternative with reference to either of the possible views of the facts. We think it necessary to have his conclusion as to them definitely expressed and, therefore, call on him for a finding on the following issue:—

"Was 1st defendant admitted by Solomon Thenkondan as a *porakudi*, and if so, when?"

The finding should be submitted within six weeks from this date; and the parties will be at liberty to file objections to the finding within seven days after notice of the return of the same shall have been posted up in this Court.

In compliance with the above order, the Subordinate Judge of Tanjore submitted the following

FINDING.—Their Lordships Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar, directed this Court to record a specific finding on the following issue, viz.:—

"Was 1st defendant admitted by Solomon Thenkondan as a *porakudi*, and, if so, when?"

when this matter came up before their Lordships in Second Appeal No. 19 of 1913.

2. The learned District Munsif, who has discussed this question in paragraphs 8 to 11 of his judgment, came to the conclusion that "although the Thenkondans might have been the original owners of the land, still the *porakudi* tenancy set up is not true. There is evidence on the defendants' side to show that 1st defendant's ancestors have been in exclusive possession from a very long time and that the 1st defendant's family never did *pannai* work." When the matter came up before this Court, my predecessor, Mr. D. Venkoba Row, made the following remarks:—

"The plaintiff has adduced evidence to show that Solomon Thenkondan (plaintiff's 1st witness) let 1st defendant into possession about 20 or 25 years ago on condition of his doing service and that he was doing service till 5 or 6 years ago. The District Munsif has disbelieved it, and I am not sure if he is right in doing so. No doubt there are discrepancies in the evidence, but they, by themselves, would not be sufficient, I think, in a case like this to afford proper ground for rejecting the evidence.... The oral evidence adduced on defendants' side to show that 1st defendant and his ancestors have been in possession of this *manai* for three generations, is not, in my opinion, worth much."

3. I have perused the evidence and I cannot agree with the opinion expressed by my predecessor. Plaintiff examined 8 witnesses in all, including (plaintiff's 1st witness) Solomon Thenkondan. The plaint land forms a portion of *paimash* No. 72/4 and it belonged originally to four sharers. Plaintiff's 1st witness deposed that the easternmost $\frac{1}{4}$ th fell to the share of

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Muthaiyan Thenkondan, which is now in 1st defendant's enjoyment as *pannayal*, that it was never enjoyed by Thirupathi and that it is not in Thirupathi's enjoyment at present. Thirupathi is the 3rd defendant in the suit. Immediately west of Muthaiya Thenkondan's share is plaintiff's 1st witness's share, i. e., plaint site. This particular plot is said to be a vacant site in the possession of 1st defendant and others. The next 1/4th share is Doraisami Thenkondan's share, and plaintiff's 1st witness cannot say who is in possession of that particular share, and he opined that somebody under 1st defendant must be in possession of that plot. The westernmost 1/4th belongs to Tapasiya Thenkondan which is also in the possession of 1st defendant. Thus from the plaintiff's 1st witness's evidence, it cannot be said that all the four shares are in the possession of the same individual since long and plaintiff's 1st witness himself admits that he has no knowledge in respect of some of the plots at least. It is also admitted by Solomon Thenkondan that the plaint site is a vacant site at present and has been so all through and that the house of 1st and 2nd defendants is north of the pathway north of the plaint land. Plaintiff's 1st witness further admits that before he put 1st defendant in possession of the property, he enjoyed the land by raising vegetables, &c., and that no *porakudi* was in enjoyment till then. Defendants are not admittedly plaintiff's 1st witness's *pannayals* at present and when they ceased to be *pannayals*, is not clear. Plaintiff's 2nd witness, Aiyasami Thenkondan, and plaintiff's 4th witness, Tapasiya Thenkondan, are co-parceners with Solomon Thenkondan and are entitled to 1/4th each in *Painash* No. 72/4. As pointed out by the learned District Munsif in paragraph 10 of his judgment, there are several contradictions as between the evidence of these three sharers. According to the 2nd witness, 1st defendant's tenancy was on condition of his paying *varam* for the dry crops cultivated on the plaint land and the *pannai* work is only a secondary consideration. The building now in existence, according to plaintiff's 2nd witness, came into existence 4 or 5 years ago and till then 1st defendant is said to have been living elsewhere. Whatever it be, the evidence of these

three witnesses, Nos. 1, 2 and 4, is interested and ought to be received with great caution. Plaintiff's 3rd witness is the Village Munsif. According to him 1st defendant came into possession of the four sites 20 years ago and he immediately built a house there, which is in direct contravention of the statement made by plaintiff's 2nd witness. This witness is a dismissed Village Munsif and he admits that he was not present when 1st defendant was put into possession. He is also closely related to plaintiff's 1st witness, Solomon Thenkondan, and to Tapasiya Thenkondan. The 5th witness, Seenu Naick, is a *mirasdar* owning properties worth about Rs. 10,000, but a resident of Koonamangalam, a separate village. This witness says that he was present when the land was given to 1st defendant 25 years ago, along with some *manja* land given as *inam* by the Thenkondans. This latter statement is retracted by the witness in re-examination. Witness admitted that 1st defendant owns three *manais* in the plaint village. Plaintiff's 6th witness is the Village Munsif of the village for the last six years and was assistant Monigar from 1902. He was not present when 1st defendant was put in possession of the property, but adds that a house was built on the *manai* 20 years ago by 1st defendant. According to the 7th witness, Kuppasami Naick, 1st defendant has been in possession since 25 or 30 years. The witness says that he was present when the *manai* was given to defendants in consideration of their working for Solomon Thenkondan. The whole *manai* was allowed to remain vacant till 1st defendant erected a house 12 years ago. This is opposed to the statement made by the other witnesses and of the 2nd witness in particular. The witness is specific that 1st defendant never did *pannai* labour to anybody. It appears from the evidence of this witness and also from other circumstances in the case that 1st defendant is a man of means, a *mirasdar*, himself owning about 1 1/2 *velis* of land and that 2nd and 3rd defendants have also got independent properties of their own. From this standpoint and also from the admission of plaintiff's 5th witness that 1st defendant owns three *manais* in the plaint village, the inference cannot be easily drawn

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that 1st and 2nd defendants were the *porakudi* tenants of plaintiff's 1st witness. Plaintiff's 8th witness, Kallian Pallan, supports plaintiff's version. But from his evidence it clearly appears that he has got strong animus against defendants. He admits having given evidence against 1st defendant's son and nephew in a criminal case.

Further, the witness's brother-in-law was charged with the murder of 1st defendant's brother. Thus, although there are 8 witnesses, Nos. 1, 2 and 4 are interested, 3rd is a dismissed village servant giving vague and interested evidence, 5th is a resident of a separate village having no independent knowledge of the situation, the 6th witness has given evidence against 1st defendant's son, 7th partly useful to defendants and 8th witness is inimically disposed towards defendants. Further, except in the case of one or two witnesses, there is no direct evidence to show under what circumstances defendants got the site from plaintiff's 1st witness and the special *porakudi* tenancy set up by plaintiff's 1st witness is not satisfactorily established.

4. Defendants examined four witnesses including 1st defendant, Viyapuri, and 2nd defendant, Raman. Defendants' 3rd and 4th witnesses, Payan and Rangan, are residents of the same Palla Street. These four witnesses say that they (defendants Nos. 1 and 2) and their ancestors have been living in this *manai* since long. It may be that the *manai* originally belonged to plaintiff's family as found by the District Munsif, but having in view the circumstance that defendants and their forefathers have been living in this *manai* since long, it is not possible to accept plaintiff's witnesses' evidence about the *porakudi* tenancy set up by them.

5. Therefore, I find the issue for defendants and against plaintiff.

This second appeal coming on for hearing on the 28th of April 1915, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court (Oldfield and Seshagiri Aiyar, JJ.) made the following

ORDER OF REFERENCE.

We accept the finding, which is one of fact. The question for decision is, then, whether the 1st and 2nd defendants have acquired

an absolute title by prescription against plaintiff, purchaser at Court auction of the right, title and interest of the mortgagor of the property. The plaintiff is now suing to recover possession. The 1st and 2nd defendants contend that their prescription conferred on them full title, including both the mortgagor's and the mortgagee's interests. The facts as alleged or found are that the mortgage was in 1878; the suit on it was in 1900; plaintiff's title originated in her purchase on 31st October 1906; the present suit was brought in 1910; and the defendants' adverse possession began 20 years before suit, that is, in 1890. The effect of prescription against a mortgagee under a simple mortgage has been dealt with by two Benches of this Court in *Parthasarathi Naikan v. Lakshman Naicken* (1) and *Ramasami Chetti v. Ponnu Padayachi* (2), diametrically opposite conclusions being reached. The matter was the subject of reference to a Full Bench in *Peria Aiyar Ambalam v. Shoumugasundaram* (3); but it was found unnecessary to deal with it. In this conflict of authority we refer to a Full Bench the question "Whether the possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is adverse to the simple mortgagee."

This second appeal coming on for hearing as per above order on the 4th August 1915, upon perusing the said Order of Reference and upon hearing the arguments of Mr. G. S. Ramachandra Aiyar, Vakil for the Appellants, and of Mr. C. Padmanabha Aiyangar for Mr. A. K. Madhava Rao, Vakil for the Respondent, and the question having stood over for consideration till this day, the Court expressed the following

OPINION.

WALLIS, C. J.—I should have been prepared to adopt the judgment of Munro, J., in *Parthasarathi Naikan v. Lakshmana Naicken* (1), which was followed in Allahabad

(1) 9 Ind. Cas. 791; 35 M. 231; (1911) M. W. N. 201; 9 M. L. T. 399; 21 M. L. J. 466.

(2) 9 Ind. Cas. 28; 36 M. 87; (1911) 1 M. W. N. 209; 21 M. L. J. 397; 9 M. L. T. 264.

(3) 22 Ind. Cas. 615; 26 M. L. J. 140; 15 M. L. T. 112; 1 L. W. 119.

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in *Nandan Singh v. Jumman* (4) and approved by the Full Bench of that Court in *Raj Nath v. Narain Das* (5), and was itself in accordance with the Calcutta decision in *Aimadar Mandal v. Makhan Lal Dey* (6), if it were not this last decision has been questioned in *Nandkumar Dobey v. Ajodhya Sahu* (7) and not followed in *Bireshwar Samanta v. Periya Sakhi Debi* (8) where the opposite view taken by Abdur Rahim and Ayling, JJ., in an earlier case in this Court, *Ramaswami Chetti v. Ponna Padayachi* (2), was accepted as being in accordance with the decisions of the Privy Council in *Prannath Roy Chowdry v. Rooken Begun* (9), *Karan Singh v. Bakar Ali Khan* (10). Before dealing with these decisions, I may say we have not been referred to any English authority for the position that a mortgagee whose right to possession has not accrued may be debarred from suing by possession adverse to his mortgagor commencing after the date of the mortgage. Under the Statute of 21 Jac. I, C. 16, what was barred was the right of entry or right of taking possession, and time did not begin to run until that right accrued, and then only when the possession of the occupier was adverse. So too under sections 2 and 3 of the English Real Property Limitations Act, 1833, in suits by persons entitled to possession under an instrument, time only begins to run from the date when the right to possession accrues. It is well settled that these are the sections applicable to a mortgagee, *Doe d. Roynance v. Lightfoot* (11), though there are other provisions giving a fresh starting point from the date of part payment. Under an ordinary English mortgage the mortgagee was entitled to possession at any time and could bring ejectment against the mortgagor who

only held at his pleasure, *Keech v. Hall* (12), but the possession so taken by him would be the onerous possession of a mortgagee accountable for the profits to the mortgagor, and it was held that on foreclosure a fresh right of action arises for possession as owner, *Pugh v. Heath* (13). Under the English Statutes, it seems to me to be immaterial whether possession commencing after the date of the mortgage was or was not adverse to the mortgagor and the recent decision in *Nisbet Potts' Contract In re* (14) is in accordance with this view.

In Bengal and Madras, outside the Presidency Towns where the Act of James I was received, time under the Regulations ran from the accrual of the plaintiff's cause of action, and this in the case of immovable property was held to accrue when the possession of the occupier became adverse.

In *Prannath Roy Chowdry v. Rooken Begun* (9), which was governed by the Bengal Regulations, the main contention raised by Mr. Rundell Palmer for the appellant was that a suit for foreclosure instituted by his clients more than twelve years after the mortgage debt had become payable was not barred under the Bengal Limitation Regulations, because the disputes and litigation going on between the heirs of the mortgagor and third parties claiming as purchasers were a good cause for not suing earlier. In addition, however, to this contention, which was upheld by their Lordships who disposed of the suit, he argued further that there was no rule of law which creates an absolute possessory title in a 2 years' undisturbed possession, even if that had been such. On the other side, it was not contended that the respondents, who claimed under an alleged purchase from the mortgagor, had been holding adversely to the mortgagee. The contention was that they had purchased subject to the mortgage and were entitled to redeem. Their Lordships' judgment must be read with reference to these contentions. The case was one of

(4) 17 Ind. Cas. 432; 34 A. 640; 10 A. L. J. 275.

(5) 24 Ind. Cas. 907; 36 A. 567; 12 A. L. J. 982.

(6) 10 C. W. N. 904; 33 C. 1015.

(7) 11 Ind. Cas. 485; 14 C. L. J. 292 at p. 298; 16 C. W. N. 351.

(8) 28 Ind. Cas. 917.

(9) 7 M. I. A. 323; 4 W. R. P. C. 37; 1 Sath. P. C. J. 307; 1 Sar. P. C. J. 69; 19 E. R. 331.

(10) 5 A. I.; 9 I. A. 99; 4 Saraswati's P. C. J. 382.

(11) S. M. & W. 553; 151 E. R. 1158; 11 L. J. Ex. 151; 5 Jur. 966; 58 E. R. 813.

(12) 1 Dougl. 21; 1 Sm. L. C. 511; 99 E. R. 17.

(13) 7 A. C. 235; 51 L. J. Q. B. 367; 46 L. T. 321; 30 W. R. 553.

(14) (1906) 1 Ch. 286; 75 L. J. Ch. 238; 54 W. R. 286; 94 L. T. 297; 22 T. L. R. 234.

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a mortgage by conditional sale, and their Lordships observed that if the mortgage-deed had been allowed to take effect according to its tenor, possession might be considered to have become adverse to the mortgagee-purchaser from the completion of the title or, as I understand it, from the time when the mortgagee was to become owner under the terms of the deed and entitled to possession as such. As, however, under the Bengal Regulations, the conditional sale was to be treated as a mortgage, they held that the possession of persons in the position of the respondents whose case was that they had acquired and held the property subject to the mortgage was not, any more than in England, inconsistent with the mortgagee's title, or their possession adverse to the mortgagee. As regards the defences with which a mortgagee suing for possession after foreclosure might be met by occupants other than the mortgagor, their Lordships say that he might be met "by proof of a prior or a superior title, or by proof of want of title in himself, or that he has not perfected his title to possession". By these last words, I understand that the mortgagee must show that his own title to possession has accrued. Their Lordships certainly did not say that a mortgagee suing in the circumstances stated, might be met by proof of possession adverse to his mortgagor, commencing subsequently to the mortgage at a time when he himself had no right to possession against the mortgagor or any one else.

Under the Indian Limitation Act of 1859, as under the English Real Property Limitation Act, 1833, there was no special provision for suits by mortgagees, but as regards suits to recover the mortgaged property, they clearly come within the terms of section I, Article 12, which allowed 12 years from the date of the cause of action for suits to recover immoveable property or any interest therein not otherwise provided for. Even suits by a mortgagee to enforce his rights by sale were held by this Court to come within this section in *Chetti Goundan v. Sundaram Pillai* (15), and the decisions of the Full Bench in Calcutta in *Surican*

Hossein v. Shahazilah Golam Mahomed (16) and of the Privy Council in *Jumeswar Dass v. Mahabeer Singh* (17) were to the same effect. Dealing with a suit by a mortgagee governed by this section in *Brojonath Koonloo Chowdry v. Khelut Chunder Ghose* (18), their Lordships observed that "when both things occur, possession by such a holder" (a holder claiming adversely)..... "and the right of entry under the mortgage-deed more than 12 years old, it is impossible to say that such a possession is not protected by the law of limitations". In the case just mentioned, the mortgagee himself had the right to take possession and had failed to exercise it for 12 years.

Under the Act of 1859, it was no doubt held in Calcutta by Bayley and Jackson, JJ., in *Ram Coomar Sein v. Prosonno Coomar Sein* (19), that in a suit by a mortgagee for possession after foreclosure he might be met by proof of possession for 12 years adverse to the mortgagor, and the decision of their Lordships in *Prannath Roy Chowdry v. Rookea Begum* (9) was cited in support of this view, but, as I have endeavored to show, their Lordships laid down no such proposition in that case, and indeed their observations point the other way. Further I do not see how *Ram Coomar Sein v. Prosonno Coomar Sein* (19), is to be reconciled with the subsequent decision of the House of Lords in *Pugh v. Heath* (13) already referred to. As regards *Sheoumber Sahoo v. Bhowaneedeen Kulwar* (20), a decision of the year 1870 which was also cited, it is stated in the very brief judgment that the possession of the third party was adverse to the mortgagee, but the facts are not set out. If this case proceeded on the authority of *Ram Coomar Sein v. Prosonno Coomar Sein* (19), it is open to the same observations. *Karan Singh v. Bakar Ali Khan* (10), the case on which most reliance is placed in *Ramatawmi Chetti v. Ponna Padayachi* (2) and *Bireswar Samanta v. Priya Sakhi Debi* (8), was decided under the Limitation Act of 1871, which by Article 132 in suits for

(16) 9 W. R. 170.

(17) 1 C. 163; 25 W. R. 84; 3 I. A. 1; 3 Sar. P. C. J. 58; 3 Suth. P. C. J. 222.

(18) 14 M. I. A. 144; 16 W. R. 38 (P. C.); 8 B. L. R. 104; 2 Suth. P. C. J. 480; 2 Sar. P. C. J. 711; 20 E. R. 740.

(19) W. R. 1864, 375.

(20) 2 N. W. P. H. C. R. 223.

(15) 2 M. H. C. R. 51.

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money charged on immoveable property allowed 12 years from the date of the money being due, and by Article 135 in suits instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged allowed 12 years from the time when the mortgagee was first entitled to possession, and by Article 145 in suits for possession of immoveable property or any interest therein not otherwise specially provided for "allowed 12 years from the time when the possession of the defendant or of some person through whom he claims, became adverse to the mortgagee." The judgments of the Allahabad High Court, before whom the case of *Karan Singh v. Bakur Ali Khan* (10) came on appeal and Letters Patent Appeal, have not been reported, but the learned Judges who made the reference to the Full Bench in *Raj Nath v. Narain Das* (5), state that they examined the records of this case and that the five Judges of the Allahabad Court before whom the case came, seem to have been of opinion that 12 years' adverse possession would bar a suit in a simple mortgage, and seem to have attached no importance to the fact that the mortgagee had not been entitled to possession of the property; and that they also seem to have thought that Article 145 and not Article 132 was the Article applicable. The language of Article 145 as to the class of suits it covers, is much the same as that of section I, Article 12, of the Act of 1859, and according to the decisions already referred was wide enough to cover a suit for sale; but this was only the residuary Article, and, if the claims of Article 132 had been urged at the bar, they must have been dealt with in the judgment. The contest in the High Court was as to whether the possession by the Collector had been adverse to the plaintiffs. The majority held that it had not and their Lordships agreeing with them on this point dismissed the suit without calling on the other side. The only other point taken by the appellant was that it was for the plaintiff to show that he had been in possession within 12 years. As to this, their Lordships observed in effect that this was so under section I, Article 12, of the Act of 1859, under which time ran from the date of the cause of action, but not so under Article 145 of the Act of 1874 under

which time ran from the date when the possession became adverse to the plaintiff. Article 145 was apparently the Article relied on for the appellant, and I do not think this observation can be taken as amounting to a decision as to the inapplicability of Article 132, as the point was not taken and the respondent who was not called on, had no occasion to take it even if he had so desired. Still less do I regard it as a decision as to the inapplicability of Article 132 of the Act of 1877 as interpreted by their Lordships in *Vasudeva Mudaliar v. Srinivasa Pillai* (21), or of Article 132 of the present Act to a suit for sale by a mortgagee on a simple mortgage governed by the Transfer of Property Act.

Further, taking Article 145 to have been the Article applicable, I think that on the finding that 12 years' adverse possession had not been proved, the question whether such possession, if proved, would have been adverse to the mortgagee, though not entitled to possession, cannot be considered to have been decided, as it does not appear to have been raised and there was no occasion or opportunity for the respondent to raise it. Moreover, as was acutely pointed out by Munro, J., it is not clear that it arose on the facts, because the Collector took possession before the date of the mortgage sued on, and if his possession was held adverse to the mortgagee, the latter would have been clearly barred by 12 years' adverse possession commencing before the date of the mortgage.

I would answer the reference in the negative.

SADASIYA AIYAR, J.—One of the reasons given for the decision in the Full Bench case in *Peria Aiyar Ambalam v. Shmuganundaram* (3) is that "where more than one inference may be drawn, that inference should not be drawn which imputes a wrongful act to a person." In that case, the mortgagee in possession was ousted by a trespasser and it was held that the trespasser should not be imputed with an intention to injure the mortgagor also, if it could be helped. His trespass against the mortgagee was, no doubt, wrongful, but (if I

(21) 30 M. 426; 17 M. L. J. 444; 4 A. L. J. 625; 9 Bom. L. R. 1104; 6 C. L. J. 379; 11 C. W. N. 1005; 34 I. A. 187 (P. C.); 2 M. L. T. 333.

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interpret the above passage correctly) a further wrongful intention against the mortgagor also need not and should not ordinarily be imputed to the trespasser.

That reason appears to me to be equally or rather a *fortiori* applicable to a case where a trespasser, who dispossessed the mortgagor, is pleading that his possession is adverse to the rights of a simple mortgagee, who is not entitled to possession of the mortgaged land.

The question whether when the simple mortgagee is not entitled to possession, even a distinct notice by the trespasser to that mortgagee that he (the trespasser) denies the mortgagee's right, could be treated as adverse possession of the incorporeal rights of the mortgagee, has a sort of indirect bearing on the question before us and was, therefore, argued by the appellants' learned Vakil (Mr. G. S. Ramachandra Aiyar). On this point, I have heard nothing which compels me to recede from the view expressed by me in *Lakshminarayana Aiyer v. Ulagammal* (22), that it is very difficult to establish the claim of acquisition of title by adverse possession of an incorporeal right. With the greatest respect to certain *obiter* observations *contra* in the judgment in *Peria Aiyar Ambalam v. Shanmugasundaram* (3), I am unable to concur with them. Assuming that the Roman Law is different [see *Nallamuthu Pillai v. Betha Naicken* (23), which was, however, a case where the adverse possession began before the date of the mortgage], that rule of Roman Law was probably based (as pointed out by my learned brother Sreenivasa Aiyangar, J., in the judgment now to be pronounced by him) on the rights of a simple mortgagee under the Roman Law to get possession of the hypotheca after the money became due by expiry of the time fixed for payment. If, however, it is otherwise, it does not then seem to me to be such an equitable rule as ought to be followed by Indian Courts, having regard to the fact that the English Statute Law has deliberately laid down the opposite

rule, even though a mortgagee under the English form of mortgage obtains the legal ownership of the mortgaged property unlike an Indian mortgagee.

If some tangible benefit (periodical or otherwise, such as the right to receive rents and profits though not to get physical possession) is derivable by the owner of an incorporeal right and if he is prevented by the trespasser from getting that benefit and if the trespasser obtains that benefit himself, a dispossession of such incorporeal right is conceivable [see *Venkataramanachari v. Thirunaranachari* (24)], but not in other cases. I, therefore, adhere to the views expressed by Napier, J., and myself in *Leukata Krishna Moorthi v. Bheemakka* (25), and I willingly follow the very carefully considered judgment (if I may respectfully say so) in *Parthasarathy Naikan v. Lakshmana Naicken* (1), whose authority is endorsed by the judgment just now pronounced by my Lord answering the reference in the negative.

SRINIVASA AIYANGAR, J.—I think on principle the question under reference admits only of one answer, *i. e.*, in the negative. The rights of a simple mortgagee of immoveable property are now settled by Statute. He is not an owner and is not entitled to possession of the mortgaged property. He has no claim to the produce or the rents and profits of the property either before or after the mortgage-money becomes due. A simple mortgage does not vest any estate in the mortgagee. [Ghose on Mortgages, page 76, IV Edition; *Papamma Rao v. Viraprataha H. V. Ramachandra* (26).] His only right is to cause the property to be sold through Court. The mortgagor, as owner is entitled to remain in possession and receive the rents and profits of the land; he is not accountable for them or for the use he makes of his property to the mortgagee, provided he does not commit waste so as to render the security insufficient. The right of a simple mortgagee is, however, a real right, and he is entitled to enforce his charge even against a purchaser for value without notice. Except for a possible difference as regards their enforceability against purchasers for value without notice, there is no

(24) 27 Ind. Cas 919; 2 L. W. 212 at p. 217.

(25) 26 Ind. Cas. 295.

(26) 19 M. 249 at p. 252 (P. C.) 23 I. A. 32; 6 M. L. J. 53.

(22) 26 Ind. Cas. 528; 28 M. L. J. 256.

(23) 23 M. 37.

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difference in their legal incidents between a simple mortgage and a charge. See observations of Krishnaswami Aiyar, J., in *Balasubramanian v. Siruguru Asari* (27). A suit by a simple mortgagee to enforce payment of the mortgage-money by a sale of the property is governed by Article 132 of the Limitation Act, and he is entitled to bring such a suit within 12 years after the mortgage-money had become due. [See *Vasulera Mudaliar v. Srinivasa Pillai* (21).] His right cannot be extinguished under section 28 of the Limitation Act, though the bar of the remedy in the case of a real right may have the same effect as the extinction of the right itself. As he is not entitled to possession of any sort or kind of the mortgaged property, there can be no adverse possession against him. Can then his rights be affected by a trespasser taking possession of the mortgaged property ousting the mortgagor in possession? If they are, he must have a cause of action against the trespasser. Abdur Rahim, J., thinks he has. He says "that these two cases" [referring to *Ram Coommar Sein v. Prasanna Coommar Sein* (19) and *Sheoamber Sahoo v. Bhowaneedeen Kulwar* (20)] "make it clear that the mortgagee is not without remedy against a trespasser taking possession of the mortgaged land, although it may be that he is not entitled to possession under his mortgage, and I myself do not see any valid reason why the mortgagee should not be able under such circumstances to protect his interests by proper proceedings" [*Ramaswami Chetti v. Ponna Podayachi* (2)]. I am unable to see what suit a simple mortgagee is entitled to bring to protect his interests as against a trespasser, and there is no indication in the learned Judge's judgment as to the nature of the proceedings by which he is to protect his interests. He obviously cannot bring ejectment against the trespasser and he certainly cannot bring a suit praying that possession be delivered to the mortgagor, as the mortgagor's possession is not in any sense for the benefit of the simple mortgagee. A simple suit for declaration of the mortgagee's right, when such a right is denied by the trespasser, may probably be brought, but that is a proceeding which the mort-

gagee is not bound to take, and a decree in such a suit cannot save the rights of the mortgagee from becoming barred, if otherwise they would be. The cases referred to by the learned Judge were cases where the mortgagee was entitled to possession either before or after the mortgage amount had become due, and it is possible in those cases for a mortgagee to bring ejectment against a trespasser. A squatter taking possession of the mortgaged property may equally affect the interests of the mortgagee and the mortgagor, where both of them are entitled to or are in possession of their respective interests in the property, where such interests are capable of possession. Even incorporeal property may be capable of possession in law, but such possession involves either actual possession of tangible property or the receipt of some tangible benefit therefrom. Such possession may also be protected by possessory remedies. It must also be remembered that the mortgagor does not hold possession of the property on behalf of the mortgagee and the mortgagor is not charged with the duty of protecting the interests of the mortgagee, as a trustee or the *karnavan* of a *tarwad* or the manager of a joint Hindu family is charged with the duty of protecting the interests of a *cestui que trust* or the junior members of the family. [See the observations of Sundara Aiyar, J., in *Ambalavana Chetty v. Singaravelu Odriyar* (28).] The mortgagor's laches or negligence should not affect the rights of the mortgagee. If, therefore, a simple mortgagee has no cause of action against a trespasser, his rights should not be affected or be extinguished by the operation of any law of limitation. It is true that a simple mortgagee may be entitled to enforce payment of the money due by a sale of the property, if the mortgage amount had become due; but that cause of action accrues to him owing to the default of the mortgagor and not on account of any act of the trespasser. If the mortgage-money had not become due, he cannot institute a suit to recover it, though a trespasser may have taken possession of the mortgaged property, and it would be most unreasonable to hold that the mortgagee's rights are extinguished by the extinction of

(27) 11 Ind. Cas. 629; 21 M. L. J. 62.

(28) 15 Ind. Cas. 146; (1912) M. W. N. 689 at p. 680.

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the mortgagor's title by 12 years' adverse possession before the mortgagee is in a position to protect his rights. To adopt the language of the Master of the Rolls in *Nisbet & Potts' Contract, In re* (14), "unless and until the right of the covenantor has been in some way infringed, so that it becomes necessary for him to enforce that right, there is no reason, either in principle or in fairness, why his right should be in any way affected." I see no reason, therefore, for holding that the extinction of the mortgagor's title by the adverse possession of a third party operates to extinguish the mortgagee's right to enforce his charge, any more than easements over the property.

Subramania Aiyar, J., however, seems to think that a hypothecation right is liable to be affected by prescription. He says that "there can be no doubt that such a right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor", and relies on some passages in Salkowski's Roman Law, Mackledy's Roman Law and Hunter's Roman Law. In the passage just quoted, the learned Judge seems to assume that a mere claim to hold property free of a charge could operate to extinguish such rights, although the act of possession by itself may not affect it. If the trespasser's possession by itself could not affect the rights of the simple mortgagee, the assertion by such trespasser could not possibly have any effect. As stated in Angell on Limitations: "The principle on which the Statute of Limitations is predicated is not that the party in whose favour it is invoked, has set up an adverse claim for the period specified, but that such adverse claim is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. A mere claim of title, unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted and consequently his rights are unaffected by Statute." (See Angell on Limitations at page 398.)

In Roman Law there was, it seems, in later times, no distinction between a *pignus*

and an hypotheca and in both forms of mortgage the mortgagee was entitled to the possession of the mortgaged property. In *pignus* the possession was given to the mortgagee at the time of the transaction, while in hypothecation the mortgagee was entitled to obtain possession after the debt became due. Hunter's Roman Law, pages 436 and 447 (Remedies), Salkowski's Roman Law at page 485 and Mackledy's Roman Law at page 285. It is instructive to note that Lord Hobhouse thought that except for long practice and the Transfer of Property Act, it might be reasonably argued that a simple mortgagee in India was entitled to usufructuary possession under the terms of his contract. [*Papamma Rao v. Ramachandra* (26).]

Are we then compelled to answer the question in the affirmative by any authority binding on us? Reliance was placed on the decisions of the Privy Council in *Prannath Roy Chowdry v. Rookea Begum* (9) and *Karan Singh v. Bakar Ali Khan* (10). The plaintiff in the case reported as *Prannath Roy Chowdry v. Rookea Begum* (9) had obtained a mortgage by conditional sale from the owner and had instituted proceedings to foreclose the mortgage under Regulation XVII of 1806. After obtaining a foreclosure order, he brought a suit to recover possession of the properties, as owner against the defendant who was in possession claiming under a purchase from the mortgagor which, however, was not proved or admitted in the case. The question was whether the plaintiff had validly foreclosed the mortgage by conditional sale so as to enable him to bring ejectment as owner. The proceedings for foreclosure were taken more than 12 years after the expiry of the term for the repayment of the mortgage-money. Under Bengal Regulation III of 1793, a suit was barred "where the cause of action shall have arisen 12 years before any suit shall have been commenced on account of it." In discussing the question whether the plaintiff was entitled to bring a suit for foreclosure after the expiry of 12 years, their Lordships pointed out that a suit for foreclosure against the mortgagor or against persons claiming in privity with the mortgagor may not be barred, while a suit for possession against a stranger who claimed to hold the property free of any mortgage may be barred. But their Lord-

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ships do not say that the mortgagee's right may be barred by the possession of an adverse claimant, even if the mortgagee's right to possession had not accrued, or where the mortgagee was not entitled to possession at all. On the other hand, in the case of *Anundo Moyee Dossee v. Dhonendra Chunder Mookerjee* (29), their Lordships say: "if the title of the mortgagee to enter, by reason of a default having occurred before, had accrued, and if the purchaser under such a title, i. e., as purchaser at an execution sale, had been in possession for 12 years, believing himself to be bona fide owner under a claim to the ownership of the property, and not being in possession in any way as mortgagor or under the mortgagor...they are of opinion, that the suit to disturb the possession of such a purchaser ought to be brought within the 12 years after the commencement of his possession." That, I think, conclusively shows that a mortgagee who had no right to enter was not affected by any adverse possession.

In *Karan Singh v. Bakar Ali Khan* (10), the plaintiff, a simple mortgagee, sued to enforce his charge. The mortgages were executed in the year 1862 on behalf of the daughter's sons of the last male owner. The property was in the possession of his widow till the end of 1860. It appears that on the death of the widow, disputes arose as to the title to the property between the defendant, Karan Singh, and the daughter's sons of the last male owner, each claiming the property as his. Neither party was in possession, the Collector having taken possession of the property in 1861 soon after the death of the widow to secure the Government Revenue, pending the settlement of the disputes between the rival claimants. The mortgages were executed in January and October of 1862 on behalf of the daughter's sons, when they were not in possession of the property and before the disputes as to title were settled. In 1863 by an award, the title of the defendant, Karan Singh, was established against the daughter's sons in a proceeding

to which the mortgagee was not a party and the Collector handed over possession of the property to Karan Singh and also paid him the income of the estate in his hands. The plaintiff brought the suit in July 1874 and the defendant pleaded that he had been in adverse possession for the statutory period of 12 years from the year 1861, treating the possession of the Collector as his possession. If the defendant's contention was correct, it is obvious that the mortgagee would not be entitled to sue to enforce his mortgages, as the effect of the defendant's possession would have been to extinguish the title of the mortgagor from the year 1861 [*Rajah of Venkatagiri v. Isakapalli Subbiah* (30) and *Nandkumar Dobey v. Ajodhya Sahu* (7)]. The sole question in the case, therefore, was whether the defendant was in adverse possession from 1861. When their Lordships speak of the possession of the plaintiff or of the possession of the defendant adverse to the plaintiff, they were, I think, referring to the mortgagor under whom the plaintiff claimed, as they speak of possession and adverse possession in 1861 before even the mortgages were executed. There is really no warrant for the inference that their Lordships assumed that a suit by a simple mortgagee to enforce his charge by sale was a suit for possession, that such a mortgagee was entitled to possession or that such a suit was governed by Article 145 of the Limitation Act of 1871, corresponding to Article 144 of the Acts of 1877 and 1908. In the Act of 1859, there was no special provision for suits by a mortgagee except that, in suits by a mortgagee to recover possession of the mortgaged properties from the mortgagor in Courts established by a Royal Charter, the time when the cause of action arose was defined by section 6. They were governed by clause 12 of section I and even a suit by a hypothecatee to enforce his charge was held to be a suit for recovery of an interest in immoveable property and the period of limitation was 12 years from the time the cause of action arose. [*Surivan Hussein v. Shahazadah Golam Muhomed* (16), *Chetti Goundan v. Sundaram Pillai* (15) and *Junes-*

(29) 14 M. L. A. 101 at p. 111; 16 W. R. 19 (P. C.); 8 B. L. R. 122; 2 Suth. P. C. J. 457; 2 Sar. P. C. J. 698; 20 E. L. 724.

(30) 26 M. 410 at p. 417.

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war Dass v. Mahabeer Singh (17).] Sir Barnes Peacock is reported to have said that "if land is mortgaged as security for a loan, in addition to a covenant for payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant, and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to me that the charge upon the land created an equitable interest in the land, and that a suit brought to enforce that charge is in substance and in effect a suit for the recovery of that interest", see page 174 in 9 W. R. A simple mortgagee under the Transfer of Property Act can neither bring ejectment to recover the land mortgaged, nor can it be said that his right is an equitable interest. As pointed out by Seton Karr, J., in the same case, it must be admitted that the language of the Article was not quite appropriate as applied to a suit to enforce a charge by sale. Clause 12 was, however, applicable whether the suit was against the mortgagor or persons claiming under him or against a trespasser in possession. When the Act of 1859 was repealed and the Act of 1871 passed, a special Article was enacted in respect of suits to enforce payment of money charged on land, viz., Article 132, Article 149 in respect of suits in the Chartered High Courts to recover possession of the mortgaged property from the mortgagor, and Article 135 for similar suits in *mofussil* Courts, but the words "from the mortgagor" are omitted. It has been held that Article 135 applies to suits for possession against both mortgagors and strangers [*Shurnomoyee Dasi v. Srinath Das* (31)]. There was no special Article as regards suits for foreclosure (that was first introduced in the Act of 1877, Article 147). Clause 12 was re-enacted as Article 145, but with a change in the wording. Instead of the words 'for the recovery of' the words 'for possession of' were substituted, which are even less appropriate to a suit for sale. It is admitted that Article 132 of the Act of 1871 was applicable to suits by a simple mortgagee instituted against the mortgagors or persons claiming under them to enforce

the charge by sale of the mortgaged property, and the Privy Council in *Vasudeva Mudaliar v. Srinivasa Pillai* (21) say that it was perfectly settled that such suits were governed by that Article. The Privy Council in the above case make no distinction whatever between suits against mortgagors and against strangers in possession of the mortgaged property and the language of the Article does not warrant any such distinction. But we are asked to infer that their Lordships in the case of *Karan Singh v. Bakar Ali Khan* (10) assumed without question or discussion that such a suit was not governed by Article 132, but was a suit for possession against a stranger in possession of immoveable property governed solely by the residuary Article 145, that they assumed unnecessarily a metaphysical possession in the simple mortgagee and that he was affected by a vicarious bar. I decline to draw any such inference. The Privy Council characterised Act XIV of 1859 as an inartificially drawn Statute and the later Act of 1871 as a "more carefully drawn Statute" [see *Maharaja Fultehsangji Jaswant-singji v. Desai Kulliauraini Hakoomutrai* (32) and *Delhi and London Bank Limited v. Orchard* (33)]. It seems to me that the Legislature in 1871 specially enacted Article 132 for all suits by simple mortgagee to enforce the payment of money charged by sale of the property mortgaged instead of leaving some suits to be governed by that Article and others by Article 145.

It is unnecessary to deal with the other cases as they are reviewed by Munro, J., in *Parthasarathi Naicken v. Lakshmana Naicken* (1) and Karamat Hussain, J., in *Nandan Singh v. Juman* (4).

In England, the matter is settled by Statute. I may, however, refer to a passage in the judgment of Farwell, J., in the case of *Nisbet & Potts' Contract, In re* (14), in the first Court wherein he holds that a charge on the property can be enforced against a trespasser who acquired a title to the property by adverse possession. *Nisbet & Potts' Contract, In re* (14).

Reference answered in the negative.

(32) 21 W. R. 178 (P. C.); 13 B. L. R. 254; 1 I. A. 34; 10 B. H. C. R. 281.

(33) 3 C. 47 (P. C.); 4 I. A. 127; 3 Sar. P. C. J. 721; 3 Suth. P. C. J. 423; 7 P. R. 1878; 1 Ind. Jur. 457.

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CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 907 OF 1911.

July 27, 1911.

Present:—Justice Sir Asutosh Mookerjee Kt.,
Mr. Justice Richardson.ASKAR MIAN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

SAHEDALI BARA BHUYIAN AND OTHERS
—PLAINTIFFS—RESPONDENTS.*Assam Land and Revenue Regulation (I of 1886), ss. 39, 154 (1), 35, 36—Application for registration of name by purchaser of land dismissed—Suit for declaration and possession in Civil Court, if maintainable Jurisdiction—Renewal of Settlement by vendor after sale, effect of.*

Where the plaintiffs purchased lands from the defendants and applied for the registration of their names under the Assam Land and Revenue Regulation, 1886, but their application was refused by reason of the opposition of the defendants, who repudiated the sale:

Held, that the Civil Court was competent not only to declare the title of the plaintiffs, but also to place them in possession of the disputed property by ejectment of the defendants. [p. 425, col. 1.]

Held, further, that the mere fact that the defendants obtained a renewal of the settlement from the Revenue Authorities after the sale, did not create in them a right which they did not possess. [p. 425, col. 1.]

Section 154, sub-section (1) of the Assam Land and Revenue Regulation must be read along with, and is controlled by, the concluding clause of section 39 of the same Act. [p. 425, col. 2.]

Appeal against the decree of the Subordinate Judge of Cachar, dated the 16th January 1911, reversing that of the Munsif of Hailakandi, dated the 30th June 1910.

Babus Manmatha Nath Mookerjee and Salendra Nath Mukherjee, for the Appellants.

Babus Gobinda Chunder Dey Roy and Hemendra Kumar Das, for the Respondents.

Babu Ram Charan Mitra, for the Government.

JUDGMENT.—This appeal is directed against a decree in favour of the plaintiffs-respondents for recovery of possession of land upon declaration of title. The Courts below have concurrently found that on the 3rd September 1896, the lands were purchased by the plaintiffs from the defendants. Notwithstanding this sale, the defendants got themselves registered under the provisions of the Assam Land and Revenue Regulation and kept the plaintiffs out of possession; the latter have consequently been driven to seek the assistance of the Court.

The defendants originally held under a settlement which was in operation from the 1st April 1883 to the 31st March 1898. In 1894, there was a survey for the purposes of a fresh settlement, but the term of the previous settlement was extended for two years and the new settlement did not take effect before the 1st April 1900. At the time when the new settlement was made, the defendants were able to obtain settlement from the Revenue Authorities, notwithstanding that they had parted with their rights, by reason of two circumstances; namely, first, that the settlement was based on the survey of 1894 when they were landholders lawfully in possession; and secondly, that after the transfer to the plaintiffs, the defendants took a sub-lease from them and were in actual occupation when the settlement was made in 1900. Subsequently, the plaintiffs applied to the Revenue Authorities to register their names; but their application was refused in 1907 by reason of the opposition offered by the defendants, who repudiated the sale. Consequently on the 1st September 1908, the plaintiffs instituted this suit for recovery of possession upon declaration of title. The Subordinate Judge has found upon the question of title in favour of the plaintiffs and no attempt has been made in this Court to assail the accuracy of his conclusion. But it has been argued that the Civil Court is not competent to make a decree for possession, and in support of this view, reliance has been placed upon the cases of *Madhub Nath Surma v. Mayarani Medhi* (1) and *Patan Maria v. Bhabiram Dutt Barna* (2). On the other hand, reference has been made by the plaintiffs-respondents to the decision in *Hedlot Khasia v. Karan Khasiani* (3) in support of the view that a decree for possession may be made by the Civil Court in favour of the successful plaintiffs. As the question raised is not free from difficulty and as its determination may affect the revenue administration of the Province of Assam, we thought it proper to invite the assistance of the Government Pleader who has now ascertained the views

(1) 17 C. 819.

(2) 24 C. 239; 1 C. W. N. 94.

(3) 13 Ind. Cas. 377; 15 C. L. J. 241.

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of the Revenue Authorities on the subject and has communicated them to us. After a careful consideration of the arguments addressed to us on both sides, we have arrived at the conclusion that it is competent to the Civil Court, not only to declare the title of the plaintiffs, but also to place them in possession of the disputed property by ejectment of the defendants.

Sections 8 and 9 of the Assam Land and Revenue Regulation, 1886, define the status of a landholder, as a person who has a permanent heritable and transferable right of use and occupancy of his land. Consequently, when the defendants, who were themselves landholders, transferred the property to the plaintiffs, the latter acquired the status of a landholder. The plaintiffs were, however, at the time when they applied for registration of their names, out of possession, and their application was properly rejected by the Revenue Authorities. But this did not affect their title as landholders. This is plain from section 39 of the Regulation, which is in these terms: "subject to the provisions of section 151, the order of a Settlement Officer as to the person to whom a settlement should be offered, the amount of revenue to be assessed and the nature and term of the settlement to be offered, shall be final, and a settlement concluded with that person shall be binding on all persons from time to time interested in the estate; but except as provided by sections 35 and 36, no person shall, merely on the ground that a settlement has been made with him or with some person through whom he claims, be deemed to have acquired any right to or over any estate, as against any other person claiming right to or over that estate." Sections 35 and 36 have no application to the case before us, as they refer to cases of refusal of settlement by the Revenue Authorities. It is consequently plain that the mere fact that the defendants have obtained a renewal of the settlement from the Revenue Authorities, does not create in them a right which they do not possess. We are not unmindful that these sections must be read along with section 154 on which much reliance has been placed by the defendants-appellants. Sub-section (1) of section 154, no doubt, provides

that except when otherwise expressly provided in the Regulation or in rules issued under the Regulation, no Civil Court shall exercise jurisdiction in the matter of questions as to the validity or effect of any settlement or as to whether the conditions of any settlement are still in force; but this provision must be read along with, and is obviously controlled by, the concluding clause of section 39. It is further clear that the plaintiffs do not raise any question as to the validity or effect of the settlement, nor do they seek to alter the conditions of the settlement by the Revenue Authorities. Their object is to substitute themselves in place of the defendants; in other words, to acquire the property as settled by the Revenue Authorities with the defendants. Consequently, it cannot be maintained that the object of this suit is to raise a question which falls within clause (a) of sub-section (1) of section 154. Equally unfounded is the contention that the claim for recovery of possession is barred under clause (m) of sub-section (1) of section 154, which merely provides that no Civil Court shall exercise jurisdiction in any matter respecting which an order expressly declared by the Regulation to be final subject to the provisions of section 151, has been passed. The view we take, is strengthened by an examination of clause (a) of section 62, which lays down that nothing contained in Chapter IV and nothing done in accordance therewith shall be deemed to preclude any person from bringing a suit in the Civil Court for possession of, or for declaration of his right to, any immovable property to which he may deem himself entitled. The suit now before us is clearly of this description. The application of the plaintiffs for registration was rightly refused by the Revenue Authorities; they were at the time out of possession, which, as is clear from section 53, is an essential requisite for an order of registration. The only remedy of the plaintiffs was to institute a suit in the Civil Court, as they have done, for declaration of their right and for recovery of possession. The appellants have contended, however, that the plaintiffs should obtain a mere declaration in this suit, and should then apply

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to the Revenue Authorities to register their names and to place them in possession. But, apart from the fact that the Revenue Authorities cannot register the name of a person who is out of possession, we must bear in mind what was properly emphasised by the Government Pleader namely, that they have no power, in fact, they have no machinery, to give possession, except in the circumstances mentioned in sections 12, 54 and 116, which do not cover the case before us. Consequently, if we were to accede to the contention of the appellants and to give the plaintiffs a mere declaration, the declaratory decree would be infructuous; in fact in this very case, the Board of Revenue, in dealing with the application of the plaintiffs for registration of their names, said in 1907 that they must obtain possession from the Civil Court before their names could be registered. We hold accordingly, upon a review of the statutory provisions on the subject, that the Civil Court is competent to make not only a decree for declaration of title but also for recovery of possession. This, as we have been informed by the Government Pleader, is precisely the view of the Revenue Authorities. We have been pressed, however, with the decisions of *Mudhub Nath Sarma v. Mayarani Medhi* (1) and *Putan Maria v. Bhabiram Dutt Barna* (2), which to some extent support the contention of the appellants. But we observe that in those cases, the provisions of section 62 were not brought to the notice of the Court; and we also notice that in the later case of *Hedlot Khasia v. Karan Khasiani* (3) a decree for possession on declaration of title was made, notwithstanding the earlier decisions. We follow accordingly the decision of *Hedlot Khasia v. Karan Khasiani* (3) and hold that the decree for possession made by the Subordinate Judge must be maintained.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 222 & 311 TO 327 OF 1912.

August 19, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice N. R. Chatterjea.

LOKE NATH SINGH AND OTHERS —
DEFENDANTS—JUDGMENT-DEBTORS—APPELLANTS
versus

GAJU SINGH AND OTHERS—PLAINTIFFS—
DECREE-HOLDERS—RESPONDENTS.

Execution—Decree against one set of defendants on contest, against another by consent—Appeal against whole decree by contesting defendant—Execution, limitation for—Limitation Act (IX of 1908), Sch. I, Art. 182, cl. (2).

A person who is a party to a compromise cannot challenge the validity of the consent decree by way of appeal, but the party to the suit who has not joined in the compromise is competent to appeal against the decree if he has been prejudiced thereby. [p. 428, col. 1.]

In a suit where a decree has been obtained against one set of defendants by consent and against the other on contest and the contesting defendant appeals against the decree and thereby the validity of the entire decree is in controversy in the appeal, the decree-holder is entitled to the benefit of clause 2 of Article 182 of Schedule I to the Limitation Act, 1908, in execution of the decree against both sets of the defendants. [p. 429, col. 1.]

Appeals against the decisions of the District Judge of Patna, dated the 11th March 1912, affirming those of the Subordinate Judge of Bankipur, dated the 22nd December 1911.

Sir *Rash Behary Ghose*, Babus *Joges Chunder Roy* and *Ganes Dutt Singh*, for the Appellants.

Babus *Umakali Mukherjee*, *Biraj Mohan Mojumdar*, *Surendra Kumar Bose* and *Bankim Chunder Mukherjee*, for the Respondents.

JUDGMENT.—This appeal is directed against an order in proceedings in execution of a decree for delivery of possession of land made on the 17th September 1903. The question in controversy is, whether an application for execution of this decree, made on the 7th May 1910, is barred by limitation. The Courts below have concurrently held that the application is not barred. We are now invited by the judgment-debtors to hold that this view is erroneous in law. For the determination of the question raised before us, it is necessary to recapitulate the essential facts, which are all admitted.

The plaintiffs sued two sets of persons, who may be called A and B, for recovery of possession of land. A petition of compro-

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mise was filed on behalf of some of the defendants. The Court came to the conclusion that the compromise was operative only as regards some of them (A) and gave effect to it to that extent. The suit was heard on the merits as against all the other defendants (B). The result was a two-fold decree, first, for possession as against the consenting defendants (A), without mesne profits or costs; and, secondly, for possession against the contesting defendants (B), who were made liable for costs and mesne profits. B appealed to the District Judge and valued their appeal at the value of the subject-matter of the entire property involved in the suit in the Court of first instance. They did not join A as respondents; the only respondents to the appeal were the successful plaintiffs. The appeal was preferred on the 25th January 1904. The parties, however, agreed to await the decision of this Court in an analogous litigation, which had been brought up here by way of first appeal. After the disposal of that appeal by this Court, the appeal before the District Judge was taken up, and was dismissed on the 8th May 1907, on the footing of the agreement that the parties would abide by the decision of the High Court in the suit previously mentioned.

[The present application for execution of the decree of the 17th September 1903 was made on the 7th May 1910. On the 28th August, writ for delivery was issued; and it is alleged that the decree-holders were placed in possession on the 5th September. On the 29th September, however, objection was taken by the judgment-debtors that the decree was incapable of execution as the rights thereunder had been extinguished by the Statute of Limitation. The Courts below have overruled this contention. On the present appeal, the controversy has centred round clause 2 of the third column of Article 182 of the Schedule to the Indian Limitation Act. That clause provides that an application for execution of a decree of a Civil Court not provided for by Article 183 or section 43 of the Code of 1908 must be made within three years from the date of the final decree of the Appellate Court or the withdrawal of the appeal, where there has been an appeal. On behalf of

the judgment-debtors appellants reliance had been placed upon the cases of *Sreenath v. Brojo Nath* (1); *Wise v. Raj Narain Chuckerbutty* (2); *Hur Proshad v. Enayet Hossain* (3); *Raghunath Pershad v. Abbul Hye* (4); *Christiana Beushawn v. Benarasi Proshad* (5); *Sangram Singh v. Bujhara Singh* (6); *Mashiat-un-nissa v. Rani* (7) and *Badi-un-nissa v. Shams-ud-din* (8). On the basis of these decisions the argument has been founded that as the decree-holders could have executed the consent decree obtained by them against A, notwithstanding the pendency of the appeal preferred by B, they could not claim the benefit of clause (2) of the third column of Article 182. The contention in substance is that in reality there are two completely distinct decrees on the same sheet of paper and the fact that an appeal had been preferred by B against one of these decrees, does not entitle the decree-holders to an extension of time against A in respect of the other decree. It is further pointed out that not only was not an appeal preferred against the consent decree, but under the law an appeal could not have been preferred against that decree. Sir Rash Behary Ghose for the appellants has, however, drawn our attention to the decisions in *Mullick Ahmed Zamma v. Mahomed Syed* (9); *Basant Lal v. Nojmun-nissa Bibi* (10); *Gungamoyee v. Shih Sanker* (11); *Nundun Lal v. Rai Joykishen* (12); *Kristo Churn Dass v. Radha Churn Kur* (13); *Nurul Hasan v. Muhammad Hasan* (14); *Muthu v. Chellappa* (15) and *Gopal Chunder v. Gosain Das Kalay* (16). Some of these cases are possibly distinguish-

(1) 13 W. R. 309; 4 B. L. R. Ap. 99.

(2) 10 B. L. R. 258; 19 W. R. 39 (F. B.).

(3) 2 C. L. R. 471.

(4) 14 C. 26.

(5) 22 Ind. Cas. 685; 19 C. W. N. 257.

(6) 4 A. 36; A. W. N. (1884) 128.

(7) 13 A. 1; A. W. N. (1889) 207.

(8) 17 A. 107; A. W. N. (1895) 20.

(9) 6 C. 194; 6 C. L. R. 573.

(10) 6 A. 14; A. W. N. (1883) 179.

(11) 3 C. L. R. 430.

(12) 16 C. 598.

(13) 19 C. 750.

(14) 8 A. 573; A. W. N. (1886) 237.

(15) 12 M. 479.

(16) 25 C. 594; 2 C. W. N. 556.

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able, but it has not been disputed that from the others a rule is deducible which would negative the contention of the appellants. On behalf of the respondents, reliance has been placed particularly upon the cases of *Badi-un-nissa v. Shams-ud-din* (8); *Gopal Chunder v. Gosain Das* (16); *Ashfaq Husain v. Gauri Sahai* (17), which, it has been contended, negative the position taken up by the appellants.

It is not necessary for our present purpose to determine the true scope and meaning of the term 'appeal' as used in clause 2 of the third column of Article 182; upon that matter there has been divergence of judicial opinion. While a narrow view was taken in some of the cases already mentioned, a wider interpretation was placed upon the term in the cases of *Abdul Rahiman v. Moidin Saiba* (18); *Shivram v. Sakharani* (19), *Viraraghava Ayyangar v. Ponnammal* (20) and *Kristuama v. Mangammal* (21). In these cases the position was maintained that time ran against the decree-holder from the date of the final decree in the appeal, irrespective of the question whether the appeal did or did not imperil the decree whereof execution was ultimately sought. We do not propose to enter upon an examination of this wide problem for two reasons; first, because, even if the view be maintained that a decree-holder is entitled to the benefit of the extended time contemplated by clause (2) of Article 182 only when the decree whereof execution is sought, is imperilled by the appeal, the position taken up by the appellants cannot be sustained; and secondly, because the contention of the appellants must fail in view of the decision of the Judicial Committee in *Ashfaq Husain v. Gauri Sahai* (17).

As regards the first point, it is clear that although a person who is a party to a compromise cannot challenge the validity of the consent decree by way of appeal, it is competent to a party to the suit, who has not joined in the compromise, to appeal against the decree if he has been

prejudiced thereby. This has been recognised in suits for partition of joint properties where a decree has been made by consent of some only of the parties to the litigation: *Nityamoni Dasi v. Gokul Chandra Sen* (22). It is also clear that circumstances may be imagined in suits of other description, for instance, suits for contribution or even suits for possession of joint property where, in the event of a compromise amongst some only of the parties to the litigation, another person, a party to the suit but not a party to the compromise, may challenge the decree by way of appeal on the ground that he has been prejudiced thereby. In the present instance, we have the unquestionable fact that the contesting defendants did prefer an appeal against the entire decree. In that appeal, there was, to use the language of the decision in *Ramchandara Gopal v. Antaji Vasudev* (23), the chance or risk of the Appellate Court modifying the decree of the trial Court. The entire decree was under appeal and was in peril. It is worthy of note that the contesting defendants were in a manner constrained to appeal against the entire decree. The plaintiffs sought a decree for ejectment of the defendants; the relief claimed was a joint decree against all of them. The result of the consent decree and of the decree on contest was that there was a decree for possession in favour of the plaintiffs against all the defendants, but against some, the decree was by consent while against others, it was on contest. The decree did not define the precise position of the defendants who had entered into the compromise. It did not specify their share in the property if they were in joint possession; if they were in occupation of demarcated plots, the decree did not define such portions. The result was that the decree, though made by consent as to a portion and on contest as to the remainder, was still a joint decree, in the sense that, if maintained, it entitled the plaintiffs to recover possession of the entire property in dispute from all the defendants jointly. The contesting defendants appealed against this decree. As the decree did not define their position, they were bound to appeal against the whole

(18) 22 B. 500.

(19) 1 Ind. Cas. 459; 33 B. 39; 10 Bom. L. R. 939.

(20) 23 M. 60; 9 M. L. J. 284

(21) 26 M. 91.

(22) 9 Ind. Cas. 210; 13 C. L. J. 16.

(23) 5 Bom. L. R. 735.

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decree. It is thus plain that the validity of the entire decree was in controversy in the appeal, and from this point of view, the plaintiffs-decree-holders would undoubtedly be entitled to the benefit of clause 2 of Article 182: *Gopal Chunder v. Gosain Das* (16); *Badi-un-nissa v. Shams-ud-din* (8). Some stress has been laid upon the decision in *Christiana Benshawn v. Benarasi Proshad* (5), which is clearly distinguishable and is of no assistance to the appellants. In that case, there were two distinct decrees, one in favour of some of the defendants against the plaintiff, the other in favour of the plaintiff against the other defendants. An appeal was preferred against the latter portion of the decree; that appeal did not and could not imperil the other portion of the decree. In these circumstances, the decree-holder was rightly held not entitled to the benefit of clause (2) of Article 182. Nor is the decision of the Judicial Committee in *Batuk Nath v. Munni Dei* (24) of any avail to the appellants. In that case, there was no decree of the Court of Appeal, because the appeal preferred to the Judicial Committee never came up for disposal by their Lordships. The appeal was dismissed by the Registrar for non-prosecution, and it was ruled that the order of the Registrar was not a decree of the Court of Appeal.

As regards the second point, namely, the effect of the rule deducible from the decision of the Judicial Committee in *Ashfaq Husain v. Gauri Sahai* (17), we are of opinion that it is completely destructive of the contention of the appellants. There a joint decree for sale of land was obtained by the plaintiffs against the defendants. The decree was *ex parte* against one of the defendants and was on contest as against the other. The person against whom the decree had been made *ex parte* took steps to have the decree vacated in so far as she was concerned. The decree, however, remained untouched as against the other defendants. Ultimately, the suit was re-tried as against the person at whose instance it had been re-opened, and a decree was made against her which was confirmed

on appeal. It was ruled that the decree-holders were entitled to the benefit of clause (2) of Article 182, not only against the defendant at whose instance the case had been re-opened, but also as against the defendants against whom a decree had been made on contest in the first instance. The Judicial Committee pointed out that the plaintiffs were entitled to a joint decree against all the defendants, and that the decree originally made was merely a step for the attainment of that ultimate object, so that time ran as against the decree-holders from the date when the final decree was made. In the case before us, the plaintiffs were entitled to a joint decree against all the defendants. On appeal by the contesting defendants, the entire matter was re-opened. When the appeal was dismissed in the end, the decree of the trial Court stood confirmed; it is clear that the plaintiffs were entitled to wait till the final decree had been made in their favour. If this view were not taken, the plaintiffs might find themselves in a position of considerable embarrassment, as an attempt to execute against the consenting defendants alone a decree which did not define their liability, might lead to obvious complications. In our opinion, the plaintiffs were not bound to execute the decree till the final disposal of the appeal.

We hold accordingly that the view taken by the Courts below is correct and that the application for execution is not barred by limitation. We may add that on behalf of the appellants, Babu Joges Chandra Roy candidly admitted that the justice of the case was entirely with the respondents and that it was iniquitous on the part of the appellants, who had consented to a decree against themselves, to urge every conceivable objection against the execution of that decree. In that estimate of the merits of the case, we entirely agree.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold *mohur*.

Similar orders will be drawn up in each of the other appeals which will consequently be dismissed with costs, one gold *mohur* in each case.

(24) 23 Ind. Cas. 544; 36 A. 244 (P. C.); 19 C. L. J. 574; 12 A. L. J. 596 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729; 18 C. W. N. 740.

Appeals dismissed.

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CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL NO. 59 OF 1912.

August 24, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.

RAMNATH GAGOI—PLAINTIFF—

APPELLANT

versus

PITAMBAR DEB GOSWAMI—DEFENDANT
—RESPONDENT.

Partnership, constitution of—Partners, rights of, to purchase partnership property—Settled account, action for balance of, maintainability of—Contract Act (IX of 1872), s. 180—Bailor and bailee—Suit against wrongdoer, who can maintain.

A partnership is constituted whenever the parties have agreed to carry on a business or to share the profits in some way in common. [p. 431, col. 2.]

A partner is entitled to purchase partnership property, provided there is full disclosure, and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has a legitimate grievance against the other. [p. 432, col. 1.]

An action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties. [p. 432, cols. 1 & 2.]

Under section 180 of the Contract Act either the bailor or the bailee may bring a suit against a third person for deprivation or injury to chattel bailed, the latter by virtue of his possession, the former by reason of his property. [p. 432, col. 2; p. 433, col. 1.]

Appeal against the decree of the Subordinate Judge of Sibsagar, dated the 18th December 1911.

Babus Tarakiskore Chaudhuri, Brajalal Chakrabarty, Hirendra Nath Ganguli and Kshitis Chandra Chakrabarty, for the Appellant.

Babu Biraj Mohan Mojumdar, Mr. N. C. Bardolai and Babu Probodh Kumar Das, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff for recovery of eight elephants or, in the alternative, of their price. The facts material for the determination of the rights of the parties lie in a narrow compass, and may be briefly narrated. The defendant, the Gossain of Garamur Satra, took a lease from Government of the Dayang Dhausiri Mahal No. 6 in the district of Sibsagar for the purpose of catching elephants during the years 1909-1910 and 1910-1911. The license fee was Rs. 2,750 per annum. On the 3rd July 1909, the defendant took the plaintiff as a partner in the venture, and the terms settled between them are set out in

a letter of that date written by the defendant to the plaintiff. The contract was subsequently embodied in a formal deed of agreement executed on the 24th November 1909. The substance of the arrangement was that the plaintiff became a partner to the extent of a half share, and was authorised to manage the works, such as building stockades, catching elephants, &c. It was further agreed that at the time of the sale of the captured elephants, the plaintiff would give intimation to the defendant, so that the sale might be conducted in the presence of a representative of the latter. The plaintiff was made liable to pay a half share of the license fee in four equal instalments. The elephants were captured in five places during the first three months of 1910, Loengtha, Rangma, Bokajan, Hazat Ali stockade at Depupani, Itonia stockade at Depupani. Two methods were adopted for capture of the elephants, viz., *melalasikar* or the noosing of wild elephants by *mahouts* mounted on tame elephants, and *khedasikar* i. e., the driving of wild elephants into a stockade. With regard to *melalasikar*, two sets of persons had interest in the elephants captured, viz., the *mahaldars* or licencees from Government, who had a one-fourth share and the *kunkidars* or the owners of tame elephants, who had the remaining three-fourths share. As regards *khedasikar*, three sets of persons had interest in the elephants captured, viz., the *mahaldars* who had one-fourth, the *gardars* or builders of the stockades who had a half share, and the *kunkidars* or owners of the tame elephants employed to take the wild elephants out of the stockade, who had the remaining one-fourth share. It is obvious from the preliminary statement that the title to an elephant captured could be transferred only with the assent of all the persons who possessed an interest in the animal. It may also be added that it is customary to allot to the lessee of the *mahal* the biggest elephant caught if the operations are exceptionally successful; and the defendant in this case was particularly anxious to secure an elephant worthy of his position. Animals were captured, as we have said, during the first three months of 1910, and the evidence shows that they were valued and sold, some to strangers, while others were taken by one

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or other of the parties interested in the capture. On the 28th February 1910, a tusker six feet nine inches high was captured, was marked down to the Gossain as worthy of his position, and was actually delivered to him in the first week in April; its value, Rs. 1,500, was debited in the account against the defendant. About this time, the defendant discovered that another tusker eight feet three inches high had been captured on the 25th March in the Hazat Ali Stockade and had been marked down to the plaintiff. The defendant resented this and he appealed to the plaintiff and his brother to let him have this elephant for the sake of his dignity. This request passed unheeded and the plaintiff removed with eight of the newly caught elephants and with others belonging to himself to Akhoy Phutya, about 50 miles distant from the depot at Yamguri, where all the captured elephants were brought. The defendant, thus baffled, sent information to the Police that the plaintiff was absconding with elephants. The result was that the Police intervened and attached the elephants; one was sold while under attachment, and seven others were made over to the agent of the defendant on the 13th May 1910. Attempts at a settlement proved abortive, and on the 1st October 1910, the plaintiff commenced this action for recovery of the elephants taken away from him or for their value. The defendant resisted the claim mainly on the ground that plaintiff had not acquired an absolute and exclusive title to the animals, that he had no enforceable claim till the partnership accounts were adjusted, and that if the accounts were settled, it would be found that a large sum was due from the plaintiff to the defendant. The Subordinate Judge has dismissed the suit. He has held that in the suit as framed, the partnership accounts could not be adjusted, and that till the accounts between the parties were adjusted, the plaintiff was not entitled to relief.

The plaintiff has appealed to this Court and has contested the grounds for the decision of the Subordinate Judge; he has also suggested that, if necessary, leave should be granted to amend the plaint and to convert the suit into one for partnership accounts, so that the rights and

liabilities of the parties might be investigated and determined.

We may state at the outset that there is no room for controversy that the plaintiff and the defendant were partners, for as Sir Montague Smith said in *Mollwo, March & Co v. Court of Wards* (1), a partnership is constituted whenever the parties have agreed to carry on business or to share the profits in some way in common: *Pooley v. Driver* (2). What then was the position of the parties as partners in this venture? It is plain from the evidence that the accounts of the captures in the different places were made up separately, i. e., stockade by stockade. Consequently, if it be found that the accounts of one stockade have been finally settled, it cannot be maintained that the rights of the parties in the elephants captured there, remained undetermined because the accounts of some other stockade had not been finally adjusted. Now the eight elephants in dispute as described in schedule 8 to the plaint were captured as follows—four, Nos. 1, 4, 5 and 8 at Rungma and Bokajan, three Nos. 2, 6 and 7 in the Itonia stockade, and one, No. 3, at the Hazat Ali stockade. As regards the Rungma and Bokajan elephants, we may state at once that the accounts were not finally settled. The oral evidence suggests that the agent of the defendant was present, made up an account and signed a book; these are not produced by the plaintiff and Malli Ram, the agent, was indeed not even cross-examined with regard to these accounts. There is no trustworthy evidence to show that the prices fixed by the plaintiff for elephants caught in these stockades were ever submitted to the agent of the defendant for approval. There is, on the other hand, indication in the evidence that the Rungma and Bokajan stockades were worked solely by the plaintiff. It is impossible for us to hold that the plaintiff has acquired sole ownership to the elephants captured at Rungma and Bokajan. This portion of the claim cannot possibly be sustained and we did not, indeed, think it necessary to hear the respondent on this part of the case.

(1) (1872) 10 B. L. R. 312; 18 W. R. 384; L. A. Sup. Vol. 86; on App. 4 P. C. 419.

(2) (1876) 5 Ch. D. 458; 46 L. J. Ch. 466; 36 L. T. 791.

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We have next to deal with elephant No. 3 captured in the Hazat Ali stockade and elephants Nos. 2, 6 and 7 in the Itonia stockade. In each of these cases, the evidence, in our opinion, proves that complete title had vested in the plaintiff. There was a sale in each instance with the concurrence of all the parties interested in the animal and the price fixed was approved on behalf of the defendant by Gopal Bhuyan and Maliram Khatomal, who was unquestionably the representative of the Gossain as contemplated by the deed of agreement. The only question is, whether the plaintiff is debarred of his remedy, because there has not been a complete adjustment of accounts. It is plain that a partner is entitled to purchase partnership property, provided there is full disclosure and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has a legitimate grievance against the other; *Dunne v. English* (3), *Imperial Mercantile Credit Association v. Coleman* (4). Indeed, if this principle were not adopted, the transaction might not only be fruitless but end in loss to the parties. Elephants captured cannot be forthwith sold to strangers, and there is no reason why each partner should not be allowed to take some of the animals if the transaction is perfectly fair and they are agreed as to the prices. We are of opinion that the title of the plaintiff cannot be assailed merely on the ground that he has purchased partnership properties; he did so with the assent of all the persons interested in the animals, and his purchase was in no sense in contravention of the terms of the deed of agreement. Is there, then, any reason why the plaintiff should be denied relief, because all the accounts had not been adjusted? The acquisition of an absolute title to the four elephants mentioned, was not contingent upon the adjustment of all the accounts of the partnership. In this situation, the principle formulated by Lord Cottenham in *Rawson v. Samuel* (5) applies, viz., that an action for the balance of a

settled account would not be restrained merely because there were other unsettled accounts between the parties. In the present case, there are not even cross-demands; the defendant has not chosen to sue the plaintiff for adjustment of the partnership accounts, and he cannot invite the Court to assume that the balance of that account would be found to be in his favour. Reference may be made to the earlier decision in *Preston v. Strutton* (6), where the pendency of an unsettled partnership account upon which the balance was in dispute, was held to be no ground for an injunction to restrain execution upon a judgment which had been obtained upon a note given for a balance upon a former settlement. In the present case, the plaintiff had acquired a complete and indefeasible title to the elephants mentioned; he was in lawful possession of them; he was deprived of that possession, because the defendants set the Police authorities in motion on untrue information, and thus obtained possession of the animals. We may observe that at least as regards one of the elephants, it was argued that the evidence showed that the plaintiff was not himself the owner as he had made the purchase for the benefit of another person. The contention in substance is that the suit in respect of such elephants could be maintained only by the person for whose benefit the purchase had been made. There is no foundation for this argument, as section 180 of the Indian Contract Act provides that if a third person deprives the bailee of the use or possession of the goods bailed or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. This is good sense and conforms to what is now well-settled law in England (*Story on Bailments*, section 93F, *Giles v. Grover* (7), *Jeffries v. Great Western Railway Co.* (8). As was

(3) (1874) 18 Eq. 524; 31 L. T. 75.

(4) (1873) 6 H. L. 189; 42 L. J. Ch. 644; 29 L. T. 1; 21 W. R. 696.

(5) (1841) Cr. & Ph. 161; 54 R. R. 259; 10 L. J. Ch. 214; 3 Jur. 947; 41 E. R. 451.

(6) (1792) 1 Anstruther 50; 145 E. R. 797.

(7) (1832) 6 Bligh. (N. S.) 277 at p. 452; 9 Bing. 128; 2 M. & S. 197; 1 Cl. & F. 72; 5 E. R. 598; 36 B. R. 27.

(8) (1856) 5 El. & Bl. 802 at p. 807; 25 L. J. Q. B. 107; 2 Jur. (N. S.) 230; 4 W. R. 201; 119 E. R. 690; 103 R. R. 753.

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said by Baron Parke in *Manders v. Williams* (9), no proposition can be more clear than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrong-doer, the latter by virtue of his possession, the former by reason of his property. We hold accordingly that the plaintiff is entitled to the value of the four elephants Nos. 2, 3, 6 and 7. But we are not prepared to allow him a decree for the sums claimed as expenditure for tending and training the animals; there is no satisfactory evidence in support of this claim.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified. The plaintiff will be awarded a decree for Rs. 4,600; this sum will carry interest at 6 per cent. per annum from the date of the institution of the suit to the date of realisation; we observe that the plaint does not include a claim for interest antecedent to the suit. Each party will receive and pay costs in proportion to his success and defeat in both the Courts.

Appeal allowed in part;

Decree modified.

(9) (1849) 4 Exch. 339 at p. 344; 80 R. R. 588; 18 L. J. Ex. 437.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1113 OF 1913.

August 17, 1915.

Present:—Justice Sir Asutosh Mukherjee, Kt., and Mr. Justice Newbould.

KHUB LAL SINGH AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

AJODHYA MISSEK—DEFENDANT—

RESPONDENT.

Hindu Law—Alienation by widow, validity of—Test—Disposition for religious or charitable purposes or for spiritual benefit of husband and for worldly purposes, distinction between—Legal necessity—Hindu widow, daughter or mother, power of—Acts of religious merit—Excavation and consecration of tank—Extent of alienation.

Where a deed by a limited owner with qualified power of alienation is impeached, the test is, is the transaction fair and proper, lawful and valid and justified by Hindu Law; necessity is only one of the phases of the test of propriety. [p. 434, col. 1.]

A widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual

welfare of her husband than what she possesses for purely worldly purposes. [p. 434, col. 1.]

There is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and within proper limits the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce, to his spiritual benefit. [p. 435, col. 2.]

A Hindu widow, daughter or mother, is entitled to alienate a small portion of the estate in her hands for religious purposes. [p. 435, col. 1.]

Under the Hindu Law the excavation and consecration of a tank are acts of high religious merit and a disposition made by a widow for such a purpose is lawful, valid and proper. [p. 436, col. 1.]

An alienation of an area slightly over two *bighas* out of ten *bighas* by a widow for the performance of a work of recognized religious merit, is not unreasonable in extent. [p. 436, col. 2.]

Appeal against the decree of the District Judge of Gaya, dated the 12th December 1912, affirming that of the Subordinate Judge of Gaya, dated the 13th March 1912.

Babus Lachmi Narayan Singh and Sivandan Roy, for the Appellants.

Mr. U. P. Roy and Babu Harihar Prasad Singh, for the Respondent.

JUDGMENT.—The subject-matter of the litigation which has culminated in this appeal is immoveable property admittedly included in the estate of one Syamlal Misser, who died in 1889. He was succeeded by his widow Puna Koer, who, on the 2nd May 1899, granted two permanent leases of the disputed land to the defendants on nominal rents. Puna Koer died in 1910. On the 20th May 1911 the plaintiff, whose paternal grandfather was the brother of the father of Syamlal Misser, instituted this suit for recovery of possession on declaration that he had succeeded to the estate as reversionary heir and was not bound by the permanent leases granted by the widow. The defendants resisted the claim on the ground that the transactions impeached were lawful, valid and justified by Hindu Law. The Courts below have concurrently found that the leases had been granted to raise money for the excavation and consecration of a tank and for the erection of a wall in connection with a temple founded by Syamlal Misser shortly before his death; and the evidence shows that the premium for the two leases, namely, Rs. 525 was applied for the aforesaid purpose. The Courts below have, however, decreed the suit, in the view

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that the excavation and consecration of the tank and the erection of the wall were not legal necessities. On the present appeal by the defendants, we have been invited to hold that the objects specified, justified the alienations which are consequently operative against the inheritance in the hands of the reversionary heir.

The test in cases of this description, where a deed by a limited owner with qualified power of alienation is impeached, is, whether the purpose for which the alienation was made was proper or legitimate. The limits of this power were defined by Turner, L. J., in a celebrated passage in the judgment of the Judicial Committee in *Collector of Masulipatam v. Caraly Vencata Narrainpah* (1): "The widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity." To maintain that in every case where an alienation by a limited owner is impeached, legal necessity therefor must be established to support its validity, is to take a narrow and restricted view of the scope of the true rule on the subject. The test is, is the transaction fair and proper, lawful and valid and justified by Hindu Law; necessity is only one of the phases of the test of propriety. This is manifest from the observations of Sir James Colville in *Raj Lukhee Deba v. Gokool Chunder* (2), of Lord Davey in *Sham Sundar Lal v. Achhan Kunwar* (3) and of Lord Moulton in *Bijoy Gopal Mukerji v. Girindra Nath Mukerji* (4). It is unquestionable then that the widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely

(1) 8 M. I. A. 529 at p. 550; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

(2) 13 M. I. A. 209; 3 B. L. R. (P. C.) 57; 12 W. R. (P. C.) 47; 2 Suth. P. C. 275; 2 Sar. P. C. J. 518; 20 E. R. 529.

(3) 25 I. A. 183; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417.

(4) 23 Ind. Cas. 162; 41 C. 793; 19 C. L. J. 620 (P. C.); 18 C. W. N. 673; 12 A. L. J. 711; 16 Bom. L. R. 425; 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533; (1914) M. W. N. 430.

worldly purposes. An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary; but some of them were mentioned by way of illustration in an opinion of the Pandits quoted with approval by Lord Gifford in delivering the judgment of the Judicial Committee in *Cossinaut Bysack v. Hurroosondry Dossee* (5), "religious purposes include dowry to a daughter, building temples for religious worship, digging tanks, and the like." The Pandits added "the widow has a life-interest (in both moveable and immoveable property), and is entitled to the enjoyment of the same, and to dispose of the same by gift, mortgage, sale, or otherwise, for the benefit of her departed husband's soul, even without the consent of her husband's kinsmen; in so doing, she will observe moderation." We may here refer to some very weighty observations, made by Lord Gifford, on the mode of determination of questions of this character by our Tribunals: "This being a question purely of Hindu Law, great care must be taken in coming to a decision upon that subject, in order to prevent the judgment of English Judges being warped by impressions made upon their minds in consequence of their habitual application of English Law and the nature of English decisions to which they are accustomed, and to consider in what way, a Hindu Court of Justice would have decided the point." These remarks could hardly have been borne in mind in some of the decisions quoted before us. It is not necessary for our present purpose to enter upon a minute analysis of the cases on the subject, but reference may be made to the decisions in *Mahoda v. Kuleani* (6); *Ramchander v. Gungagovind* (7); *Kartick Chunder Chukerbutty v. Gour Mohun Roy* (8); *Runjeet Ram Koolal v. Mahomed Waris* (9); *Ram Kawal Singh v. Ram Kishore Das* (10); *Churaman Sahu v. Gopi*

(5) (1820) 2 Morley's Digest 198; 3 Ind. Dec. (o. s.) 907, affirmed in Privy Council, Clark's Rules and Orders 1831 p. 91; Montagu's Cases on Hindu Law, 477; 1 Ind. Dec. (o. s.) 212; Morley 85; 1 Ind. Dec. (o. s.) 945; Vyavastha Darpan, 1st Ed. 97, 2nd Ed. 89.

(6) (1803) 1 Mac. Sel. Rep. 82; 5 Ind. Dec. (o. s.) 62.

(7) (1826) 4 Mac. Sel. Rep. 147; 7 Ind. Dec. (o. s.) 110.

(8) 1 W. R. 48.

(9) 21 W. R. 49.

(10) 22 C. 506.

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Sahu (11); *Harmanage Narain Singh v. Ram Gopal Achari* (12); *Jagjiban v. Deo Shankar* (13); *Rupoor v. Sebak Ram* (14); *Chunnee Lal v. Jussoo* (15); *Gopalla v. Narayana* (16); *Rama v. Ranga* (17); *Lakshminarayana v. Dasu* (18); *Vappuluri v. Garinalla* (19); *Gudimetla Vancatarazu v. Bollozu Kottaya* (20); *Puran Dui v. Jai Narain* (21). These cases generally recognise the doctrine that a Hindu widow, daughter or mother is entitled to alienate a small portion of the estate in her hands for religious purposes, though the actual result reached in individual decisions may be open to criticism upon their special facts. In some of these cases, however, a distinction is drawn between acts of which the religious merit is solely acquired by the female heir and acts of which the religious merit accrues to the deceased or is shared by the female heir with him. As Prannath Saraswati points out, however, in his erudite lecture on the Hindu Law of Endowments (page 167), this distinction is not supported by the texts in the case of the widow, though it may be valid in the case of the daughter or the mother. According to a text of Vrihaspati quoted in the *Dayabhaga*, Chapter XI, section 1, the husband and wife participate in the effects of good and civil actions, and this mutual relation is not dissolved by the death of either partner. This is emphasized in another passage (*Dayabhaga*, Chapter XI, section 1, clauses 43 and 44), where it is expressly stated that the widow performs acts spiritually beneficial to her husband from the date of her widowhood, and she is enjoined to be assiduous in the performance of religious duties, because, according to a text of Vyasa, she thereby conveys her husband, though abiding in another world, and herself to a region of

bliss. To the same effect, is the *Viromitrodaya* of Mitra Misra, Chapter III, part 1 section 3 (Shastri Golap Chander Sarkar's translation, page 136), where reference is made to a text of Katyayana which recognises the right of the widow to make gifts for spiritual purposes and also to mortgage or sell so much as is sufficient for such purposes, even in religious ceremonies that are optional, and *a fortiori*, in those daily and occasional ceremonies which are enjoined by the Shastras and the omissions whereof entail demerit. The *Viromitrodaya* (page 141) also maintains that in making gifts for spiritual purposes as well as in making sales or mortgages for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right extends to the entire estate of her husband; the author, in fact, reads the injunction as to moderation as restricted to improper temporal uses. This view, however, has not been accepted, and it has been ruled that a gift of a moderate portion of the property of her husband by the widow, with a view to his spiritual benefit, is valid (See *Jagannath's Digest*, translated by Colebrooke, Book I, Ch. 5, Sec. 3, Pl. 195; Book II, Ch. 4, Sec. 1, Pl. 2 & 3; Book V, Ch. 8, Pl. 399). The true rule thus appears to be that there is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit.

Tested in the light of these principles, what is the position of the parties here? Shyamlal Misser had, shortly before his death, founded a temple. His widow raised Rs. 528 by the grant of two perpetual leases with a view to excavate and consecrate a tank and to complete the walls of the temple buildings. The deeds contain recitals that her husband had enjoined her to carry out the works mentioned. These recitals, as pointed out by the Judicial Committee in *Brij Lal v. Musammatt Inda Kunwar* (22), are not by themselves conclusive

(11) 1 Ind. Cas. 945; 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 545.

(12) 19 Ind. Cas. 417; 17 C. W. N. 782.

(13) (1812) 1 Bor. 394 at p. 436.

(14) (1816) 1 Bor. 495 at p. 448.

(15) (1813) 1 Bor. 55 at p. 60.

(16) (1830) Mad. S. D. A. 74.

(17) 8 M. 552.

(18) 11 M. 288.

(19) 6 Ind. Cas. 240; 34 M. 288; 8 M. L. T. 74;

(20) M. W. N. 222; 20 M. L. J. 798.

(21) 16 Ind. Cas. 139; 23 M. L. J. 223; 12 M. L. T.

230; (1912) M. W. N. 861.

(22) 4 A. 482; A. W. N. (1852) 115.

(22) 23 Ind. Cas. 715; 26 A. 187 (P. C.); 19 C. L. J. 469; 26 M. L. J. 443; 18 C. W. N. 649; 12 A. L. J. 495; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794.

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evidence of their truth, and the facts alleged should be proved *aliunde*. But obviously, after the death of both Shyamlal Misser and Puna Koer, independent evidence is not likely to be available for the determination of the question, whether or not the husband gave any specific instructions to the widow. Assume, then, that the alleged instructions have not been proved; still the fact remains that the widow raised money and applied the same for completion of the buildings and for the excavation and consecration of a tank in connection with the temple. The water of the tank would be needed for purposes of ablution and worship, but even apart from this, the excavation and consecration of a tank are acts of high religious merit, as is authoritatively laid down in a series of texts quoted in the *Jalashaotsargatattwa* of Raghunandan and the *Chaturbargachintamani* of Hemadri (Dena-khanda, Cha. XIII, Asiatic Society's Ed., p. 1003). Many of these texts which extol the religious merit of the construction, consecration and maintenance of tanks and other reservoirs for storage of water, are translated by Pranuath Saraswati in his tenth lecture on the Hindu Law of Endowment. We feel no doubt what answer a Hindu Court of Justice would have given, if a question had been raised before it as to the propriety and validity of these acts of the widow from the point of view of Hindu Law. As Lord Gifford said in *Cossinaut Bysack v. Hurroosondry Dossee* (5), it is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition. In the case before us, the disposition has been made for the performance of a work of recognised religious merit and cannot consequently be treated as other than lawful, valid and proper.

One other question requires consideration, namely, whether the alienation covers a reasonable portion of the property of the husband of the lady; this, as Lord Gifford said, must be determined with reference to the circumstances of the particular disposition. The Courts below did not direct their attention to this

aspect of the case, possibly because its true bearing on the question in issue was not realised; and it seemed at one stage as if a remand might be necessary for the investigation of this point on fresh evidence. An examination of the record, however, shows that there are materials sufficient to enable us to come to a conclusion on the matter. Several other suits were instituted, simultaneously with the present suit, for the cancellation of other alienations by Puna Koer. These cases show that Shyamlal Misser left more than ten *bighas* of land and that the area now in dispute slightly exceeds two *bighas*. We are of opinion that, in the circumstances of this case, the area alienated did not constitute an unreasonably large fraction of the entire estate. In the case of *Ramchunder v. Gurgagorind* (7), the Pandits indicated their opinion that the widow might validly alienate, for religious purposes, three-sixteenths of her husband's property. In *Churaman Sahu v. Gopi Sahu* (11), the gift which was sustained, was of a portion of the estate worth more than one-fourth and less than one-third of the total value. In these circumstances, we are unable to say that the alienation was unreasonable in extent.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 9 OF 1913.

March 8, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Fawcett, A. J. C.

CHANDIRAM KARAMSING—PLAINTIFF—
APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA

—DEFENDANT—RESPONDENT.

Forest Act (VII of 1878), ss. 81, 82—Forest produce, right of Government to recover money payable for, without giving credit for amount realized from sale of attached property—Pleadings—New plea, raising of, first in appeal, propriety of.

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A by a contract with Government obtained the right of felling and removing timber and of manufacturing charcoal in certain forest *coupes*. Under this contract A had to pay Rs. 6,431 in four equal instalments. A paid only the first instalment. On his failure to pay the second instalment, the Divisional Forest Officer attached all materials of timber, firewood and charcoal which A had in the *coupes* or depots and prevented A from further exploitation of the *coupes* until the instalments due were paid or security for payment given. The materials attached were subsequently sold and the amount retained by Government. The Divisional Forest Officer, sought to recover in addition, the full amount of all the three unpaid instalments, as arrears of land revenue under section 81 of the Forest Act:

Held, that the action of the Divisional Forest Officer could not be justified under section 82 of the Forest Act, as that section expressly provides that the proceeds of the sale should be applied first in discharging the amount due and as it does not authorise an absolute confiscation of the forest produce and independent recovery of the entire amount due. [p. 439, col. 2.]

Held, further, that the plea of justification under section 82 not having been raised in the pleadings in the lower Court, could not be allowed to be raised for the first time in appeal. [p. 439, col. 2.]

Appeal against the decision of the District Judge, Hyderabad.

Mr. Dipchand Chandumal, for the Appellant.

Mr. E. Raymond. (Government Pleader), for the Respondent.

JUDGMENT.

FAWCETT, A. J. C.—On the 22nd September 1909, plaintiff-appellant entered into a contract, under which (subject to the conditions and restrictions specified therein), he obtained the right of felling and removing timber, and of manufacturing charcoal, in certain forest *coupes*. Under this contract, plaintiff had to pay the sum of Rs. 6,431 in four equal instalments of Rs. 1,607-12-0 on 15th January 1910, 15th March 1910, 1st July 1910 and 15th August 1910. He paid the first instalment on the 5th February 1910, but has paid no other instalments. On the 21st February 1910, he had been asked to pay the second instalment punctually and on the 4th June, he was similarly asked to pay up the third instalment due on 1st July. On the 16th June 1910, the Divisional Forest Officer ordered the Range Forest Officer to attach all materials of timber, firewood or charcoal, plaintiff had in the *coupes* or depots, as he had failed to pay the second instalment. This order was given effect sometime before the 2nd July 1910, when a report that the attachment had been made, was submitted

by the Sub-Ranger deputed to make the attachment. On the 30th August 1910, the Divisional Forest Officer demanded payment of all three instalments. Nothing seems to have been done by the plaintiff till the 12th September 1910, when he petitioned for permission to remove the attached materials and asked for time to pay the instalments due. On the 26th September 1910, the Divisional Forest Officer wrote to the Conservator of Forests the letter which is the first one in the correspondence, Exhibit 64. From paragraph 1 of this letter, it appears that the Conservator had sanctioned the plaintiff being granted an extension of time "for the exploitation of his *coupes*," and the Divisional Forest Officer enquires "whether this is not a mistake, and whether extension for the removal of materials already cut from the *coupes* to his depots is not what was actually intended." He himself was opposed to any grant of extension for further exploitation of the *coupes* for reasons which he gives in this letter. The Conservator on the 27th September replied that the plaintiff should be allowed "to cut and remove also the remaining portion of his materials in the *coupe*, provided a satisfactory surety is first given." The plaintiff admits that he was told by the Divisional Forest Officer that, if he gave security, he would be allowed to cut the standing trees and take away his attached materials and that he agreed to this, and mentioned Mr. Parsram, Pleader, as his surety. On 28th September, the Mukhtiarkar was accordingly requested to enquire into the solvency of the proposed surety and, if it was found satisfactory, to get the surety-bond executed. But on the 24th November 1910, Mr. Parsram definitely refused to stand surety for plaintiff. Meanwhile on the 10th November plaintiff had applied to the Conservator, saying he was sorry he had not been able to give security as ordered, and asking for further time to pay the instalments and work his *coupes*. The Conservator, however, on the 26th November 1910, in answer to a reference from the Divisional Forest Officer ordered that no further time should be given to plaintiff to furnish a surety, and on the 5th December 1910, the Divisional Forest Officer reported that he was informing plaintiff accordingly. On the 21st January

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1911, the Collector at the request of the Forest Department issued a warrant for the arrest and detention of plaintiff under section 157 of the Land Revenue Code, and in respect of Rs. 4,823-4-0 due for the three unpaid instalments; and plaintiff was arrested and released on his giving security under section 164 of the same Code. On the 8th February 1911, plaintiff through his Pleader, Mr. Parsram, submitted certain proposals for compromising the matter by plaintiff being allowed further time to exploit the remaining area subject to his payment of the arrears, but these were refused by the Conservator on 11th February, on which date plaintiff filed a suit against Government for a declaration that nothing was due from him and an injunction restraining defendant from recovering anything from him or executing a warrant against him. On the 15th February 1911, the Conservator instructed the Divisional Forest Officer not to "sell the material in the coupe and depots which has been confiscated pending further orders." On the 27th May 1911, the Divisional Forest Officer gave orders, however, for the sale of these materials, which he describes as "confiscated material" of plaintiff, and an auction was accordingly held on the 5th June 1911, resulting in the recovery of Rs. 1,785 as sale-proceeds.

In paragraph 7 of the plaint it is contended that, as plaintiff did not get possession of the coupes till after the agreed time, defendant first failed to comply with the terms of the contract and could not insist on plaintiff's strict compliance with the terms as to payment of instalments. In answer to this, defendant in his written statement says, "he did not abandon the contract as suggested in paragraph 7 of the plaint, and that he was willing up to the very end to continue the contract, provided only that plaintiff would give security for payment of the amount due from him." It is then pleaded that the plaintiff's material, which had been attached, "therefore, vests in him by virtue of clauses 3 (c) and (f) of the agreement." Under clause (c) plaintiff agreed "that he will pay the full amount of the contract sum, whether the whole of the material contracted for, be exploited by him from the coupe or not", and under clause (8) "that any material remaining within the coupe, on the 1st October 1910,

or later, shall be the property of Government." The District Judge has accepted this contention. He holds that plaintiff had committed a breach of the agreement by not paying the second instalment at any rate by May 15th, 1910; that the Forest Department was justified in preventing him from removing any more of the forest material before he paid the overdue instalment; that from the moment his materials were attached, plaintiff gave up the contract as he made no attempt to have the attachment raised by paying the second and subsequent instalments; and that as the attached property became the property of Government under clause 3 (f) of the agreement, plaintiff cannot claim that its value should be deducted from the amount of the three instalments due from him under clauses 1 (a) and 3 (c) of the agreement.

This view is, however, in my opinion, quite untenable. Clauses 3 (c) and (f) of the agreement obviously contemplate the contract continuing for the full period of the contract, and are subject to an implied condition to that effect. Clause (c) provides against the contractor claiming any remission merely because of his neglect to exploit the coupe fully, and it cannot reasonably be held that under clause (f), it was intended that Government should be enabled to obtain the contractor's property by the simple process of attaching it and preventing its removal from the coupe before the date specified. Nor do I think it can properly be held that plaintiff gave up the contract, in the sense that he could have continued it and was in no way prevented by the Forest Department from doing so. The facts I have already mentioned, in my opinion, conclusively show that, as contended by the appellant's Pleader, the contract must be treated as having been put an end to by the Conservator under clauses (c) and (f) of the agreement. These clauses are as follows:—

"3 (a) That if in the opinion of the Conservator, the contractor has broken, evaded or failed to fulfil any of the herein-contained conditions or infringed any provision of the law or rules, forest or other, at the time being in force, it shall be lawful for the said Conservator, by a notice in writing to be served upon the contractor, to put an end to this agreement without prejudice to the right of the Secretary of State for antecedent breaches of contract, and

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to retain out of the contractor's deposit, or out of any other money of the contractor's in the possession of any Railway or Forest Officer, the amount or such portion as is possible of the amount of damages sustained by reason of the non-performance by the contractor of this agreement; or, instead of so putting an end to this agreement and retaining such sum, to retain such sum without putting an end to this agreement.

Provided always that nothing in this clause or in that last preceding, shall affect the liability of the contractor to criminal prosecution for any offence committed by him against any law or rules, forest or other, at the time in force.

(p) That, if this agreement be put an end to in whole or in part by the Conservator as aforesaid, the privileges secured to the contractor under the contract in whole or in part, as the case may be, may be re-sold by the authorised officer, subject to the orders of the Conservator, at the risk of the contractor (who shall have no claim to the profit, if any realised by the Government on such resale), or may be otherwise disposed of as the said Conservator may direct, and any money which may have been paid to Government under this agreement, and the entire stock of timber, firewood and other things in the *coupe* or at the depots aforesaid, or in transit between the two at the time at which the operation of the agreement was suspended by the authorised officer, or, in the event of suspension or part of the agreement only, such part of the entire stock of timber, firewood and other things in the *coupe* or in the depots, or in transit between the two, as relates to the part suspended, shall be and remain the property of Government and shall be disposed of for the benefit of Government in such manner as the Conservator shall direct."

The first circumstance which justifies the view that the contract was put an end to under these clauses, is that the confiscation of plaintiff's materials cannot otherwise be justified, and the Court should presume that the intention was to act legally rather than illegally. This is consonant with the maxim, *omnia presumuntur rite esse acta*, and the general

principle that it is right to put the most favourable construction on the acts of others and to presume that a man intends to be just, which, as stated in Snell's Principles of Equity, 12th edition, page 43, is the basis of the maxim that "equity imputes an intention to fulfil an obligation." Under clause (p) mentioned above, the plaintiff's "entire stock of timber, firewood and other things in the *coupe*" could be confiscated to Government, as was done by the Conservator. At the hearing of the appeal an attempt was made by the Government Pleader to justify this confiscation under section 82 of the Indian Forest Act. But though section 81 of that Act has been relied on in defendant's written statement, there is no reference in it to section 82; and on the contrary the attachment is apparently sought to be justified only by "the circumstances of the case" (paragraph 2) and the agreement (paragraph 3). To allow the respondent in the appeal to fall back on section 82 would, therefore, be to allow a considerable departure from defendant's pleadings, which appellant might reasonably complain, would operate to his prejudice. But in any case, I do not think section 82 can possibly cover what was done in this case. It gives a lien on forest produce for money payable for or in respect of that forest produce, and a power to sell such produce for the recovery of the amount due. But it expressly provides that "the proceeds of the sale shall be applied first in discharging" the amount due. It does not authorise an absolute confiscation of the forest produce and independent recovery of the entire amount due, such as defendant seeks to justify in this case. Here the Conservator has treated the attached property as confiscated, and the entire amount of the three instalments due is sought to be recovered from the plaintiff, irrespective of the sale-proceeds of the attached property. No doubt, the Divisional Forest Officer's order of attachment on 16th June 1910 was justifiable, and was very likely intended to be passed, under section 82. But if so, the procedure laid down in that section should have been followed, i.e., the forest produce should have been sold at any rate in December 1910, when it was decided that plaintiff would be granted no further extension of time, and the sale-proceeds applied in reduc-

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ing the amount due from him. But this was not done, and on the contrary the property was confiscated in the manner authorised by clause 3 (p) of the agreement: consequently, defendant cannot fall back on section 82 of the Forest Act as a justification of the action taken in this case.

Then again, the correspondence shows that there was an actual "putting an end to" the agreement between the parties. This is virtually admitted in paragraph 5 of defendant's written statement, where it is stated defendant "was willing up to the very end to continue the contract, provided only that plaintiff would give security for the amount due from him." There is nothing in the agreement under which the Conservator could demand such security as a condition of the continuance of the contract; and if the offer of the Conservator to allow plaintiff an extension of time for exploitation of the *coupe* and removing his materials, provided he gave security, had been carried out, it would clearly have amounted to an altered contract, which would take the place of the original contract under section 62 of the Contract Act. It also seems clear from the Divisional Forest Officer's letter of 26th September 1910 (Exhibit 64) that he was not allowing plaintiff to go on cutting timber and otherwise exploiting the *coupe*, because in his view, this meant his spending more borrowed money and lessening the chance of recovery of the outstanding instalments. This is corroborated by plaintiff's evidence that he was told by the Divisional Forest Officer that he would be allowed to cut the standing trees and take away his goods *if he gave security*, and by the admission in paragraph 4 of defendant's written statement that Government confiscated the remaining portion of the wood. The proposed arrangement about plaintiff's giving security fell through, and the original contract was certainly put an end to at any rate in September 1910, when the Forest Department refused to allow plaintiff to carry on further operations, unless he furnished good security. The term of the contract, it may be noted, did not expire till 30th September 1910.

No doubt, it is true that plaintiff was not prevented from cutting further timber at the time of the attachment, and that Government are not to blame for the obstacles in the way of further exploitation

due to water entering the *coupe* in July and plaintiff's coolies running away. If the Forest Officials had exercised due care in proceeding so that their action could have been justified under section 82 of the Forest Act, Government would have had a much better case. But as it is, the Court can only presume that their action was taken under clauses 3 (o) and (p) of the agreement, which is consonant with the facts for the reasons already given and which at any rate gives Government a better case than if the action of attaching and confiscating plaintiff's materials is treated as entirely unjustifiable. And this is in no way prejudicial to appellant, because it is the case put before the Court by his Pleader.

The mere fact that defendant failed to pay the three instalments, and had no other means to pay what was due, could not, of course, justify the attachment of the materials. Under the agreement plaintiff had free possession and control of these materials subject only to the restrictions as to passes for removal, etc., specified in the agreement.

In my opinion, therefore, the Conservator must be taken to have put an end to the agreement under clause 3 (o) and to have acted as he did under that and the connected clause (p). The fact that under clause (o), there has to be a notice in writing served upon the contractor, does not prevent this clause operating, because this qualification is introduced for the benefit of the party to whom such notice must be given, and it may accordingly be waived by plaintiff under the principle *quilibet potest renunciare juri pro se introducto*, just as notice of dishonour of a title of exchange may be waived by the drawer or endorser (*cf.* Broom's Legal Maxims, 7th Edition, pages 533-4). There is no difficulty about this, as appellant asks the Court to treat the case as one in which the agreement was put an end to under this clause (o).

This being so, the question arises whether Government are entitled to recover the three unpaid instalments in addition to the property confiscated and money retained under clauses (o) and (p). There is nothing in those clauses reserving any such additional right, though provision is made for saving any

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right of the Secretary of State for antecedent breaches of contract. The whole agreement is also of an elaborate nature, in which it appears to be intended to specify all the disabilities and restrictions to which the contractor is subject. I think it is clearly a case to which the ordinary rule of construction, *expresso unius est exclusio alterius*, must be applied; and that the provisions of clauses (o) and (p) must be treated as exhaustive in regard to the remedies available to Government in the event of the agreement being put an end to by the Conservator. This construction does not seem unreasonable, because Government might, and probably in general stand to, gain much more than was actually due, by the confiscation, etc., authorised by these clauses, and the clause (p) has probably been framed on the basis that the risk of loss in such a case may be safely taken by Government. If this is not the intention, then it should have been made clear. In this connection it may be noted that a contractor cannot get relief from the stipulations by way of penalty contained in this agreement, as he might otherwise do (where they press hardly) under section 74 of the Contract Act, because of section 84 of the Forest Act, which expressly applies to the agreement. There is, therefore, all the more reason for the above construction of clauses (o) and (p), as in such a case one beneficial to the person subject to the penalties imposed should, where otherwise justifiable, be preferred.

In the present case Government have recovered Rs. 4,035-14-0 as against Rs. 6,431 due under the contract, and have the benefit of the timber which remained uncut by the plaintiff, so that the equities are not so very much in their favour. And it certainly would be inequitable that they should be entitled to recover Rs. 4,823-4-0 in addition to the Rs. 4,035-14-0 already recovered, and thus make a considerable profit out of the plaintiff's breach of agreement.

For these reasons, I hold that the three instalments, in respect of which the warrant was issued by the Collector, are no longer payable or due to Government, and, therefore, that section 81 of the Forest Act does not authorise the recovery of those instalments under the provisions of the Bombay Land Revenue Code.

It may be added that, though Government would have been entitled to recover the Rs. 4,823-2-0, if the contract had not been put an end to and advantage not been taken of the provisions of clause 3 (p) of the agreement, *cf. P. R. & Co. v. Bhagwan Das Chaturbhuj* (1), yet they are clearly not entitled under ordinary contract law both to this recovery and the penalty provided in that clause of the agreement (*cf. section 74, Contract Act*). Also as the Conservator subsequently ratified the Divisional Forest Officer's order of attachment, which was passed at the time when the first of the three unpaid instalments was due, that ratifications must, as part of the confiscation and putting an end to the agreement, have retrospective effect under the ordinary rule in such cases. The agreement was thus put an end to in respect of the first breach of contract and the saving of the right of the Secretary of State for antecedent breaches of contract in clause 3 (o) will not operate to prevent clause 3 (p) barring the recovery of all three instalments.

I would, therefore, reverse the decree of the lower Court and grant the plaintiff a declaration that this sum of Rs. 4,823-4-0 is not due from him to defendant in respect of the agreement Exhibit 29. An injunction is unnecessary in this case, as defendant is the Secretary of State. I would also allow plaintiff his costs from defendant throughout.

PRATT, J. C.—I agree.

Decree reversed.

(1) 2 Ind. Cas. 475; 34 B. 192; 11 Bom. L. R. 335.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 16
OF 1915.

September 27, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Davar.

DWARKADAS DAMODAR—DEFENDANT
No. 10—APPELLANT

versus

DWARKADAS SHAMJI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Trusts Act (II of 1882), s. 83—"Legal representative," meaning of—Failure of trust after settlor's death—Resulting trust in favour of heirs of settlor.

Where the subject of dispute is the estate of a deceased intestate for which no administration has been granted, the term "legal representative" in

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section 83 of the Trusts Act includes the person or persons beneficially entitled who represent the interests of the deceased by virtue of inheritance. [p. 443, col. 1.]

The representative by inheritance is to be found according to law at the moment of the death of the deceased. [p. 443, col. 1.]

Where, therefore, a Hindu woman conveyed certain property by a deed of trust, and the trust failed after her death:

Held, that there was a resulting trust in favour of the settlor, and, therefore, the property descended to her heirs at the time of her death. [p. 443, col. 1.]

Messrs. *J. Mehta and Vibhakar*, for the Appellant.

Messrs. *Jinnah and Jayakar*, for Respondents Nos. 1 and 3.

Messrs. *Vaidya and Moos*, for Respondent No. 4.

Mr. *Desai*, for Respondent No. 5.

JUDGMENT.—This appeal comes before us on a judgment of Mr. Justice Macleod upon an originating summons for the purpose of deciding certain questions with regard to a settlement executed by one Hakoobai on the 11th of December 1873. The summons was taken out by one of the trustees of the settlement, who also claimed to be a beneficiary entitled to the trust property in the events that had happened. The other parties to the summons were the other trustees and all persons who could conceivably be supposed to be interested as the heirs of the settlor or her daughter Gomtibai.

The question concerning the plaintiff's beneficial interest was raised in the plaint in these terms:—

"The plaintiff says that he was born at the date of the said indenture and is the nearest heir of the said Gomtibai according to Hindu Law, capable of taking any benefit under the said indenture, and submits that under the terms of the said indenture and a true construction thereof, the plaintiff has become absolutely entitled to the aforesaid trust property."

The plaintiff was represented in chambers upon the summons and had his case fully argued by Mr. Setalvad, but after argument, it was decided against him by the learned Judge, and having regard to the fact that the matter has been fully considered and that no appeal has been preferred on behalf of the plaintiff, we must take it that the question of his interest is finally settled against him. That question having been

settled by the learned Judge, there remained for decision question 8: "In the events that have happened, who is the person entitled to the property?" It was conceded by all the parties to the summons except the unsuccessful plaintiff that in the events that had happened, there was an intestacy and a resulting trust in favour of the settlor. Then the question arose who were or was the heirs or heir of the settlor entitled to take the property. On the one hand, it was contended that the heir of the settlor at the time of her death was Gomtibai, her surviving daughter, and that since Gomtibai was dead at the date of the summons, her children, the respondents, were entitled to the property. On the other hand, the tenth defendant claimed that the heir of the settlor could not be ascertained until the extinction of the beneficial interests which were validly created under the settlement, and that at the date of such extinction, he was the nearest heir of the settlor.

Now the law as to what are known in ordinary legal language as "resulting trusts" is stated in section 83 of the Indian Trusts Act:—"Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust property, the trustee, in the absence of a direction to the contrary, must hold the trust property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative." Section 191 of the Indian Succession Act provides that "Letters of Administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death." Similarly, the Probate and Administration Act, section 4, says:—"The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." That would include property falling into possession at the time of the testator's death or many years afterwards, for all interests vest in the personal representative. The executor or administrator, as the case may be, holds all property not validly disposed of, for the persons beneficially entitled at the moment of the death of the deceased owner.

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In the present case, we have to deal with the estate of a deceased intestate for which no administration has been granted. We have only to find the beneficiary. The Succession Certificate Act does not on the facts necessitate a grant of administration. The term 'legal representative' in section 83 of the Trusts Act must in such a case include the person or persons beneficially entitled who represent the interests of the deceased by virtue of inheritance.

The heirs then are the 'legal representatives' and they represent the estate of the deceased for the purpose of interests established by way of a resulting trust just as would the executor or administrator. Their representation dates from the same period and the reversion under the resulting trust, whether foreseen or unforeseen, having vested as a transferable interest in the deceased, vests on her death in her representative. The representative by inheritance is to be found according to law at the moment of the death of the deceased, the maxim being "*solus Deus facit heredem, non homo.*"

On behalf of the appellant, it was argued that there could be no vested reversion till the "succession opened". This expression is appropriate where there is a claim on the death of a Hindu widow enjoying her husband's estate, but its use in the present case indicates the fallacy underlying the argument for the appellant. To use the words of the Judicial Committee in *Moniram Kolita v. Keri Kolitani* (1), the widow's "estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The succession does not open to the heirs of the husband until the termination of the widow's estate."

Here, the valid life-interest of Gomitibai under the settlement was merely a "particular" estate, by reason of which the reversionary interest of the settlor remained to fall into possession at some

future time, although capable of immediate transfer or inheritance.

As Gomitibai was at the death of the settlor both the sole heir and the sole beneficiary capable of taking under the settlement, her life-interest under the settlement merged in her reversion, on the principle that "whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is annihilated or in the law phrase is said to be merged, that is, sunk or drowned in the greater." 2 Blackstone's Commentaries, 177.

The question of merger was not, however, argued and it is sufficient for the disposal of the appeal to say that Gomitibai and not the appellant was the settlor's heir. If that had been the only question in appeal, we should dismiss it with costs. But it is not the only question. There remains a question of costs.

The question which we have dealt with in the foregoing remarks appears to have occasioned considerable difficulty in the lower Court. It was argued on the 21st of November after the decision of the case against the plaintiff and was then adjourned for further argument into Court under the rule which permits a Judge to adjourn a case where he thinks fit for argument into Court.

The tenth defendant had been brought before the Court by one of the trustees, who for his own reasons wished to have all possible claims adverse to his claim disposed of in the originating summons, and it was also a matter of much interest and importance to the other trustees because they had to decide whether or not they held for their co-trustee or whether there was a resulting trust for the heirs of the settlor. The case, therefore, falls within the authorities which have been cited to us, *Waidanis, In re, Rivers v. Waidanis* (2) and *In re Buckton, Buckton v. Buckton* (3), both of which appear to us to justify the conclusion that the tenth defendant ought to be allowed his costs upon this summons, and that being so, he is entitled to his costs of this appeal also.

(1) 5 C. 776 at p. 789 (P. C.); 6 C. L. R. 322; 7 I. A. 115; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 785; 4 Ind. Jur. 362; 3 Shome L. R. 198.

(2) (1907) 97 L. T. 707, 1 Ch. 123; 77 L. J. Ch. 12.

(3) (1907) 2 Ch. 406 at p. 414; 76 L. J. Ch. 584; 97 L. T. 332; 23 T. L. R. 692.

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We affirm the decree of the lower Court, except in this respect that the tenth defendant is entitled to his costs out of the estate. We dismiss the appeal ordering all parties to the appeal to have their costs out of the estate.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2248 OF 1912.

June 9, 1915.

Present:—Mr. Justice Walmsley and
Mr. Justice Newbould.

RAGHUNATH JHA—DEFENDANT NO. 2—
APPELLANT

versus

Babu BIRJANDON SINGH AND OTHERS—
PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act XIV of 1882), s. 335—
Order passed without inquiry, if order within section—
Suit for possession—Limitation Act (XV of 1877), Sch.
II, Art. 11.*

Where a resistance is offered in an execution proceeding, an order passed without any inquiry at all is not an order under section 335 of the Civil Procedure Code, 1882, and a suit for the possession of the property brought one year after the order, is not barred by Article 11 of Schedule II to the Limitation Act, 1877. [p. 445, col. 1.]

Appeal against the decree of the District Judge, Darbhanga, dated the 25th May 1912, affirming that of the Munsif, Darbhanga, dated the 28th of August 1911.

Dr. Rash Behari Ghose and Babus Sarosh Charan Mitter and Chandra Sekhar Persad Singh, for the Appellant.

Babus Dowarka Nath Chakravartty and Manmohan Bose, for the Respondents.

JUDGMENT.

WALMSLEY, J.—The plaintiff obtained six decrees on hand-roles against defendant No. 1, Ramji Lal Das, and his father, and in execution caused the property in suit and other property to be put to sale, and himself purchased it on April 11th, 1906. Meanwhile, he says, Ramji Lal fabricated three bonds, among them a mortgage-bond purporting to have been executed on February 25th, 1893, in favour of Raghunath Jha, defendant No. 2. The latter obtained an *ex parte* decree against Ramji Lal on the basis of this

mortgage-bond in Suit No. 26 of 1906 and in execution bought the property now in suit. In February 1907 the plaintiff asked the Court to put him in possession of the property in suit, but resistance was offered by Raghunath Jha. The Munsif disposed of the matter by an order dated February 18th, 1907. The plaintiff instituted the present suit on August 8th, 1910, and the reliefs for which he asked were, so far as this appeal is concerned, for declaration that the mortgage bond of February 25th, 1893, the proceedings in Suit No. 26 of 1906 on that bond and the proceedings in execution of the decree were fraudulent and inoperative against him (the plaintiff) and that he (the plaintiff) is entitled to possession of the land in suit. Defendant No. 2 contested the suit and it is he who has preferred this appeal.

On the merits, the Courts below have decided in favour of the plaintiff, and the only contention in appeal is that the suit is barred by limitation. It is said that the Munsif's order of February 18th, 1907, was an order under section 335, Civil Procedure Code of 1882, and that the suit is barred by Article 11 of the Limitation Act of 1877, because it was not brought within one year of that order.

It is obvious that this contention must prevail if the order mentioned was an order under section 335, Civil Procedure Code.

It appears that on February 15th, 1907, the plaintiff as auction-purchaser applied to the Court to be put in possession of the purchased property, and the Munsif's order of the next day was that the *nazir* should go and give him possession but should return if there was any opposition. On February 18th, the Munsif recorded this order: "this petition is vehemently objected to. The best course left for the applicant is to bring a suit. Case is dismissed." In this order, the "applicant" must be the plaintiff, then auction-purchaser, and the "petition" and the "case" are his petition to be put in possession.

By section 335, Civil Procedure Code, it is provided that "the Court on the complaint of the purchaser shall enquire into the matter of the resistance * * * and pass such order thereon as it thinks fit." We are asked

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to presume that the Court made an enquiry, although no record of such an enquiry exists, and that the order dismissing the decree-holder's petition was in consequence such an order as is contemplated by section 335, Civil Procedure Code. Our attention has been drawn especially to the case of *Sardhari Lal v. Ambika Pershad* (1), where their Lordships of the Privy Council remarked that "the Code does not prescribe the extent to which the investigation should go." That case may be distinguished from the present one, *firstly*, by the fact that there was an order allowing certain objection to an attachment made by the decree-holder, and *secondly*, by the fact that the nature of the enquiry made by the Court was not known, and their Lordships assumed that there was some sort of enquiry. These are substantial points of difference, and because of these differences, I do not think that the principle laid down by the Privy Council governs the present case.

On the other hand, we have been referred to two Calcutta cases, where the circumstances are very similar to those of the present case. The first is that of *Rash Behary Bysack v. Budden Chunder Singh* (2). If the Munsif's compressed order of February 18th were expanded, it would be, *mutatis mutandis*, very much the same as the order recorded by the Munsif in that case, and it was held that there had been no judicial enquiry as required by the section and consequently no proper order. The second case is much more recent and it refers to the Privy Council judgment; it is the case of *Sarat Chandra Bisu v. Tarini Prasad Pal* (3), where Maclean, C. J., held that if there was no enquiry at all, there was no order within the meaning of section 335, Civil Procedure Code.

In my opinion, it is clear that there was no enquiry at all in the present case on which an order could be based, and that the order passed was not an order under section 335, Civil Procedure Code. Consequently I hold that the suit was not barred by limitation. The appeal is dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

(1) 15 C. 521 (P. C.); 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 219.

(2) 12 C. L. R. 550.

(3) 34 C. 491; 11 C. W. N. 487.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION No. 31 of 1913-14 OF
JAUNPUR DISTRICT.

April 19, 1915.

Present:—Mr. Holms, S. M.; and
Mr. Campbell, J. M.NIRMAN SINGH AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

BAHADUR SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

N.-W. P. Rent Act (XII of 1881), s. 8.—Tenant—
Trespasser—Occupancy right, acquisition of.

A person who has been in possession for twelve years without the consent of the zemindar, even if that period of twelve years was completed before the present Tenancy Act came into force, cannot be said to have acquired occupancy right in the holding. [p. 445, col. 2.]

Babu Sat Narain Prasad v. Ram Kumar, Selected Decision No. 3 of 1910, followed.

Second appeal from the order of the Commissioner, Benares Division, dated the 8th June 1914, reversing the order of the Assistant Collector of Jaunpur District, in a case of ejectment under section 58/63 of Act II of 1901.

JUDGMENT.

HOLMS, S. M.—(March 13th, 1915)—I am unable to agree with the finding of the officiating Collector with powers of the Commissioner that the defendants had acquired occupancy rights before the passing of Act II of 1901. Under section 8, Act XII of 1881, only tenants who had actually occupied or cultivated land continuously for twelve years had rights of occupancy and under that Act a mere trespasser could acquire no right under that section. The evidence in this case is rather meagre. The small plot in question, of about two-thirds of an acre, was recorded as a tank in 1288 *Fasli*, and in 1307 *Fasli* the defendant was recorded as tenant without paying rent for 14 years. There is nothing to show whether the land is now cultivated, but assuming that it is, he has been in possession for some 27 years without paying rent at all. It would appear that he began to cultivate a portion of the tank without the consent of the land-holder and there is nothing to show that the land-holder consented. *Babu Sat Narain Prasad v. Ram Kumar* (1) governs the case. The only weak point is that the plaintiff in his

(1) Selected Decision No. 3 of 1910.

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plaint calls the defendant a non-occupancy tenant, but I think the explanation of this is to be found that the plaintiff merely followed the entry in the *patwari's* paper.

I would set aside the order of the Collector and restore the order of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 135 OF 1914.

October 13, 1915.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

CHIRAKKAL PUDIAMADATHUMMAL
PERINGATI KOYATTI HAJI—

PETITIONER—APPELLANT

versus

CHIRAKKAL PUDIAMADATHUMMAL
PERINGATI KOYAMAN KUTTY

HAJI, KARNAVAN AND MANAGER OF HIS
Tawazhi Tarwad, AND ANOTHER—

COUNTER-PETITIONERS—RESPONDENTS.

Succession Certificate Act (VII of 1889)—*Muhammadans governed by Marumakkattayam Law*—*Karar*—*Self-acquisition to lapse to tawazhi*—*Construction of document*—*Power to dispose of in life-time.*

A *karar* or family settlement among the members of a Muhammadan family governed by Marumakkattayam Law ran in the following terms:—

"The properties acquired by the members of each *tawazhi* as their own as well as those that may be so acquired, shall, on the death of such acquirers, lapse only to their *tawazhi*."

Held, that there was nothing in the language of the instrument to show that the acquirer of the property debarred himself from dealing with it during his life-time either by alienation *inter vivos* or by means of a Will, and that, therefore, a legatee claiming under such a Will made by such a member was *prima facie* entitled to a succession certificate. [p. 449, col. 2]

Appeal against the order of the District Court of North Malabar in Original Petitions Nos. 57 and 115 of 1913.

Messrs. C. Madhavan Nair and J. L. Rozario, for the Appellant.

Mr. A. Sundaram, for the Respondents.

JUDGMENT.—In this case two persons applied for certificate of succession to a deceased man, who was a member of a Muhammadan family in Malabar. The appellant was an *anandravan* of the deceased's *tawazhi* and the respondent was the *karnavan* of the *tawazhi* as well as of the main *tarwad*.

The appellant asked for a certificate with respect to certain property, which he alleged was the self-acquired property of the deceased. The learned District Judge has dismissed the petition of the appellant, on the ground that by virtue of a certain *karar* whatever property the deceased might acquire in his life-time, belonged to the *tawazhi*; so that the Will under which the appellant claimed the certificate was not operative in respect of the property of the deceased. The *karar* is a family settlement and what is its effect, so far as this matter is concerned, depends upon the proper interpretation of paragraph 5. What that paragraph says is: "The properties acquired, by the members of each *tawazhi* as their own as well as those that may be so acquired, shall, on the death of such acquirers, lapse only to their *tawazhi*." There is nothing in this language to show that the acquirer of the property debarred himself from dealing with it during his life-time either by alienation *inter vivos* or by means of a Will. All that it says, is that on his death the property shall descend to the *tawazhi*. This is like any similar provision in an ordinary Will and it does not preclude the person making such a provision from dealing with it in his life-time either by an *inter vivos* or a testamentary disposition. We think, therefore, that the appellant has a *prima facie* title under the Will to a succession certificate.

But there is also another question in the case which has not been clearly determined by the learned District Judge, and that is whether the properties in question were the self-acquisitions of the deceased or belonged to the family. If they are not the self-acquisitions of the deceased, then the Will in favour of the appellant can have no operation. The District Judge has not come to any finding on the point. He touches on the point, but leaves it undecided. Before the petition could be disposed of, there ought to be a finding on the question whether the property was the self-acquisition of the deceased or family property. If the District Judge finds that it is self-acquired property, then the appellant would be entitled to a succession certificate. With these observations, we remit the case to the District Judge to dispose of it according to law. It

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will be open to each party to adduce fresh evidence. The costs will abide the result.
Appeal allowed; Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1914-15
OF FYZABAD DISTRICT.

March 10, 1915.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

MATA DIN SINGH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

DWARKA KURMI—PLAINTIFF—

RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 108 (9) (c)—Illegal ejectment—Compensation, suit for—Necessary party—Limitation.

A suit for compensation for illegal ejectment under section 108 (9) (c) of the Oudh Rent Act, lies against the landholder alone and the entire body of the landlords is not a necessary party to such a suit. [p. 447, col. 1.]

Though the plaintiff may bring a suit for compensation between any time from the date of the illegal ejectment up to a year after the date of the recovery of possession, yet he can only get compensation in respect of the time during the year preceding the bringing of the suit in which he was out of possession. [p. 447, col. 2.]

Kashi Nath Singh v. Shamju, Selected Decisions No. 16 of 1892, followed.

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 16th September 1914, confirming that of the Assistant Collector of Fyzabad District in a case of recovery of compensation.

JUDGMENT.

HOLMS, S. M.—(March 4th, 1915)—I may dispose of a minor point first in this case. Ground No. 2 has nothing in it. The respondent has every right to sue the landholder alone for compensation under section 108 (9).

The appellant contends that, under *Kashi Nath Singh v. Shamju* (1), the respondent is entitled to recover compensation only for the time he was out of possession during the year preceding the date on which he instituted the suit, that is to say, the 21st November 1913. The respondent alleges he was wrongly dispossessed on the 25th June 1912; the suit for recovery of possession was decreed on the 28th

November 1912; and he was restored to possession on the 22nd January 1913 by order of the Court. The Board have held in that Selected Decision that dispossession following on illegal ejectment is a continuing wrong and that a plaintiff may bring a suit for compensation under section 108 (9) (c) between any time from the date of the illegal ejectment up to a year after the date of the recovery of possession, but that he only can get compensation in respect of the time during the year preceding the bringing of the suit in which he was out of possession. The respondent, however, argues that he is entitled to get compensation for the whole period of his dispossession. He urges that, as he has a year in which to bring his suit after the date of his restoration, if he could not do this and waited till the last moment, he would be entitled to nothing; whereas if he were to bring a suit before the date of his restoration to possession, he would have to sue again on account of the compensation for the subsequent period until his restoration and that this would result in an inconvenient multiplicity of suits. He, therefore, asks me to dissent from the Selected Decision. I agree with the observations of the Board of 1892, that it would have been more convenient had the law allowed the period of limitation in suits under section 108 (9) (c) to run from the date of restoration to possession, limiting the compensation to three years as in the case of mesne profits; but I am unable to agree with the appellant's argument that this is the present law, without any limitation as to the number of years' compensation to be given. If a plaintiff wishes to avoid losing compensation for some years, clearly he has a remedy by bringing promptly a suit for recovery of occupancy under section 108 (10) and a suit for compensation under section 108 (9) (c) at the same time within a year after the illegal ejectment first took place. It is true that the interpretation adopted in the Selected Decision creates one difficulty. If the trial of these suits lasts some time, the plaintiff might be entitled to fresh compensation from the date of the institution of the suit till the date of his recovery of occupancy. Whether he would have to bring a fresh suit or whether his compensation could be awarded in the suit referred to, need not be dis-

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cussed here. The Board of 1892 in their decision came to no definite conclusion as to this.

I see no sufficient reason to dissent from *Kushi Nath Singh v. Shamju* (1). This being so, it seems clear and is practically not disputed that there could be no *kharif* crop on the ground of any kind between 21st November 1912 and the date of the *rabi* crop being put in. I would set aside the orders of the lower Courts and dismiss the suit for compensation, parties bearing their own costs in all Courts in the circumstances.

CAMPBELL, J. M.—I agree.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 216 OF 1914.

August 13, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

RANGAPPA NINGAPPA IMMADI
AND OTHERS—DEFENDANTS—APPELLANTS

versus

VENKATBHAT LINGANBHAT JOSHI

AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Marriage, form of, how determined—Lingayat form of marriage—Joshi, whether can demand fees.

In order to determine whether a marriage is in the Hindu form or in the *Pancha Kalas Lingayat* form, the Court must consider the marriage as a whole rather than the particular ceremonies performed. [p. 449, col. 1.]

If the ceremony performed is not a Hindu marriage ceremony as a whole, the *joshi* or *gramopadhya* has no right to demand the marriage fees. [p. 449, col. 2.]

Waman Jagannath Joshi v. Balaji Kusaji Patil, 14 B. 167, explained.

Second appeal from the decision of the District Judge of Dharwar, in Appeal No. 88 of 1912, reversing the decree passed by the Subordinate Judge at Dharwar, in Civil Suit No. 227 of 1911.

Mr. Nilkanth Atmaram, for the Appellants.

Mr. S. V. Palekar, for the Respondent.

JUDGMENT.—The contest in this case resolves itself into this, whether the ceremonies observed by Lingayats in marriages are to be regarded as a whole in deciding whether or not the village *gramopadhya* is entitled to perform the ceremony, or whether

the ceremony can be split up into parts, and if it is found that some part of the ceremonial is similar to that according to the Brahmin ritual, the *gramopadhya* can insist upon payment of fees in respect of such part of the ceremonial as may have been performed by another. The point is stated exceedingly well by the learned Subordinate Judge, Mr. Wagh. He says:

"It is urged that some of the ceremonials such as the fastening of the *mangalsutra* and the *kankandhara* are common to the Hindu form and the *Pancha Kalas* form, and that, therefore, the fastening of the *mangalsutra* and the *kankandhara* in the *Pancha Kalas* form of marriage entitles the plaintiffs to the fee appropriate to the Hindu form. If the ceremonials of the Brahmins, the Jains and the Lingayats are compared, it would be found that they agree in some points and are divergent in others. Yet they have their characteristic basic differences arising out of the faith on which they are founded. It would not be right, therefore, from the common circumstance of the fastening of the *mangalsutra* or of the wristthread or the throwing of rice on the bridal pair to say that the ceremony is Hindu in form and that the *watandar joshi* is entitled to his fee. We have to take the marriage ceremony as a whole and determine whether it is in the Hindu form or in the *Pancha Kalas Lingayat* form. If it is the former, the *joshi* is entitled to his fee, and if it is the latter, he is not."

The contrary view is stated by the District Judge who, after consideration of the cases cited to him, namely, *Raja valad Shivappa v. Krishnabhat* (1), *Waman Jagannath Joshi v. Balaji Kusaji Patil* (2), and *Krishnumbhat v. Anunt Gangadharbhat* (3), says:—

"I am, therefore, of opinion that the Court must consider the particular ceremonies performed rather than the marriage as a whole and that even if some ceremonies, whether optional or obligatory, were performed which plaintiff himself could not perform, and for which he can, therefore, claim no fees, the fact does not debar him from claiming fees on account of other ceremonies which were

(1) 3 B. 232.

(2) 14 B. 167.

(3) 4 Morris 111.

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actually performed and which plaintiff could perform, and is entitled to perform, in the ordinary course in the case of marriages in the caste of defendant No. 1. The addition of some ceremonies which plaintiff could not perform and the omission of others which would necessarily have been performed had plaintiff officiated, does not affect his right to recover his proper fees, if any, on account of such ceremonies as were performed."

We are of opinion that the view taken by the District Judge is based upon a misapprehension of what was decided by this Court in *Waman Jagannath Joshi v. Bulaji Kusaji Patil* (2). The judgment of the Subordinate Judge, with appellate powers, reversing that of the Subordinate Judge, was there under appeal to the High Court. The Appellate Court's opinion was that "the plaintiffs were only entitled to recover in case a marriage was performed in any of the modes known to the Hindu Law, or in the mode described by Mr. Mandlik with respect to castes other than the Brahmin caste, and that the marriages in dispute being not performed in any such way, they were not such marriages as they were entitled to recover fees for in virtue of any right acquired by grant or prescription." The High Court said:

"We agree with the lower Appellate Court that, under such circumstances as he thinks existed here, there would have been no intrusion on the plaintiff's privileges which would give them a right to recover their fees from the *yajman* as laid down in the decisions of this Presidency... But no issue was expressly raised as to the manner in which the marriages in question were performed; and although in the course of the hearing, some evidence was given on the subject, neither party, we think, clearly understood what was the real issue between them on that part of the case." Therefore, the issue was sent down to the District Court: "What ceremonies were performed on the occasions of the marriages, or either of them, and by whom?" We have referred to the record in that case, and we find that the learned District Judge, after stating what ceremonies were, on the evidence taken on remand, performed, stated his opinion that "the ceremonial enumerated by the late V. N. Mandlik in his Hindu Law, as observed by lower castes, was not followed on these occa-

sions." That was a confirmation of the inference drawn by the lower Appellate Court whose judgment was under appeal to the High Court, and upon that finding, the Court confirmed the decree of the First Class Subordinate Judge, with appellate powers, with costs. We take that as an authority for the opinion of the Subordinate Judge that if the ceremony performed is not a Hindu marriage ceremony as a whole, the *voshi* or *gramopadhy* has no right to demand the fees.

We reverse the decision of the lower Appellate Court and restore that of the Subordinate Judge with costs throughout upon the plaintiffs. The cross-objections are dismissed with costs.

Decree reversed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 32 OF 1914-15
OF SULTANPUR DISTRICT.

June 14, 1914.

Present:—Mr. Holms, S. M.

HARPAL SINGH—PLAINTIFF—
APPELLANT

versus

KANDHIYA BUX MISIR AND OTHERS—
DEPENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Compromise in Court—Perpetual lease executed but not registered—Mention of lease in compromise—Terms not entered—Lease, admissibility of, in evidence.

A previous suit for ejectment was compromised. A *sulehnama* was written and filed in the Court. A lease was executed on the same date giving particulars of the terms upon which the land was to be held by the tenant. The lease was a perpetual lease, but it was not registered. In the *sulehnama*, the lease was mentioned but the terms were not mentioned.

Held, in a subsequent suit for ejectment, that the lease, not being registered, was inadmissible in evidence. [p. 450, col. 1.]

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 13th October 1914, reversing that of the Assistant Collector of Sultanpur District, in a case of ejectment under section 108/8 of Act XXII of 1886.

The appeal first came up for hearing on the 11th of March 1915 when the Court passed following

ORDER.—The lease which was executed on the same date as the *sulehnama*, on the 8th of

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June 1882, was in favour of the present appellant, Harpal Singh, as to whom there is a finding of fact by the Assistant Collector that he is the nephew of Sheoraj Singh, the husband of Musammal Bilasi. It is undisputed that after Musammal Bilasi died, Harpal Singh succeeded to the holding, though the appellant says she died twenty years ago and respondent says she died ten or eleven years ago. It is clear then that the respondent treated Harpal as the heir of Musammal Bilasi, as there is no allegation that he was given the land in any other capacity. He pays the same rent as Bilasi paid and as was entered in the *sulehnama*. One of the respondents, the *lambardar* Kanhaiya Bakhsh, who issued the notice of ejectment in 1832 against Musammal Bilasi, apparently gave the *putta*, but the respondents contend that it is inadmissible in evidence as it was not registered. If this contention is correct, the appeal must fail. I feel, however, some doubt whether in a case of this sort the *putta* which was executed on the same date as the *sulehnama* and was mentioned in it, should not be considered an integral part of the *sulehnama* and as such not liable to be registered.

Adjourned to look up rulings on this point. After the adjourned hearing the appeal again came up for hearing on the 14th June 1915 when the Court passed the following

JUDGMENT.—The *sulehnama* mentions a *putta*, but does not call it an *istimrari* (perpetual) lease. Its terms then are not embodied in the *sulehnama*, and it is inadmissible in evidence as it was not registered.

Appeal dismissed with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 17 OF 1913.

April 7, 1915.

Present:—Mr Pratt, J. C., and

Mr. Boyd, A. J. C.

THE FIRM OF RAJARAM NANDLAL—

PLAINTIFFS—APPELLANTS

versus

THE FIRM OF ABDUL RAHIM—

DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 39, 105—Agent, responsibility of, for an error of judgment—Indemnity—Refusal to indemnify, whether sufficient cause for

rescission of contract—Sufficient cause—Agent's duty on termination of contract.

An agent is not responsible to his principal for any loss caused on account of an error of judgment, provided he exercises reasonable skill and diligence. [p. 451, col. 2.]

Lagunas Nitrate Company v. Lagunas Syndicate (1899) 2 Ch. 392; 68 L. J. Ch. 699; 48 W. R. 74; 81 L. T. 334; 15 T. L. R. 433, referred to.

The promise of indemnity is an implied term of the contract of agency; hence the refusal of the principal to indemnify the agent for any act done by him in the course of agency justifies him to rescind the contract. [p. 452, col. 1.]

Where an agent, who has entered into a contract in his own name for the purchase of goods deliverable at a future date, rescinds the contract of agency for sufficient cause before the period of termination, the principal is entitled to credit for the price of the goods on the date the business is terminated. [p. 452, col. 2.]

Lacey v. Hill, Crawley's Claim, (1874) 18 Eq. 182; 43 L. J. Ch. 551; 30 L. T. 484; 22 W. R. 586, referred to.

Appeal against the decision of the Additional Judicial Commissioner of Sind.

Mr. Rupchand Bilaram, for the Appellants.

Mr. Wadhmal Oodharam, for the Respondents.

JUDGMENT.—The facts in this case, except in details which seem to us to be of little importance, are not really in dispute.

The plaintiffs in the Punjab employed the defendants to do business for them as commission agents in Karachi. The defendants from time to time and in accordance with instructions received from the plaintiffs entered into contracts for the purchase and sale of *toorla*. Forward contracts for the purchase of *toorla* of February, March and April deliveries were made by the defendants in accordance with personal instructions given by plaintiffs' manager who had come to Karachi for that purpose. The *toorla* of the February delivery was re-sold at plaintiffs' instructions at the end of February and the transaction resulted in a loss of Rs. 1,972.

Plaintiffs' manager then left Karachi and subsequent instructions were given by letter and by telegram.

Plaintiffs had not paid for the February loss, but on the 15th of March the plaintiffs wrote Exhibit 5 to say that they were ashamed but were making arrangements to find money to meet this loss. On the 16th March, the defendants drew a *hundi* for Rs. 500 on the plaintiffs which they did not honour.

On the 17th of March defendants telegraphed (Exhibit 6) to the plaintiffs asking

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them to pay the *hundli* and remit money to pay the amount of the loss and to enable them to take delivery, failing which they would be obliged to sell it.

Plaintiffs replied by telegram (Exhibit 7) and by letter (Exhibit 8) on the 21st March asking the defendants for a week's time promising to arrange for payment and requesting the defendants not to sell without hearing from them. The telegram contains the words "Settled with Mukamdin." This Mukamdin was defendants' man who had been to see plaintiffs. It was plaintiffs' case in the lower Court that the demand for indemnity had been settled by their giving Mukamdin a pro-note for Rs. 2,000. But the lower Court has found that this story is absolutely false and no serious attempt has been made before us to dispute the finding of the lower Court on the point.

The defendants replied (Exhibit 9) on the 22nd March, reiterating the demand made for payment in Exhibit 6 and stating that unless they were put in funds they would have to sell.

Plaintiffs replied on the 25th March (Exhibit 13) giving the defendants instructions to deal with the *tooria* of the March delivery as they thought best, either to sell or to take delivery and give it to a European office on "unfixed rate" terms.

The vendor of the March delivery did not make *mili khari*, i. e., did not fix a date for delivery, and the March contracts were settled at the rates prevailing on the last day of March.

In other words, the defendants sold on behalf of plaintiffs on the 31st of March—but after doing so, they sent to the plaintiffs, the following telegram (Exhibit 15) on the 1st April 1912:—

"Rajaram Nandlal, Bhalwal."

"Accept B. C. I inform you that the *tooria* of March will be settled and inform you about April *tooria* that neither you paid my receipt, nor you sent remaining amount nor you sent rupees for deposit, hence on registering this card in Post Office, I shall dispose of *tooria* of April at my discretion in your account, any work write me. 1st April 1912 Abdul Rahim Haji Fatehadin, Karachi Bunder, written by Atta Mahomed."

After this telegram, the defendants ignored plaintiffs' instructions and sold the April

tooria on the 2nd, 8th and 9th April.

The plaintiffs filed this suit for an account and the lower Court has debited the plaintiffs with the loss on the February contracts and credited them with the profits on the March and April transactions taking the rates at which the defendants actually sold. The result was a decree against the plaintiffs for Rs. 381-12-0. Plaintiffs appeal. The correctness of the debit for February is admitted. As to March, the plaintiffs cannot complain that the defendants did not act in accordance with the instructions given them in their telegram, Exhibit 13. The telegram gave them the option of selling and the settlement of the rates of the 31st March, the last day of the period of delivery, was made in accordance with the rule in *Leigh v. Paterson* (1) followed in *Mackertich v. Noba Coomar Ray* (2) and was equivalent to a sale. It is contended, however, that if the defendants had acted with skill and reasonable diligence, they would have taken delivery and disposed of the goods to a European firm on 'unfixed rate' terms. But there are two complete answers to this contention. In the first place, the defendants had not been put in funds to enable them to take delivery or even to pay the margin money. It is not alleged that under the contract of agency, it was incumbent on defendants to use their own capital in plaintiffs' business. Nor did plaintiffs allege this in reply to defendants' telegram, Exhibits 6 & Exhibit 9. And again, as the rates of the 31st March were profitable, the defendants acted in the best interests of plaintiffs in selling according to their instructions. They could not have foreseen the future rise of the market and, therefore, the utmost that could be said against them is that they committed an error of judgment in so selling. But an agent is not responsible for an error of judgment provided he exercises reasonable skill and diligence: *Lagunas Nitrate Company v. Lagunas Syndicate* (3).

As to the April delivery, Mr. Rupchand's contention is that as the defendants had no instructions to sell, the plaintiffs are entitled to the rates of the last day of

(1) (1818) 8 Taunt. 540; 20 R. R. 552; 2 Moore 558; 129 E. R. 493.

(2) 30 C. 477; 7 C. W. N. 431.

(3) (1899) 2 Ch. 392; 68 L. J. Ch. 699; 48 W. R. 74; 81 L. T. 334; 15 T. L. R. 436.

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April as the vendors did not make *miti khari*.

But it seems to us clear that the defendants' letter Exhibit 15, terminated the agency on the 1st April under section 201. An agreement to serve as an agent may be rescinded like any other agreement. This is recognised in section 205 of the Contract Act, for when the agency has to last for any particular period, the agent is only liable to make compensation if he renounces the agency within that period without sufficient cause. Here, no doubt, it was an implied term of the agency that it should last at least until the end of April. But we think it clear that the defendants had sufficient cause for renouncing and that cause is set forth in their telegram. The plaintiffs had failed to indemnify them for the February losses, they dishonoured the *hundi* drawn upon them, they then asked for a week's time, they made a false statement that the indemnity had been settled, and up to the end of March made no payment at all. The promise of indemnity is an implied term of the contract of agency and the plaintiffs' conduct amounted to a refusal to indemnify and justified rescission under section 39. This default on the part of the plaintiffs justified the defendants rescinding the agency. The telegram, Exhibit 15, is written in bazar English, but its meaning is very clear. It says in effect: "the March account I have settled as your agent, but as to the April delivery your conduct has been such that it is impossible to continue to do business with you—for you have dishonoured our *hundi*, you have not paid the losses, you have not put us in funds to take delivery, therefore, I shall sell the April delivery, *tooria* without reference to you and credit proceeds to your account." This is a clear rescission of the agency and the cause stated is sufficient.

The case of *Lacey v. Hill, Crowley's Claim* (4) is in point. In that case, the stock-brokers Messrs. Crowley & Co., in consequence of a representation by their principal Sir Robert Harvey that he would indemnify them for losses incurred on the settling day of the 15th July, continued contracts as to part of his

stock, i.e., made contracts to buy it back and re-sell it on the next settling day, the 20th July. The principal failed to pay on the 15th July and the brokers sold on the morning of the 16th. Mr. Fry, Q. C., for the legal representative of the principal contended that the brokers had no authority to sell. As to this Jessell, M. R., said:—

"The first question I have to decide is, was such a sale authorised? It was said, the only authority Messrs. Crowley had was to purchase for the next account day, the 30th, and they had no right, therefore, to sell before that day. I admit that their right to sell before that day is not a right ordinarily possessed by an agent who has contracted to buy for delivery on a future day. I think the right depends on two grounds and that it is well warranted on both. The first ground is that they did not agree to continue, except on the representation by Sir Robert Harvey that he would pay on the Friday. He left them to continue or not, knowing they could not continue unless they relied on that representation, which he failed to perform. I agree with Mr. Fry's observation that under that right, they were bound to sell soon afterwards, that they had not the right to sell at any future time they pleased; but the sale took place next morning, and so no time was really lost."

The other reason referred to by Jessell, M. R., was the custom of the stock exchange with which we are not concerned in this case. But the *ratio decidendi* in the passage quoted is that the principal's default justified the agent in rescinding the agency. In that case the agent's duty is to sell on the date the agency is terminated—for the principal is entitled to credit for the price of the goods on the date the business is terminated. So here the agency was terminated on the 1st April and the plaintiffs are entitled to the rates of that day. It is true that the defendants delayed selling and they did so at their own risk, for if the rates had fallen the plaintiffs would have still been entitled to the rates of the 1st April. But this delay of the defendants has not damnified the plaintiffs for the sales were at rates better than those of the 1st April. Mr. Rupchand's argument that plaintiffs are entitled to the rates of the 30th April is the same argument as that urged in *Lacey v. Hill, Crowley's Claim* (4)

(4) (1874) 18 Eq. 182; 43 L. J. Ch. 551; 30 L. T. 484; 22 W. R. 586.

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and the answer is the same: "You would have been entitled to this rate if the agency had continued, but as the agency was legally determined you, are only entitled to the rates of the day when the agency so terminated."

We, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 1 of 1914-15 OF
HAMIRPUR DISTRICT.

February 27, 1915.

Present:—Mr. Holms, S. M.

KUNJI MAL—DEPENDANT—APPLICANT

versus

SHEO BALAK RAM—PLAINTIFF—

RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 58, 79—Ejectment—Grove—Possession by landlord—Groveholder, possession of, nature of—Remedy of grove-holder.

A landlord took forcible possession of a grove in his *zemindari*. No contract to pay rent was entered into nor was there anything to show that the landlord was admitted as a sub-tenant. The grove-holder sued to eject the landlord as his sub-tenant. The Courts below gave a decree for ejectment. The landlord applied in revision:

Held, that if the grove-holder was to be treated as a tenant, his remedy was to sue for possession under section 79 of the Tenancy Act within six months; but if he was not a tenant, a suit under section 58 did not lie.

Application for revision of the order of the Commissioner, Jhansi Division, dated the 24th June 1914, confirming that of the Assistant Collector of Hamirpur District, in a case of ejectment.

JUDGMENT.—There seems to me little doubt that the Courts have taken a wrong view of the law. Either the grove-holder should be treated as a tenant of a holding or he should not. What he has done is to sue to eject his landlord under section 58, on the allegation that he is a sub-tenant of the land. There is no evidence whatever on the record to show that the landlord entered into any contract with the grove-holder to pay rent or was admitted to the sub-tenancy by the grove-holder. Indeed the respondent now changes his story and says that the landlord is a sub-tenant only in respect of 07 acres and

not of the whole area in dispute, 20 acres. It is true that the landlord is recorded as a sub-tenant in the land with a note that he is *zemindar*. This merely indicates that the landholder is in possession and nothing more. The respondent's case really is that the landholder has wrongfully dispossessed him from the land. This being so, if the grove-holder is to be treated as a tenant of a holding, he had his remedy under section 79 of the Tenancy Act but failed to exercise it within six months. In this case, he cannot now treat the landholder as a nominal sub-tenant and sue to eject him. On the other hand, if the respondent is not a tenant of a holding, he has no power to sue under section 58.

As regards the first ground of appeal, it seems true that under the recent ruling of the Board [*His Highness the Maharaja of Benares v. Babu Vijai Narain Singh* (1)] which follows at any rate one previous decision of the Board, as the *zemindar* raised the plea that he was cultivating part of the land as his *khulkaht*, the appeal should have been to the District Judge. It is, however, the appellant's own fault that he appealed to the Commissioner, and he can hardly be permitted now to question the jurisdiction of the Commissioner. Both Courts have held, as a matter of fact, that the land still retains the character of a grove. An error of law seems to have been committed, but I have to consider whether the Board should interfere on revision. The appellant's story apparently is that the respondent has abandoned his grove and that he entered in possession thereon. This on the face of it is an improbable story and has not been believed by the lower Courts. Thus no substantial injustice has been caused, and following the practice of the Board, there is no sufficient reason to interfere on revision.

Application dismissed. In the circumstances, parties will bear their own costs.

Application dismissed.

(1) Selected Judgment No. 14 of 1914.

MOIDEEN SAIBA V. GOPALA KUDWA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 483 OF 1913.

September 21, 1915.

Present:— Mr. Justice Spencer and
Mr. Justice Tyabji.

MOIDEEN SAIBA AND OTHERS—DEFENDANTS
NOS. 1 TO 11—APPELLANTS

versus

GOPALA KUDWA AND OTHERS—PLAINTIFFS
AND DEFENDANTS NOS. 12 TO 14—RESPONDENTS.

Lease—Lease providing for forfeiture of land on alienation—Usufructuary mortgage created but no transfer of possession made—Construction of deed—Transfer of Property Act (IV of 1882), s. 111 (g).

A lease provided: "Further I have no right to alienate the said land in any manner" and contained also a provision for re-entry. The lessee usufructually mortgaged it, though he did not divest himself of possession of the land.

Held, (1) that the mortgage by itself was not such a disposition of the property in the land as could necessarily amount to an alienation within the terms of the forfeiture clause in the lease-deed; [p. 456, col. 1.]

(2) that the law leans against forfeiture, and the party relying on it must prove it to be exact and certain. [p. 456, col. 1.]

Northcote v. Duke, (1765) 2 Eden 319; *Amb.* 513; 27 E. R. 330, followed.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suit No. 177 of 1911, preferred against that of the Court of the District Munsif of Karkal, in Original Suit No. 545 of 1909.

Mr. K. Ramanath Shenai, for the Appellants.

Mr. K. P. Lakshman Rao, for the Respondents.

This second appeal coming on for hearing on the 3rd and 4th of September 1914, the Court delivered the following

JUDGMENT.—The principal appellants are tenants under a *mulgeni* lease obtained from the predecessors-in-title of the respondents, and the question that falls to be decided is whether there has been such a forfeiture of the lease as is referred to in the Transfer of Property Act, section 111 (g).

The forfeiture is claimed by reason of a breach of a covenant in the lease, which may be translated in the following terms: "If I fail to conduct myself accordingly, I shall at once give up the said land to you and I shall have no objection to your giving it away to others." It is argued in the first instance that this covenant

must be read as referring to albreach only of the covenant to pay rent. We are unable to accept this construction of the lease. Reading the clause with the rest of the lease, we are of opinion that it was meant to come into operation on the tenants failing to act in accordance with any of the covenants contained in the lease.

The covenant which the tenants are alleged to have failed to observe is that they shall not alienate the land in any manner.

It is admitted that there have been alienations of portions of the tenancy that might *prima facie* cause forfeiture of the lease under the clause referred to. We reserve the question whether alienations of portions operate as forfeiture of the whole. But it is contended that the forfeiture has been waived in the manner referred to in section 112 of the Transfer of Property Act.

The third issue in the suit is whether the forfeiture of the lease by the lessee, if there has been any forfeiture, has been waived by the temple.

The District Munsif discussed this question at some length in paragraphs 11 and 12 of his judgment and came to the conclusion that "the *mulgar* has acknowledged the alienation by receiving rent from the alienee and cannot now repudiate the alienation."

The Subordinate Judge says he feels no doubt that there was no waiver of forfeiture. We cannot regard the reasons given in paragraph 4 of the lower Appellate Court's judgment as a satisfactory ground for this finding, as they do not meet the whole of the defendants' case.

The Subordinate Judge first refers to the money receipts, which he says do not show that rent was sent by the 8th defendant as alienee and then he considers the oral evidence of Amrita Rao and accepts his statement that no alienation ever came to his notice.

Now there are four alleged alienations, viz., (1) a mortgage by Azimuddin to the 11th respondent in 1894, (2) a partition into three shares in 1900, (3) a credit sale in 1901 by Azimuddin to Kasim Sabih, father of the defendants Nos. 8 to 10, and lastly (4) a usufructuary mortgage by

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7th defendant of his share to 11th defendant on 29th January 1908.

During these years, the proprietorship has not remained in the hands of a single lessor continuously but has changed hands three times. In 1905, Amrita Rao sold the suit property to Ramakamthi and on 20th January 1908, Ramakamthi sold it to the temple, whose *moktessors* are the present plaintiffs.

Under the law as to waiver of forfeiture analogous to the provisions of section 112 of the Transfer of Property Act, acceptance of rent by any one of these lessors might operate as a waiver of such forfeiture as might arise from any breach committed during the period when he had the landlord's interest in the land. Where after forfeiture the lessor transfers his rights to another person, the act and the mode of transfer may itself show an intention either to keep the right to claim the forfeiture subsisting or to waive it. Whether or not the lessor intended to waive the forfeiture and to treat the lease as subsisting, may be clear from the terms of the transfer. The terms of the sale-deeds B and C have not been considered by either of the Courts below.

It is necessary, therefore, to consider as to each of the alleged acts of forfeiture whether there has been a subsequent acceptance of rent or other equivocal act by the lessors concerned or by any of their successors-in-interest, and if so, what was its effect on the subsistence of the lease. The payment by the 8th defendant is not the only payment which can be considered, nor is Amrita Rao's statement sufficient to dispose of the matter. The alleged waiver of the forfeiture arising from the alienation through Exhibit L is the act of permitting 1st to 7th defendants to pay the assessment after the plaintiffs knew of the execution of Exhibit L, thus showing an intention to treat the lease as subsisting.

We must, therefore, call on the Subordinate Judge to return a fresh finding on the third issue which should be amplified by adding the words 'or by the predecessors-in-interest of the temple.'

At the same time, he will also return a finding on the question, whether there has been a forfeiture of lease by reason of non-payment of rent. In paragraph 5 of his

judgment, he has given it as his bald opinion that there has been forfeiture of rent on this account also, but he has not given reasons for his opinion nor has he stated what rent was not paid and when. The District Munsif has considered this point more fully in paragraph 13 of his judgment and has found that there has been no forfeiture on the score of non-payment of rent. The Subordinate Judge has not dealt with the payments referred to by the District Munsif, as it was necessary that he should do in a reversing judgment. Findings to be returned on the evidence on record within two months. Objections within six days.

In compliance with the order contained in the above judgment, the Subordinate Judge of South Canara submitted the following

FINDINGS.—(1). The issues remitted for findings are:—

(1) "Whether the forfeiture, if any, has been waived by the temple or by the predecessors-in-interest of the temple?"

(2) "Whether there has been a forfeiture of lease by reason of non-payment of rent?"

On the first issue the lower Appellate Court submitted a finding that Amrita Rao and his brother and his mother had waived their right to claim forfeiture when they executed the sale-deed, that no forfeiture occurred during the period the property was owned by Ramakamthi and that the temple did not waive any right it could have had in consequence of the alienation made in favour of the 11th defendant, and on the second issue he held that there was a proper and valid tender of the full rent from 1906 to 1909 both inclusive.

This second appeal coming on for final hearing after the return of the findings of the lower Court on the 14th and 17th September 1915, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—With reference to the findings now received, it is urged that there is no evidence to support the Subordinate Judge's conclusion that the forfeiture caused by the conditional sale in 1901 by Azimuddin to Kasim Sahib (father of defendants Nos. 8 to 10) was waived. The Subordinate Judge relied on the terms of Exhibit B and the conduct of the parties in not giving notice to the tenants or their

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lienees. We think that these were matters which the Subordinate Judge might properly take into consideration in determining the question of waiver, and we declined to disturb his finding on this point. We, therefore, accept all the findings.

Next with reference to the usufructuary mortgage by 7th defendant of his share to 11th defendant on January 29th, 1908, if it offended against the forfeiture clause, we have the lower Court's finding that there was no waiver on behalf of the temple of any right arising out of it. The lease (Exhibit A) provides, "Further I have no right to alienate the said land in any manner"; and contains a provision for re-entry on the breach of any of the covenants in the lease, to which we have already adverted. Now, is it clear that the parties intended to refer to such a transaction as is now before us when they spoke of alienating the land? The law leans against forfeiture. To adopt the language of Lord Chancellor in *Northcote v. Duke* (1) "When you come for a forfeiture, you must be very exact and certain," *vide* [*Northcote v. Duke* (1)]. Here there was no abandonment or divestment by the 7th defendant of all his interest in the land. He usufructuarily mortgaged his share for a term of 12 years, which was not co-extensive with his own right of occupancy, and at the same time, as recited in Exhibit L, he took a lease from his mortgagee, so that, in the result, the possession remained with him. We are of opinion that this was not such a disposition of the property in the land as would necessarily amount to an alienation within the terms of the forfeiture clause in the lease-deed.

We must, therefore, allow the appeal, and as the defendants did not appeal against the decree of the District Munsif, we restore that decree with costs in this Court. Each side to bear their own costs in the lower Appellate Court.

Appeal allowed.

■(1) (1765) 2 Eden 319; Amb. 513; 27 E. R. 330.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 5 of 1913-14 of
ETAWAH DISTRICT.

November 26, 1914.

Present:—Mr. Tweedy, S. M., and
Mr. Holms, J. M.

BALWANT SINGH—PLAINTIFF—
APPLICANT

versus

FAIZULLAH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 31, applicability of—Mortgage of occupancy holding before Act—Suit for arrears of rent—Mortgagee, if necessary party—Civil Procedure Code (Act V of 1908), O. I, r. 9.

Section 31 of the Tenancy Act will not apply to a mortgage of a holding entered into before the Tenancy Act came into force. [p. 456, col. 2.]

A mortgagee of an occupancy holding is not a necessary party to a suit for arrears of rent, as the occupancy tenant is the only person responsible for the rent of the holding. [p. 457, col. 1.]

Application for revision of the order of the Commissioner of the Allahbad Division, dated the 28th October 1913, confirming that of the Collector of Etawah District, in a case of arrears of rent.

JUDGMENT.

HOLMS, J. M.—(November 21st, 1914.)—The land is occupancy tenure and was mortgaged by the defendants in the suit for arrears of rent to one Ram Sahai. The respondent argues that, as the landholder did not sue for the cancellation of the mortgage under section 31 of the present Tenancy Act, it is, therefore, valid against him. The mortgage, however, was entered into before the Tenancy Act came into force and this section has no application. The respondent urges that, because the landholder has received rent from Ram Sahai, he must be taken as having recognised him as a mortgagee in possession. The finding as to the payment of rent is contained in the Tahsildar's decision. He writes:—"The plaintiff received the rent for 1316 *Fasli* through Ram Sahai by money order". There is no evidence now on record to this effect. The money orders which apparently prove this, have been taken back by the respondent, who does not now produce them. From the wording of the decision it would appear that Ram Sahai paid the rent on behalf of the defendants, the occupancy tenants. This fact is quite insufficient to show that the plaintiff ever recognised Ram Sahai as a mortgagee in possession.

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or habitually received rent from him. In this view, Ram Sahai was not a necessary party to the suit, and in any case under rule 9, Order I, of the Code of Civil Procedure, it is doubtful if the suit should have been dismissed merely by reason of his non-joinder. There seems to have been a clear error in law which has led to substantial injustice, as the permission to bring a fresh suit was useless as it would have been time-barred.

I would, therefore, set aside the orders passed and restore the suit to the file of the Assistant Collector for re-trial on its merits. Costs to follow the event.

TWEEDY, S. M.—I agree. There is a gross and palpable error of law which vitiates the decision of the Assistant Collector and the Collector. It makes no difference whatever whether the landholder did or did not recognise Ram Sahai as mortgagee in possession and collect the rent from him on any particular occasion. The occupancy tenant is the one and only person responsible for the rent of the holding and Ram Sahai was not a necessary party. Any arrangement by which the landholder collects rent from the mortgagee in possession is one which he makes for convenience's sake and which he can cancel any time he likes.

I agree with the proposed order.

Application allowed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 61
OF 1914.

September 30, 1915.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Spencer.

SHANMUGHAM ASARI AND ANOTHER—
DEFENDANTS NOS. 2 AND 3—APPELLANTS
versus

SIYID NATHADU SAHIB AND OTHERS—
PLAINTIFFS AND DEFENDANTS NOS. 4 AND 5—
—RESPONDENTS.

Decree directing execution of conveyance—Time fixed by decree subsequently extended—No payment of money in time—Decree-holder, if entitled to obtain conveyance.

A decree directed the judgment-debtor to execute a conveyance on payment by the decree-holder of a sum of money within one month. The decree-holder obtained an extension of time, but within that

period as well he could not make the payment. Thereafter he applied to the Court to direct the judgment-debtor to execute the conveyance.

Held, that as the application was made beyond the period fixed in the decree, it was ineffective and the judgment-debtor was within his rights in refusing the execution of the conveyance.

Ramaswami Kone v. Sundara Kone, 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26, followed.

Appeal against the decree of the District Court of Madura, in Appeal Suit No. 222 of 1913, preferred against that of the Court of the District Munsif of Tirumangalam, in Execution Appeal No. 87 of 1913 (in Original Suit No. 91 of 1908).

Mr. K. S. Hanapathi Aiyar, for the Appellants.

Mr. P. M. Srinivasa Aiyangar for Mr. R. Subramania Aiyar, for the Respondents.

JUDGMENT.—The decree in this case directed "that the 1st defendant do execute a sale-deed to the plaintiff in respect of the properties described thereunder on receiving the balance of purchase-money, Rs. 250, within one month from this date," that is, from the date of the decree. The plaintiff, who is the 1st respondent before us, failed to pay the amount and applied for time to be given to him and he was granted a month's time on 29th March 1911. He again failed to comply with the order. That being so, the application must be held to be ineffective. The appellant was to convey the properties only if he received the money which he was entitled to, under the decree. As he was not paid money within the time allowed by the Court, he was quite within his right to refuse to make the conveyance.

Our attention was drawn to the decision in *Ramaswami Kone v. Sundara Kone* (1). That was a very similar case and the learned Judges came to the conclusion that an application which was made after the period allowed by the Court, was ineffective. We think that the rule applies to this case. We, therefore, allow the appeal, set aside the order of the learned District Judge and restore the order of the District Munsif. The respondent must pay the cost of the appellant.

Appeal allowed; Or'or set aside.

(1) 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26.

NAUNIHAL SINGH v. CHABBI.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION NO. 4 OF 1914-15 OF

BULANDSHAHR DISTRICT.

April 11, 1915.

Present:—Mr. Holms, S. M., and

Mr. Campbell, J. M.

Chaudhri NAUNIHAL SINGH—

PLAINTIFF—APPLICANT

versus

CHABBI—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 11—Occupancy rights, acquisition of—Twelve years' continuous occupation—Land lying fallow.

A tank land carried crops of *singhara* or paddy in years of heavy rainfall. No rent was paid in the years when there was no cultivation and rent varied largely from year to year. The tenant claimed continuous possession on the ground that he grazed cattle when cultivation was impossible.

Held, that this was not the case in which cultivated land was left fallow for a year or two without the period necessary for the acquisition of a right of occupancy being interrupted and that under the circumstances occupancy rights did not accrue as there was no continuous occupation for twelve years.

Application for revision of the order of the Commissioner, Meerut Division, dated the 18th August 1914, confirming that of the Assistant Collector of Bulandshahr District in a case of ejectment.

JUDGMENT.

CAMPBELL, J. M.—(March 22nd, 1915.)—I am unable to agree with the lower Courts in this case, and consider that they have so misinterpreted the law that the Board are justified in interfering in revision. The land, from which plaintiff-appellant wishes to eject defendant-respondent, is a tank or depression which can only carry crops of *singhara* or paddy in years of heavy rainfall. Defendant first began to cultivate it in 1308 *Fasli*, but in several years since then, the land has been uncultivated. The rent has varied very largely from year to year, and defendant has admittedly paid no rent in the years when there has been no cultivation. Defendant, however, claims that he has been in continuous possession on the grounds that he has grazed his cattle on the land, when cultivation has been impossible.

The lower Courts have found that he has held the land continuously for more than 12 years, and has acquired occupancy rights. Under the circumstances described, I am unable to agree with them. I am of opinion that he has taken the land on a new contract

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on each occasion when it has been found to be culturable; and in the intervals, he cannot be considered to have held it at all.

I would, therefore, set aside the lower Court's orders and decree plaintiff-appellant's suit with costs in all Courts.

HOLMS, S. M.—I agree. This is not the same as a case in which cultivated land is left fallow for a year or two without the period necessary for the acquisition of a right of occupancy being interrupted.

Application allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 849 AND 850
OF 1913.

October 5, 1915.

Present:—Mr. Justice Abdur Rahim and

Mr. Justice Spencer.

ARAMANAI RAJAGOPALA CHETTYAR

—PLAINTIFF—PETITIONER

versus

ARAMANAI RANGASAMI AIYAR AND

ANOTHER—DEFENDANTS—RESPONDENTS.

Arbitration—Award, decree based on—Appeal not maintainable—Revision, when allowed—Civil Procedure Code (Act V of 1908), s. 115.

There is no appeal against a decree based upon an award but if it can be shown that the lower Court acted without jurisdiction or failed to exercise a jurisdiction or acted with material irregularity in dealing with the award, it would be open to the High Court on a proper case being made out to revise such an order. [p. 459, col. 1.]

Ghulam Khan v. Muhammad Hassan, 29 C. 167; at pp. 184, 185; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 25 P. R. 902, followed.

Petitions under section 115 of Act V of 1908, praying the High Court to revise the decree and order on application of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 72 of 1912.

Messrs. S. Srinivasa Aiyangar and K. Rajah Aiyar, for the Petitioner.

Mr. A. Krishnaswami Aiyar, for the Respondents.

JUDGMENT.—In this case, the decree is in accordance with the award and there is no objection taken on that score, but it is sought to impeach the decree on other grounds. Rule 16 of the 2nd Schedule of the Civil Procedure Code lays down that there shall be no appeal from a decree

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which is in accordance with the award, and it has been held by their Lordships of the Privy Council that there being no appeal from such a decree, a revision petition to revise a decree confirming an award, would be still more objectionable, *vid.* the decision in the case of *Ghulam Khan v. Muhammad Hassan* (1). But if it can be shown that the lower Court acted without jurisdiction or failed to exercise jurisdiction or acted with material irregularity in dealing with the award, it would be open to the High Court on a proper case being made out to revise such an order. The ruling of the Privy Council has been followed in a number of decisions of this Court and no doubt that represents the law. In this case, grounds Nos. 5 and 6 in the revision petition, cannot at all be said to allege grounds for our interference. It is stated in ground No. 6 that the arbitrator had no jurisdiction to frame a scheme in respect of the charity, the reason given, therefore, being that the charity referred to was a public charity. But there is no such finding, it is not even alleged in the pleadings that the charity in question was a public charity. Further, the plaintiff himself in his plaint asked for a scheme to be framed. In these circumstances, we cannot hold that this is a proper ground for exercising our jurisdiction under section 115 of the Civil Procedure Code.

As regards ground No. 5, it is said that a certain additional amount was allotted by the arbitrator for the carrying on of the charity and this was in excess of his powers. But we find that an issue was raised raising the question, *viz.*, what further provision, if any, should be made for the charity, and so far as we can gather from the judgment of the learned Subordinate Judge as well as the proceedings before the arbitrator, no objection was raised to the question being dealt with by the arbitrator. On looking at the nature of the dispute between the parties, it does not appear to be unreasonable for the arbitrator to have gone into the matter. This objection also fails. It is not alleged that the Subordinate Judge in dealing with

(1) 29 C. 167 at pp. 184, 185; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 25 P. R. 1962.

the award has been guilty of any irregularity in the conduct of the proceedings. We have, therefore, come to the conclusion that this is not a fit case for our interference under section 115, Civil Procedure Code, and dismiss Civil Revision Petition No. 849 of 1913 with costs.

The other petition, No. 850 of 1913, relates to the costs awarded by the Subordinate Judge with reference to the fees of the arbitrator. We think that he was entitled under the terms of the reference and in the circumstances of the case to award proper fees to the arbitrator. He did not include this amount in the decree itself, but dealt with it in a separate order passed on the same day as the decree confirming the award. This is not a matter for interference in revision. Civil Revision Petition No. 850 of 1913 is also dismissed with costs.

Petitions dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 42 OF 1914-15 OF
ETAH DISTRICT.

March 1, 1915.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

KALYAN SINGH AND OTHERS—DEFENDANTS
—APPELLANTS

versus

Babu HOTI LAL—PLAINTIFF—RESPONDENT.
Agra Tenancy Act (II of 1901), ss. 43, 49—Rent fixed by agreement in perpetuity—Suit for enhancement, if maintainable—Remedy.

Where rent has been fixed in perpetuity by an agreement, the remedy of the landholder is not a suit for enhancement of rent under section 43 but a suit under section 49. [p. 460, col. 1.]

Second appeal from the order of the Commissioner of Agra, dated the 26th August 1914, reversing that of the Assistant Collector of Etah District, in a case of enhancement of rent under section 43 of Act II of 1901.

JUDGMENT.

HOLMS, S. M.—(February 19th, 1915.)—I am unable to accede to the contentions in the grounds of appeal as drafted. Section 49 of the Tenancy Act is for the benefit of the

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State as much as for the benefit of the landholder and is clearly against the contention of the appellant that the respondent is bound for ever by his previous agreement. It seems to me, however, that the respondent in suing for an enhancement of rent under section 43 has adopted the wrong remedy. His proper course was to have sued under section 49 and have the agreement rendered void, unless the tenant agreed to pay a fair and equitable rent to be determined by the Collector. The Commissioner has remanded the case for a decision as to fair and equitable rent, but if the decree is given for an enhancement of rent under section 43, the result might be that the rent would be fixed for 10 years only. The suit, therefore, to my mind, was wrongly instituted originally and I would set aside the order of the Commissioner and dismiss the suit, the respondent paying costs in all the Courts.

The respondent will, of course, be at liberty to institute a suit under section 49.

CAMPBELL, J. M.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 637 OF 1915.

August 11, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Newbould.

NIKUNJA RANI CHOWDHURANI—

DEFENDANT—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL— PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870, s. 19E, object of—Penalty, imposition of—Order ultra vires—Suit to recover penalty imposed, maintainability of—Civil Court, jurisdiction of—Revenue Authority, power of—Penalty, nature of.

Unless there is a statutory bar, a suit is maintainable by the Secretary of State for India in Council for recovery of a penalty lawfully imposed [p. 461, col. 2.]

Where a penalty has been imposed by a Revenue Authority, a Civil Court has no jurisdiction to review the decision on the ground that the valuation had been incorrectly made or that the discretion in the imposition of the penalty had been erroneously exercised, but if the action of the Revenue Authority is *ultra vires* there is no enforceable claim which a Civil Court is bound to recognize. [p. 461, col. 2; p. 462, col. 1.]

Section 19E of the Court Fees Act contemplates an application on the part of the person who had taken out Probate and produces the same to be duly stamped and applies where the estimated value of the estate is less than what the value has afterwards proved to be: and in the absence of any such application, it does not authorize a Revenue Authority to impose any penalty. [p. 462, col. 1.]

In a Probate case notice was issued to a Collector under sub-section 1 of section 19H of the Court Fees Act. As no reply was received from the Collector, Probate was issued to the petitioner on payment of the duty payable upon her valuation of the estate. The Collector, thereafter, held that the value of the estate was much more and directed a notice to the petitioner to amend the valuation, and to explain the cause of under-valuation. The petitioner did not accept the Collector's valuation but in order to avoid litigation deposited the additional fee. The Board, however, ordered that double the fee payable be levied as penalty and a suit was instituted to recover the amount:

Held, that the imposition of the penalty was *ultra vires* and, therefore, the suit was not maintainable. [p. 462, col. 2.]

Semble.—In a case where section 19E is properly applicable, the petitioner is entirely in the hands of the chief controlling Revenue Authority, who is at liberty to refuse to stamp the Probate till the penalty has been paid. [p. 462, col. 2.]

Quære.—Whether the penalty imposed in such a case is personal and not recoverable from the estate? [p. 462, col. 2.]

Appeal against the decree of the District Judge, Faridpore, dated the 8th February 1912, affirming that of the Subordinate Judge, Faridpore, dated the 9th August, 1910.

Sir Rash Behary Ghose and Babus Dwarka Nath Chakraborty and Chandra Kanta Ghose, for the Appellant.

Babu Ram Charan Mitra, for the Respondent.

JUDGMENT. This is an appeal by the defendant in a suit for recovery of a penalty imposed on her under section 19E of the Court Fees Act, 1870. The facts material for the determination of the questions of law raised before us are undisputed, and lie in a narrow compass. The appellant applied for Probate of a Will executed by her husband Kailas Chandra Choudhury. Thereupon notice was issued to the Collector of Faridpore under sub-section 1 of section 19H of the Court Fees Act. As no reply was received from the Collector, Probate was issued to the petitioner on the 28th August 1900 on payment of Rs. 1,563, the duty payable upon her valuation of the estate. On the 10th December 1908, the Collector of Faridpore, who had meanwhile communi-

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cated with the Collector of Backergunge where some of the properties were situated, held that the value of the estate was Rs. 1,69,123, and not Rs. 78,122 as stated by the petitioner in her application for Probate. He accordingly directed the petitioner to amend the valuation and to explain the cause of under-valuation. Notice was served upon her on the 15th December 1908. On the 2nd January 1909, she presented a petition to the Collector, in which she stated that the valuation as made by her agents and accepted by her in good faith was correct, as the majority of the properties were small shares in various estates and could not fetch large values. She added, however, that she had no desire to litigate the matter and deposited Rs. 1,821, the additional fee payable, on the hypothesis that the valuation of the Collector was correct. On the 16th January 1909, the Collector recommended to the Commissioner that the additional sum might be accepted, and the Probate amended. This was endorsed by the Commissioner and submitted by him to the Board of Revenue for sanction. The Board, however, on the 4th July 1909, directed that double the fee payable, that is Rs. 6,768, be levied as penalty from the petitioner under section 19E of the Court Fees Act. This order, made without any notice to the petitioner, was communicated to her on the 15th August 1909. On the 11th September 1909, she petitioned to the Board to re-consider the matter, but during the pendency of her application for review, the Collector instituted the present suit on the 11th December 1909 for recovery of Rs. 6,768. On the 16th January 1910, the Board, on review, reduced the penalty to Rs. 3,384. On the 8th August 1910, the plaint was amended and the claim was reduced to that sum. The defendant resisted the claim substantially on three grounds, namely, *first*, that the suit as framed was not maintainable, *secondly*, that the penalty had not been imposed in accordance with statutory provisions, and consequently could not be recovered, and *thirdly*, that even if the penalty was recoverable, no decree could be made against the estate in her hands. The Subordinate Judge overruled these contentions and decreed the suit. Upon appeal that decree has been

affirmed by the District Judge. The present appeal was summarily dismissed under rule 11 of Order XLI of the Civil Procedure Code by Brett and Sharf-ud-din, JJ. The appellant then applied for review of judgment and obtained a Rule. After the retirement of Brett, J., the Rule was made absolute by Sharf-ud-din, J., on the ground that important questions of law were involved in the appeal. The appeal has now come up before us for final disposal, and on behalf of the appellant the three grounds urged in the primary Court in answer to the claim have been reiterated.

As regards the *first* objection, namely, that the suit is not maintainable, we are of opinion that there is no foundation for it. Assuming that the penalty has been rightly imposed, there must be some method for its recovery. A suit for its recovery is not barred either explicitly or impliedly. There is no provision in the law for recovery of the penalty by summary process, as section 19E is not mentioned in sub-section 1 of section 19J. But even if a summary remedy had been provided, it would not follow that the Crown was not entitled to the ordinary remedy by a suit, which is open to all its subjects. In England, where the Crown claims sums due to it by way of penalty or otherwise, the recovery may be had by information: *Attorney-General v. Freer* (1); *Bradlaugh v. Clarke* (2); *Cawthorne v. Campbell* (3). We feel no doubt that unless there is a statutory bar, a suit is maintainable by the Secretary of State for India in Council for recovery of a penalty lawfully imposed.

As regards the *second* objection, namely, that the penalty has been imposed in contravention of the Statute and is consequently not recoverable, the question has been raised whether it is open to the Civil Court to determine the matter. The decision in *Manekji v. Secretary of State for India* (4) shows that a Civil Court has no jurisdiction to review the decision of a Revenue Authority on the ground that the valuation

(1) (1822) 11 Price 193; 147 E. R. 441.

(2) (1883) 8 A. C. 354; 52 L. J. Q. B. 505; 48 L. T. 681; 31 W. R. 677; 47 J. P. 405.

(3) (1790) 1 Anst. 205 at p. 214; 145 E. R. 846.

(4) (1896) Bom. P. J. 751.

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had been incorrectly made or that the discretion in the imposition of the penalty had been erroneously exercised. But the position is different when the order for imposition of penalty is assailed on the ground that it has not been made in accordance with the Statute. If the action of the Revenue Authority is *ultra vires*, if he has not followed the procedure prescribed by the Statute which is the source of his authority, there is no enforceable claim which a Civil Court is bound to recognize. We must consequently determine whether the imposition of the penalty in the case before us, was *ultra vires*.

Section 19-I of the Court Fees Act contemplates the pre-payment of duty before an order for grant of Probate is made: *In the goods of Omda Bibi* (5). In the case before us, this appears to have been done. A notice was thereupon issued to the Collector under section 19H to enable him to test the valuation. As no communication was received from him, the Court issued the Probate. Subsequently, the Collector called upon the petitioner to amend the valuation under subsection 3 of section 19H. The applicant for Probate did not accept the valuation made by the Collector. She maintained, on the other hand, that the original valuation made by her was not inadequate, but with a view to avoid expense and litigation, she deposited the excess sum demanded. The Board of Revenue thereupon proceeded to impose a penalty on the applicant under section 19E. In our opinion, section 19E had no application in the events which had happened. As pointed out in the case of *Manekji v. Secretary of State for India* (4), section 19E contemplates an application on the part of the person who has taken out Probate and produces the same to be duly stamped. There was no such application in the present case. The section further contemplates that the estimated value of the estate is less than what the value has afterwards proved to be. In the present case, there was no determination of the valuation by the Probate Court; there was, on the one hand, an estimate by the petitioner, there was on the other hand, an assessment by the Collector which was not accepted as correct by the applicant; indeed,

she disputed the correctness of the grounds for the higher assessment. There was consequently no room for the application of section 19E. If it was intended to take proceedings under section 19E, as the petitioner disputed the correctness of the assessment by the Collector, the Court should have been moved for an enquiry into the true value of the assets under section 19H and if the Collector had adopted such a course, it would have been incumbent upon him, as explained in the case of *In the goods of Sterenson*, (6), to make out a case for enquiry upon definite facts. No such step was, however, taken, possibly for the reason that the Collector was of opinion that no penalty should be imposed. But whatever the reason might be, it is plain that there was no compliance with the statutory requirements and that the contingency contemplated in section 19E had not arisen. Nor was action taken under section 19G, which is moulded on section 43 of 55 Geo. III, Ch. 184, and section 122 of 56 Geo. III, Ch. 56. We may here point out the reason why section 19J, which prescribes the mode of recovery of penalties, makes no mention of section 19E. In a case where that section is properly applicable, the petitioner is entirely in the hands of the chief controlling Revenue Authority, who is at liberty to refuse to stamp the Probate till the penalty has been paid; no occasion can consequently arise for recovery, by summary process or by suit, of the penalty imposed under section 19E. We are of opinion that the action of the Board of Revenue was entirely misconceived and that the imposition of the penalty under section 19E was *ultra vires*. There is thus no legal foundation for the claim.

As regards the third objection, namely, that the penalty is personal and is not recoverable from the estate, we need only say that it raises a question of first impression and of some nicety, which need not be determined in view of our decision on the second objection.

The result is that this appeal is allowed, the decree of the District Judge reversed and the suit dismissed with costs in all the Courts.

Appeal allowed.

(6) 6 C. W. N. 898.

GULAB SHAH v. HAVELI SHAH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 529 OF 1913.

May 6, 1915.

Present:—Mr. Justice Chevis and

Mr. Justice Shadi Lal.

GULAB SHAH—PLAINTIFF—APPELLANT

versus

HAVELI SHAH AND OTHERS—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit dismissed for defect in form—Subsequent suit, whether barred—Joint ownership—Right to demand partition incidental.

Where the dismissal of a suit takes place for defect in the form of the suit, Order II, rule 2, of the Civil Procedure Code does not preclude a plaintiff, whose suit has been thus dismissed, from bringing a second suit. [p. 463, col. 2.]

Bhola Singh v. Gurdit Singh, 66 P. R. 1834, referred to.

Order II, rule 2, requires a plaintiff to include in a suit the whole of the claim which he is entitled to make in respect of the particular cause of action which forms the basis of the suit and does not compel him to include claims arising out of different causes of action. [p. 463, col. 2; p. 464, col. 1.]

The right to demand partition is one of the incidents of joint ownership and as long as the joint ownership subsists, any of the joint owners may demand partition. [p. 464, col. 1.]

Where, therefore, a plaintiff's suit for his share of two mortgage-debts realised by the defendants from the mortgagors was dismissed on the ground that the suit for partial partition did not lie, and he then brought a suit for partition of all joint properties:

Held, that, the causes of action in the two suits being different, the second suit was not barred by reason of Order II, rule 2. [p. 463, col. 2.]

Abdun Nasir v. Rasulan, 20 C. 385, referred to.

Second appeal from the decree of the Divisional Judge, Sialkot Division, dated the 23rd January 1913.

Mr. Ganpat Rai, for the Appellant.

Bakhshi Tek Chand, for the Respondents.

JUDGMENT.—The suit which has given rise to this second appeal has been dismissed by the learned Divisional Judge as barred by the provisions of Order II, rule 2. We have considered the arguments advanced on both sides, the facts of the previous case and the law bearing on the subject, and come to the conclusion that the rule enunciated in Order II, rule 2, has no application to the case and that this appeal must succeed.

It appears that in 1909, the present plaintiff sued the defendants for his share of two mortgage-debts realised by the defendants from the mortgagors. That suit was decreed by the Court of first instance,

but the District Judge on appeal accepted the plea that the suit for partial partition did not lie. The finding on that point was, it is clear, sufficient for the dismissal of the suit, and the fact that the Court also recorded the further finding that the debts, the subject-matter of the suit, were not proved to be joint property (which finding was a mere *obiter dictum*) does not affect the determination of the question which arises in the appeal before us.

In pursuance of the direction given by the Appellate Court, the present suit for the partition of all the joint properties has been instituted, and we fail to understand how the provisions of Order II, rule 2, govern the case. The previous suit failed because it was not properly framed, and it is a well established principle of law that where the dismissal of a suit takes place for defect in the form of the suit, Order II, rule 2, does not preclude a plaintiff, whose suit has been thus dismissed, from bringing a second suit, *vide*, *inter alia*, *Bhola Singh v. Gurdit Singh* (1).

Further, it seems to us that the causes of action in the two suits are not identical. In the present suit the cause of action is the right to have the whole joint property brought together and divided. As observed by Melville, J., in *Kakaji v. Bapuji* (2)—“So far from these two being the same cause of action, they present all the difference which is expressed by saying that the one is a cause of action, and the other is no cause of action.” It appears that at the time of the institution of the first suit, the plaintiff's right to participate in the joint property other than the two debts referred to above had not been denied, and the denial by the defendants in their written statement, which has been relied upon by the learned Divisional Judge, was a cause of action which accrued subsequent to the institution of that suit. We consider that the causes of action in the two cases were quite distinct, *vide* *Abdun Nasir v. Rasulan* (3), and it is clear that Order II, rule 2, requires a plaintiff to include in a suit the whole of the claim which he

(1) 66 P. R. 1834.

(2) 8 Bom. H. C. R. 205.

(3) 20 C. 385.

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is entitled to make in respect of the particular cause of action which forms the basis of the suit and does not compel him to include claims arising out of different causes of action.

Another aspect of the matter leads us to the same conclusion. What was the effect of the dismissal of the first suit for partition? It was clear that the parties continued to be joint owners in the properties as before and it is beyond question that the right to demand partition is one of the incidents of joint ownership, and as long as the joint ownership subsists, any of the joint owners may demand partition. We do not, therefore, see how the dismissal of the previous suit operates as a bar to the present one.

We are, therefore, quite clear that the previous dismissal on account of the plaintiff not having included the whole of his claim does not bar his second suit for partition of the whole property. If any authority is needed for the view, we would refer to the judgments of *Umrao Singh v. Piare Lal* (4) and *Kakaji v. Bapuji* (2), which are on all fours with the present case. We accordingly accept the appeal, set aside the judgment and decree of the lower Appellate Court and remand the case under Order XLI, rule 23, for the decision of the defendants' appeal on the merits. Court-fee on the memorandum of appeal shall be refunded and other costs shall be costs in the cause.

Appeal accepted; Case remanded.

(4) A. W. N. (1886) 53.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.
REVENUE PETITION NO. 21 OF 1913-14 OF
SAHARANPUR DISTRICT.
March 17, 1915.

Present:—Mr. Campbell, J. M.
ALI BUX AND OTHERS—DEFENDANTS—
APPELLANTS
versus
PARKASH NAND—PLAINTIFF—
RESPONDENT.

*Ejectment—Suit by mortgagor before obtaining
decree in redemption suit, maintainability of.*

DINA V. BISHAMBHAR SINGH.

A suit for ejectment brought by the mortgagor of a *zemindari* share during the pendency of the redemption suit and before his obtaining a redemption decree is premature and not maintainable.

Second appeal from the order of the Commissioner of the Meerut Division, dated the 3rd November 1913, reversing that of the Assistant Collector of Saharanpur District, in a case of ejectment under section 58/63 of Act II of 1901.

JUDGMENT.—I think this case must be accepted. It seems quite clear that appellant paid his rent to Ahmad Husain in 1911 and 1912. Ahmad Husain resisted respondent's possession of the land, on the strength of his mortgage; and respondent's suit for redemption of the mortgage was not decreed until November 1912, whereas the present suit for ejectment was filed in September 1912. I think that at that time appellant was justified in looking upon himself as Ahmad Husain's tenant, and that he *bona fide* paid the rent to him as he had always done before. He was not supposed to know the details of the dispute between the mortgagee and respondent.

I consider that the respondent's suit for ejectment was premature and should have been dismissed.

I would, therefore, set aside the Commissioner's order and restore the order of the Assistant Collector, giving appellant his costs in all Courts.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 2 OF 1914.

July 26, 1915.

Present:—Mr. Batten, A. J. C., and
Mr. Stanyon, A. J. C.

DINA—PLAINTIFF—APPELLANT

versus

BISHAMBHAR SINGH—DEFENDANT—
RESPONDENT.

Adverse possession—Co-owners—Exclusive possession of one co-owner, if adverse to another—Lambardar, possession by—Agent—Presumption.

The exclusive possession of one co-owner, who has entered under a common title, is not ordinarily adverse to another co-owner. [p. 467, col. 1.]

In the absence of proof that a co-sharer *lambardar* is holding the property of himself and his co-sharers

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adversely to the latter, his possession must be presumed to be permissive and as that of an agent for them. [p. 466, col. 1.]

Appeal against the decree of the Divisional Judge, Jubbulpore Division, dated the 14th November 1913, confirming that of the Additional Judge to the Court of the Subordinate Judge, Seoni, dated the 10th December 1912.

Mr. A. C. Roy, for the Appellant.

Messrs. G. L. Subhedar and K. V. Deoskar, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises, relates to the village Tuapar in the Seoni District of the Central Provinces. One Dadu Gulab Singh, since dead and now represented by the respondents, was the superior proprietor of that village. The inferior proprietary right in the same village originally belonged to the family of which the appellant Dina is now the representative member. This right was held by several co-sharers, and the share of Dina and his nephew Mangal is two annas eight pies. But Dina is the *lambardar* of the whole village. Dadu Gulab Singh gradually bought out all the shares other than Dina's thus—

	Rs.	A.	P.
On the 12th July 1886 (Exhibit P-9) ...	0	2	8
On the 23rd October 1886 (Exhibit P-10) ...	0	2	8
On the 25th October 1886 (Exhibit P 11) ...	0	4	0
On the 21st May 1906 (deed not filed). ...	0	4	0
Total ...	0	13	4

But Dina has stoutly adhered to his share, and has continued to be the *sadar lambardar*. In 1909, he filed a civil suit in the Court of the District Judge of Seoni, repudiating the title of Dadu Gulab Singh and of his vendors, and claiming a declaration that he was the sole owner of the inferior proprietary right in the entire village. The suit failed, and it was decided that Dadu Gulab Singh had become the owner of a 13 annas 4 pies share in that estate.

Subsequently Dadu Gulab Singh applied for an imperfect partition of the village. Here again Dina appeared in opposition. After an infructuous attempt to revive the

title decided against him in the above civil suit, he set up a claim by prescription to certain *sir* and *khudkasht* land which had been in his physical possession for more than twelve years preceding the suit. The Revenue Officer holding the partition proceedings, dealt with this objection as a case under section 136-G, Central Provinces Land Revenue Act, 1881, and decided it against Dina. An appeal to the Court of the Divisional Judge followed, and has been dismissed by that Court upon the ground that, as a holder of common property, the possession of Dina was not adverse to his co-sharers, and that as *lambardar*, he was a mere bailiff of the proprietary body and could not defeat or destroy their titles by mere exclusive possession and the non-payment of profits. The learned Divisional Judge completely overlooked the decision of this Court in *Sheodayal Singh v. Bhagirath Singh* (1), and if that ruling were to prevail, this case would have to be sent back. But it was not accepted by Skinner, A. J. C., in *Daud Khan v. Gorinda* (2), so far as the general rule laid down in the *placitum*, is concerned; and one of us, before whom the appeal originally came, considered that this conflict of opinion should be set at rest by a Bench. This appeal was, therefore, ordered by the Judicial Commissioner to be decided by a Bench.

The *placitum* in *Sheodayal Singh v. Bhagirath Singh* (1) reads thus:

"The possession of one co-owner is ordinarily adverse to another co-owner who is excluded from possession.

"In the absence of proof that a *lambardar* is in possession as agent of a co-sharer, such possession must be deemed to be adverse and not permissive."

We have nothing to say against the merits of the decision arrived at by our learned predecessor in the particular case which was before him. But, with all due respect, we are unable to accept as correct the two propositions of law embodied in the above *placitum*. They are opposed to numerous decisions, forming a consistent *cursus curiarum* in this and other High Courts; and we would state the law to be as follows:—

(1) 13 C. P. L. R. 69.

(2) 2 Ind. Cns. 15; 5 N. L. R. 41.

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"The exclusive possession of one co-owner who has entered under a common title is not ordinarily adverse to another co-owner.

"In the absence of proof that a co-sharer *lambardar* is holding the property of himself and his co-sharers adversely to the latter, his possession must be presumed to be permissive and as that of an agent for them."

It will be seen that these propositions are diametrically opposed to the *dicta* of Ismay, J. C., in the above case, but there is ample authority in support of both of them.

First, as regards the general law applicable to all joint or common owners. It will be seen that the ruling of our learned predecessor proceeds upon an English Statute which has no application whatever to India, and we are unable to understand why any analogy should be drawn from it, either for dealing with co-owners in India generally, or with co-sharers of *maljuzari* villages in the Central Provinces in particular.

So far as the general proposition is concerned, the Calcutta High Court have declared in *Jogendra Nath Rai v. Baldeo Das Maricari* (3) that it is a fundamental rule that the entry and possession of land by one under the common title of a co-owner will not be presumed to be adverse to the other co-owners, but will ordinarily be held to be for the benefit of all. To the same effect, are the decisions in *Mihin Lal v. Badri Prasad* (4), *Har Charan v. Biwla* (5), *Ahmad Raza Khan v. Ram Lal* (6) and *Bundacharya v. Shrinivasa-charya* (7). How far this presumption may be carried, will be found illustrated in a recent decision of their Lordships of the Privy Council in a Ceylon case, *Corea v. Appuhamy* (8). That was a case in which a man named Elias having died intestate, his property devolved by law upon his brother Iseris and three sisters. Iseris was in jail and the three sisters were otherwise absent when the estate fell in, and, therefore, the District Court took temporary possession. Iseris alone subsequently took over the property from the

Court officials, and retained it exclusively for a period which, had such possession been adverse, would have extinguished the title of the sisters. On a suit between Iseris and a purchaser of the estate of the only sister surviving at the date of the purchase, the Ceylon Courts held that Iseris had entered in the character of a sole heir or plunderer, and ruled that whichever it was "so he continued, and acknowledged no title in any one else" and had, therefore, acquired a good prescriptive title. This decision was reversed by their Lordships of the Privy Council, who remarked as follows:—

"It is difficult to understand why it should be suggested that Iseris may have entered as 'plunderer.' He was not without his faults. * * * But it is perhaps going too far to hold that he was so fond of crooked ways and so bent on doing 'wrong' that he may have scorned to take advantage of a good legal title and may have preferred to masquerade as a robber or a bandit and to drive away the officers of the Court in that character. It is not a likely story. But would such conduct, were it conceivable, have profited him? Entering into possession and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. The principle recognized by Wood, V. C., in *Thomas v. Thomas* (9) holds good: 'Possession is never considered adverse if it can be referred to a lawful title.'"

It will thus be seen that the authority is overwhelming in support of the view that the physical possession of one co-owner is presumably not adverse to others not in physical possession. We find nothing against this rule in *Gangadhar v. Parashram* (10) or in *Amrita Raji Row v. Shridhar Narayan* (11). In particular cases ouster may be presumed from long possession; but in this connection the remarks of their Lordships of the Privy Council in the above case at page 227, are instructive. A very strong case of presumptive ouster would have to be made out. It is not so here.

(3) 35 C. 961 at p. 968; 6 C. L. J. 735; 12 C. W. N. 127.

(4) 27 A. 436; 2 A. L. J. 107; A. W. N. (1905) 36.

(5) 5 Ind. Cas. 559; 32 A. 389; 7 A. L. J. 298.

(6) 26 Ind. Cas. 922; 13 A. L. J. 204; 37 A. 203.

(7) 5 Bom. L. R. 742.

(8) (1914) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 886.

(9) (1855) 2 K. & J. 79 at p. 83; 110 R. R. 107 at p. 110; 25 L. J. Ch. 159; 1 Jur. (N. S.) 1160; 4 W. R. 135; 69 E. R. 701.

(10) 29 B. 300; 7 Bom. L. R. 252.

(11) 1 Ind. Cas. 322; 33 B. 317; 11 Bom. L. R. 51.

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Then, as to the more particular case of the exclusive possession by a *lambardar* in the Central Provinces of an agricultural village belonging to himself and other co-sharers, we have a series of rulings of this Court with which it seems impossible to reconcile the dictum of Ismay, J. C., in *Sheodayal Singh v. Bhagirath Singh* (1). In *Daryasingh v. Mukundsingh* (12), it was laid down that in an undivided village the *lambardar* is the agent of the co-sharers for the management of the estate according to the ordinary custom. In *Sheoba v. Simaria* (13), it was ruled that the possession of the *lambardar* cannot be said to be adverse to the recorded co-sharers merely because he pays them no share of the profits, nor would such non-payment amount to an ouster; and further, that the burden of proving that a suit for possession by the co-sharers was within time would not lie on them. In *Ramratna v. Hira* (14), it was taken to be an established proposition that a *lambardar* is the agent of the co-sharers for village management. The same assumption governed the decision in *Sitaram v. Arjun* (15). In *Gopal v. Govind* (16), Ismay, J. C., ruled that anything which the landlord is required or authorised to do under the Tenancy Act must be done by the whole proprietary body or by an agent acting on their behalf, and remarked, at page 114: "Ordinarily the *lambardar* as the agent of the co-sharers for the management of the village would be the person whose consent is necessary and sufficient," the remark having reference to a landlord's consent to the transfer of a tenant right. In *Daud Khan v. Govinda* (2), Skinner, A. J. C., considered that the remarks of Ismay J. C., in *Sheodayal Singh v. Bhagirath Singh* (1) were to a great extent *obiter*, and open to reconsideration. In *Murlidhar v. Jagannath* (17), Mitra, A. J. C., described the *lambardar* as the customary agent of the proprietary body. Finally, in *Huijnath v. Raghunath* (18), Hallifax, A. J. C., pronounced that in the case of a *lambardar* there is a presumption, until the contrary is

shown, that he has been appointed as an agent to represent the whole proprietary body of a village in the management of the village. Apparently, however, in both the cases last above quoted, the dictum in *Sheodayal Singh v. Bhagirath Singh* (1) was overlooked, as there is no mention of that case in either decision.

For the above reasons, we respectfully dissent from the general propositions set out in the *placitum* of *Sheodayal Singh v. Bhagirath Singh* (1) and hold that it has been correctly held in the present case that the possession of the defendant over the *sir* and *khudkasht* lands, though exclusive and unaccompanied by any proved payment of profits to the plaintiffs or their predecessors as co-sharers, was not, *prima facie*, adverse: and no express ouster has been pleaded or proved to rebut the presumption that such possession was one on behalf of the whole proprietary body.

It was argued before us that the sales, by which Dadu Gulab Singh became the owner of the shares he claims to have partitioned, do not expressly transfer the right to cultivate the *sir* land, and that as to such land, at least, the defendant has become an ex-proprietary tenant. This is not merely inaccurate but absurd. The deeds expressly provide that the vendors shall take the standing crops and then give up cultivating occupancy to the vendee. But if they had not done so, the Tenancy Act of 1883 would have conferred an ex-proprietary tenure, not on the defendant, but upon the vendors themselves. It does not lie with the defendant who is only a co-sharer of the vendors, to claim that the statutory tenancy enures for his benefit.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(12) 2 C. P. L. R. 103.

(13) 2 C. P. L. R. 171.

(14) 5 C. P. L. R. 47.

(15) 8 C. P. L. R. 41.

(16) 13 C. P. L. R. 113.

(17) 23 Ind. Cas. 20; 10 N. L. R. 5.

(18) 26 Ind. Cas. 608; 10 N. L. R. 93.

MADHAVA BHUMJ SANTO V. RAMACHANDRA MARDARAJ.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 302 OF 1914.

October 21, 1915.

Present:—Mr. Justice Coutts-Trotter and

Mr. Justice Srinivasa Aiyangar.

MADHAVA BHUMJ SANTO—DEFENDANT

No. 1—APPELLANT

versus

Sri Sri Sri RAMACHANDRA MARDARAJ

DEOGARU, BEING MINOR REPRESENTED

BY HIS NEXT FRIEND, THE COLLECTOR OF

GANJAM AND AGENT TO THE

COURT OF WARDS—PLAINTIFF—

RESPONDENT.

*Madras Court of Wards Act (I of 1902), s. 58—
Remission of interest on arrears of rent—Manager,
power of.*

In cases of remissions made by the Manager appointed by the Court of Wards but not included in those specified in rule 58 of the rules framed by the Court of Wards under the Court of Wards Act, it is for the party relying upon the remissions to prove that the Court of Wards had specially authorized the Manager to grant them. [p. 468, col. 2; p. 469, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Ganjam, in Original Suit No. 69 of 1913.

The Hon'ble Mr. B. N. Sarma, for the Appellant.

Dr. S. Swaminadhan, for the Respondent.

JUDGMENT.

COUTTS-TROTTER, J.—This was a suit for rent due under a *muchilika* of the 3rd November 1908, executed to the late Raja of Kallikota by the defendant; and in addition to the arrears of rent claimed, as to which there is no dispute, a claim was also made in respect of interest, which was made payable under the instrument, at the rate of 12 per cent. per annum on the arrears.

The defendant's case with regard to interest was that he had had a meeting with the Tahsildar and the Manager in November 1911, that he had pointed out that he was quite unable to realise any rent due to him from the *ryots*, that it would be a great hardship to him to pay interest and that the Manager agreed to remit interest up to date; and in conformity with it, he (defendant) produced Exhibit III in which an account is drawn up giving him credit for a sum of Rs. 10 which he then paid. In that account, the ten rupees is divided up and credited bit by bit against the various instalments due; and the balance

is brought down to Rs. 3,789-4-5. It is clear that that account does not include any interest at all. In view of that document, and of the evidence of the defendants and the admissions of the Tahsildar in his evidence, I think that a remission of interest was made; and I do not accept the Tahsildar's statement to the contrary. Unfortunately, the defendant had to do more than this. Besides showing that the Manager had remitted interest, he had also to show that he had authority to do so. The case is put in this way for the appellant. This was not a mere remission, this was an agreement; and the consideration moving from the defendant was that he agreed to assign the decrees he had got or might get in the future against the *ryots*. And if I thought that that agreement had been proved, I would have hesitated long before holding that that was not a matter within the authority of the Manager of an estate like this. However, I am satisfied by the evidence that there was nothing to connect the agreement to remit interest with the promise, if there was any, to transfer the judgments against the *ryots*. And that being so, the thing stands as a mere remission without any consideration. Of the rules relating to the Court of Wards, rule 58 specifically limits the instances where Collectors are empowered to remit debts due to the estates. They include matters erroneously included in rent accounts, and also irrecoverable rents and debts due either in cash or in grain, for the recovery of which all possible processes have been exhausted; and in any case, the limit is to sums under Rs. 100. I cannot suppose that the Manager had greater authority in those matters than the Collector and on the materials before me, I think it is impossible to hold that the Manager in this case had the authority to do what he has done. This Court like the lower Court has suffered very much from the meagre materials put before it and from the entire absence of any sort of guidance as to what principles are to help us in determining how this question of authority is to be decided. There must be plenty of materials to assist the Court as to what the actual rights and duties of a Manager are. We are left without any such instructions and on such materials as are available

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to me, I think the appeal fails. But in view of the fact that no suggestion is made, as far as I can see, that this is no other than a perfectly honest claim, and in view of the fact that I believe that the Manager in fact agreed to the remission of interest, I think it just to allow no costs in either Court.

By some error, the decree has awarded to the plaintiff compound interest on the amounts of rent due. There was no provision whatever for that in the instrument and the decree must be amended by awarding simple interest on the total rent due, amounting to Rs. 3,800, at 12 per cent. up to the date of judgment and then the amount will be consolidated and interest calculated at 6 per cent. on that.

SKINIVASA AITANGAR, J.—I agree. The defendant who pleaded that the plaintiff remitted the interest was bound to show that that remission was authorised by the Court of Wards. The defendant was dealing with the Manager appointed by the Court of Wards, who were guardians of the minor's estates; and I think it was his duty to show that the Manager was authorised to give that remission. In the absence of any such proof, although I agree that the Manager did remit the interest, he is not proved to have any such authority; and the rule referred to by my learned brother seems to suggest that the Manager could not have any such authority.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 596 OF 1914.

May 10, 1915.

Present:—Mr. Justice Shah Din and

Mr. Justice LeRossignol.

KARIM BAKHSH AND OTHERS—PLAINTIFFS
APPELLANTS

versus

ALTAF ALI AND OTHERS—DEFENDANTS—
—RESPONDENTS.

Suit for declaration—Non-proprietors, living in village on sufferance—Wajib-ul-arz recording exclusive right of proprietary body to refuse of village, whether binding on non-proprietors.

The non-proprietary body of the village of Nizamabad brought a suit for a declaration that the

refuse and sweepings of the village were not the exclusive property of the defendants, the proprietary body, but that the plaintiffs had a right to dispose of and, if necessary, to sell the sweepings and refuse of their own houses:

Held, that as the non-proprietors lived in the village on sufferance on sites belonging to the proprietary body, the provision of the *wajib-ul-arz* specifying that all refuse from their houses should be the perquisite of the proprietary body was not inequitable and that the plaintiffs were not entitled to the declaration sought for. [p. 470, col. 1.]

Second appeal from the decree of the Additional Divisional Judge of the Gujranwala Division, dated the 7th of January 1914.

Mr. Gokul Chand Narang, for the Appellants.

Mr. Abdul Rashid and Sheikh Gulab Din, for the Respondents.

JUDGMENT.—The plaintiffs in this case are members of the non-proprietary body of Nizamabad, and they came into Court to secure a declaration that the refuse and sweepings of the village were not the exclusive property of the defendants, the proprietary body, but that the plaintiffs had a right to dispose of and, if necessary, to sell the sweepings and refuse of their own houses. The Courts below have agreed in dismissing the plaintiffs' claim and the plaintiffs have come up here on second appeal.

It has been found by the Courts below that, according to the entries in the *wajib-ul-arz* of 1868 which are repeated in the *wajib-ul-arz* of 1891-92, the refuse of the village is the exclusive property of the proprietors. The learned Counsel for the appellants contends that the non-proprietary body are not bound by the provisions of the *wajib-ul-arz*, but further he argues that even if the provisions of the *wajib-ul-arz* were binding on the plaintiffs years ago, is it equitable that they should continue to be operative at the present day when conditions have radically changed? He explains that the present litigation has been brought about by reforms in sanitation introduced by the Local District Board. Formerly one sweeper was entertained by the proprietors and he was responsible for the cleansing of the whole village; recently, however, the District Board decided that the sanitary condition of the village must be improved and it has imposed a tax upon

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the whole of the inhabitants of the village proprietors and non-proprietors—in order to defray the cost of entertainment of three sweepers. It is consequently urged that the manure of the village was conceded to the proprietary body in compensation for their outlay on the entertainment of one sweeper; and that inasmuch as the non-proprietors as well as the proprietors are called upon by the District Board to pay for the entertainment of three sweepers, the non-proprietors now receive no consideration for the surrender of the refuse from their houses. It is urged, therefore, that the *raison d'être* for the provisions set forth in the *wajib-ul-arz* no longer exists.

To this argument we are unable to attach any weight. The non-proprietors dwell in the village on sites which are the property of the proprietary body; non-proprietors dwell in the village on sufferance and one of the conditions of their residence in the village is that all the refuse from their houses shall be the perquisite of the proprietary body. Their residence in the village, and not the fact that the proprietary body had entertained a sweeper for the cleansing of the village, was the reason for their surrender of their rights in the refuse.

Though it is now asserted that the present contest has arisen from the action of the District Board, we notice that in 1891-92, when no such action on the part of the District Board was expected, the present plaintiffs objected to these provisions of the *wajib-ul-arz*. If the plaintiffs have now to pay a higher price for the cleansing of the village, they also enjoy the benefits of superior cleanliness. The fact that the proprietors have a right to all the manure from the village, might well have been represented to the District Board authorities with reference to the incidence of the taxation imposed, but with that aspect of the case we have no concern.

In our opinion, the provisions of the *wajib-ul-arz* are clear and they do not appear to be inequitable. The appeal is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 465 OF 1913.

July 31, 1915.

Present:—Mr. Batten, A. J. C.GOPIKISAN—PLAINTIFF—APPELLANT
versus

KULPAT—DEPENDANT—RESPONDENT.

Central Provinces Tenancy Act (XI of 1898), ss. 69 (i) (c), 45 (5)—Transfer of proprietary rights—Sir land, acquisition of ex-proprietary rights in—Tenant of sir land, liabilities of.

Where ex-proprietary occupancy rights accrue to a *malguzar* under sub-section (1) of section 69 of the Central Provinces Tenancy Act, the provisions of exception (c) of the section do not cease to have effect and an ordinary tenant is still liable to be evicted by the ex-proprietary occupancy tenant under the provisions of the Act. [p. 472, col. 1.]

Appeal against the decree of the Additional District Judge, Balaghat, dated the 7th May 1913, confirming that of the Munsif, Balaghat, dated the 30th November 1912.

The Hon'ble Mr. M. B. Dadabhoy, for the Appellant.

Mr. W. H. Dhabe, for the Respondent.

JUDGMENT.—This appeal arises out of a suit to eject the respondent from a field, brought by the appellant, who is the ex-proprietary occupancy tenant of the field. The plaint stated merely that the plaintiff was the occupancy tenant and the defendant the sub-tenant, and that the cause of action for ejectment was the defendant's failure to comply with the notice that he should quit at the end of the agricultural year 1910-1911. From the further pleadings, it appeared that the field was a *sir* field, which had been leased to the defendant while the plaintiff was the *malguzar*; when the plaintiff transferred his proprietary rights to a third party, he became the occupancy tenant of the field by virtue of section 45 of the Tenancy Act. The plaintiff pleaded that the defendant had been a tenant of the *sir* land from year to year, and had by operation of law become a sub-tenant when the plaintiff became the occupancy tenant. The defendant pleaded that the field had been leased out to him in perpetuity by the plaintiff's father 18 years ago, and that he was, therefore, not liable to ejectment. The Munsif found that the field was recorded as the *sir* field of the plaintiff and that the defendant

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was recorded as the sub-tenant. The suit was dismissed on the grounds that the plaintiff had failed to prove that the lease was from year to year, and that the defendant had been in possession for over 12 years.

It is to be noted that the suit was first filed in the Court of a Revenue Officer, the Additional Judge to the Court of the Sub-ordinate Judge, and that a former District Judge on appeal held that the suit was not triable by that officer, and returned the plaint for presentation to the proper Court. This order was not appealed against.

Against the decree of the Munsif dismissing the suit, the plaintiff appealed on various grounds, one of which was that the Munsif erred in holding that the land in dispute was *sir*.

The material portion of the judgment of the learned Additional District Judge runs as follows:—

"The lower Court dismissed the suit on grounds of its own, which are not quite intelligible to me. Hence the plaintiff appealed urging several reasons for doing so.

"On the facts stated, however, the plaintiff has no case. When he was the proprietor, the defendant was the ordinary tenant of the land in dispute. Then, under section 69 of the Tenancy Act, he could be evicted on the ground that the holding entirely consisted of '*sir*' land. The land, however, has since lost its character as *sir*. Now this plea, *viz.*, that the holding consists of *sir* land, cannot be available to the plaintiff. Section 45 (5) of the Tenancy Act expressly provides that accrual of occupancy rights shall not affect the rights of ordinary tenants. The defendant still remains the ordinary tenant. He cannot, therefore, be evicted otherwise than under the provisions of sections 52 and 66 of the Tenancy Act.

"It is needless now to review the reasons set forth by the appellant in his memorandum."

In brief, the Additional District Judge has dismissed the appeal solely on the ground that on a *malguzar* becoming the ex-proprietary occupancy tenant of *sir* land, the land, as between such occupancy tenant and

the former ordinary tenant of the *sir* land, loses its character as *sir*, and the ordinary tenant of the *sir* becomes an ordinary tenant without the special disabilities attaching to a tenant of *sir* under section 69 (c) of the Tenancy Act.

In appeal, the learned Counsel for the appellant-plaintiff argues, *firstly*, that on the plaintiff becoming occupancy tenant the defendant became a sub-tenant, and, therefore, liable to eviction at the end of the agricultural year by reason of the proviso to section 60 of the Tenancy Act, and *secondly*, that, if he does not become a sub-tenant, he is liable to eviction if the holding consists entirely of *sir*, under section 69 (c) of the Act.

I am unable to accede to the *first* proposition. Sub-section (5) of section 45 enacts that the accrual of occupancy rights shall not affect the rights of an ordinary tenant holding any part of the *sir* land at the time of such accrual. The rights of a sub-tenant are certainly less than those of an ordinary tenant, so that it is evident that such accrual cannot transform the rights of an ordinary tenant into those of a sub-tenant. The learned Counsel argues that the enumeration of tenancy rights mentioned in the Tenancy Act is exhaustive, that there can be two tenants of the same holding only when one of them is sub-tenant; and that there cannot be an occupancy tenant and ordinary tenants of the same land. This no doubt is the ordinary rule. But sub-section (5) of section 45 shows that the occupancy rights in *sir* land of the original proprietor, which section 45 is designed to protect, are compatible with the existence of ordinary tenants on the same land. The plea that the defendant has become a sub-tenant fails.

The *next* question is whether the Additional District Judge was right in holding that on the accrual of ex-proprietary occupancy rights, the land ceased to be *sir* land. In *Dhondba v. Vishwanath* (1) Ismay, J. C., expressed the opinion that "*sir* land which has lost its character as such under the provisions of section 45 of the Tenancy Act, will no doubt cease to be *sir* land on the expiry of the Settlement then current

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because, by reason of section 69 of the Land Revenue Act, it will no longer be recorded as *sir* land, but there is no apparent reason for holding that it ceases to be *sir* land at an earlier date." This opinion which, though given *obiter*, carries great weight was in reference to a suit between the new proprietor and the ex-proprietary occupancy tenant. It appears to me that this view applies with even greater force as between the occupancy tenant and the former ordinary tenant. With the question as to how the Settlement Officer shall deal with the respective rights of the occupancy and ordinary tenants, we are not now concerned. But until the Settlement, it would seem that sub-section (5) of section 45 of the Tenancy Act must be read as meaning that the relations between the former landlord and the ordinary tenant of *sir* land shall remain unchanged. The sub-section says that the rights of an ordinary tenant of *sir* land shall not be affected. As they cannot be affected for the worse by his becoming a sub-tenant, so they cannot be affected for the better by exception (c) of section 69 becoming inapplicable to him. Any other interpretation would result in the ordinary tenant of *sir* being put in a better position as against his landlord by a provision of law enacted for the purpose of protecting that landlord.

For these reasons I am of opinion that on the accrual of occupancy rights, the provisions of exception (c) of section 69 of the Tenancy Act do not cease to have effect.

It is argued for the respondent that the appellant did not sue to evict the respondent on the ground that the holding consisted entirely of *sir* land. For the appellant, reliance is placed on the ruling in *Dulichand Chaudhri v. Lallah Kurmi* (2), that the status of the defendant constitutes no part of the cause of action. With this question I am not concerned in this second appeal. The learned Additional District Judge decided the case without reference to the pleadings, on the sole ground that exception (c) of section 69 of the Tenancy Act can have no application when occupancy rights have accrued under sub-section (1) of section 69 of the Act. As I

hold that this is not a correct view of the law, I remand the appeal for further trial according to law. A certificate for refund of Court-fees will be granted; other costs in this Court will follow the event.

Appeal allowed; Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 47 of 1913-14 of
SULTANPUR DISTRICT.

March 3, 1915.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

Raja BHAGWAN BAKSH SINGH—
PLAINTIFF—APPELLANT

versus

AMBAR SINGH—DEPENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 60, ejectment proceedings under—Proceedings declared null and void—Tenant, if trespasser—Jurisdiction of Civil Court—Second application under s. 60, if maintainable.

A *zemindar* served upon his tenant a notice of ejectment under section 55 of the Oudh Rent Act and subsequently applied for assistance to eject under section 60 which was given, but the tenant did not give up possession. The tenant was then criminally prosecuted, when he set up the defence that he was never legally ejected and that there had been such irregularities in the action taken under section 60, that he was justified in treating the whole proceedings as null and void. This defence was allowed. The *zemindar* put in another application seeking assistance to eject under section 60. The Court below held that the position of the tenant was that of a trespasser and the *zemindar's* remedy was in the Civil Court.

Held, that the tenant never having been legally ejected, he was not a trespasser and the previous proceedings having been found to be null and void, a fresh application under section 60 was maintainable. [p. 473, col. 1.]

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 3rd April 1914, confirming that of the Assistant Collector of Sultanpur District, in a case of assistance to eject.

JUDGMENT.

CAMPBELL, J. M.—(February 5th, 1915)—I am unable to agree with the Commissioner in this case. It appears to have been decided at the criminal trial that there had been such material irregularities in giving appellant possession upon his first application under section 60 that respondent was justified in treating the whole

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proceedings as null and void and retaining possession, and that he was not thereby guilty of any contempt of Court, and was in the position of never having been legally ejected. Under such circumstances, I cannot see that he was a trespasser, subject to the jurisdiction of the Civil, and not of the Revenue, Courts.

The whole of the previous proceedings under section 60 being treated as null and void, I can see no reason why appellant should not be allowed to take fresh action under that section, as it is not alleged that respondent has been authorised by appellant in writing to continue to occupy the land.

I would set aside the orders of the lower Courts and order that respondent be ejected and pay all costs of these proceedings.

This order will also govern Nos. 48, 49 and 50.

HOLMS, S. M.—I may note, to begin with, that when I decided this case as Commissioner I had not the benefit of seeing the record of the criminal trial, as neither party had it summoned before me.

The Assistant Collector in the present suit says that he did not mean in his order in the criminal trial to imply that the landholder was not given possession, but only that "there appeared to be irregularities in the mode of taking and giving possession". In his decision in the criminal case, he says:—"The evidence of the Naib-Tahsildar throws a great deal of doubt on the legal correctness of the execution of the order of ejectment on the 29th June 1912;" but he acquitted the accused on the ground that there was no intention to commit an offence or to intimidate, insult or annoy, apparently holding that, because negotiations for a compromise were going on, the accused had acted as he did. I have endeavoured to ascertain what were the irregularities in giving possession on the first application under section 60 which are referred to, but the Naib-Tahsildar's report of the 22nd August 1912 is vague and does not mention precisely what the irregularities were. Had this been all, I would have hesitated to agree with my colleagues. I find, however, in the judgment of the 24th September 1912 in the criminal case that the present

respondent said that no ejectment took place. As then he took up the position that he had never been legally ejected, I agree with the view taken that the whole of the previous proceedings under section 60 should be treated as void and that fresh action should be taken under that section. I agree with the order proposed.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1023 OF 1914.

October 4, 1915.

Present:—Mr. Justice Seshagiri Aiyar.
K. CHIDAMBARAM PILLAI—PLAINTIFF
—PETITIONER

versus

M. S. M. DORAISWAMY CHETTY—
DEFENDANT—RESPONDENT.

Mortgage, simple—Lease of property hypothecated, to mortgagee—Construction of documents—Assignment of rent—Rent, if debt—Chose in action—Transfer of Property Act (11th of 1882), s. 6.

In 1898, a simple mortgage was executed of certain properties by the mortgagor. In 1904, he executed a lease of the same to the mortgagee and directed him to apply the rent payable under the lease towards the interest due under the mortgage-bond executed in 1898:

Held, that the two transactions must be deemed to be independent of each other and the simple mortgage was not converted into a usufructuary mortgage on the execution of the lease. [p. 474, col. 1.]

Sakari Datta v. Ainuddy, 6 Ind. Cas. 336; 12 C. L. J. 620; 14 C. W. N. 1001, followed.

An assignment of rent due under a lease is, unlike mesne profits, not opposed to section 6 of the Transfer of Property Act: it is a fixed amount and is a debt included in the term 'chose in action.' [p. 474, col. 2.]

Kocharla Seetamma v. Pillala Venkataramanayya, 21 Ind. Cas. 387; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918; 38 M. 308, distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore, in Small Cause Suit No. 1815 of 1914.

Mr. T. R. Venkatarama Sastri, for the Petitioner.

Mr. P. S. Narayanaswamy Aiyar, for Mr. O. V. Ananthakrishna Aiyar, for the Respondent.

JUDGMENT.—The plaintiff's assignor executed a deed of mortgage in favour of

ALI MOHMAD v. GREAT INDIAN PENINSULA RY. CO.

the defendant on the 17th August 1898. It was a simple mortgage-bond. Six years after, in November 1904, a document which is styled as *logia patram* was executed by the mortgagor to the mortgagee. The terms of the document are that the defendant should be in possession for five years under it and credit the rent fixed towards the interest due under the mortgage of 1898 and that if, after the five years are over, the defendant continues in possession of the property, he should credit the rent towards the interest on the mortgage-debt. I have no doubt that this document is a lease. The fact that it is for five years and the other circumstance that provision has been made for holding over, make that position clear. The rent is fixed: only the lessee is directed to apply the amount for the interest due under the mortgage document. It was contended before me that this lease-deed supersedes the original mortgage: or at least the mortgage and the lease read together constitute a usufructuary mortgage. I am unable to accept the contention. Six years after the original deed, this document was executed and consequently the decision in *Sukari Datta v. Ainuddy* (1) has no application to this case. The two transactions must be deemed to be independent of each other and, therefore, the Subordinate Judge is wrong in holding that until redemption, the amounts due under the lease deed, Exhibit A, ought to be taken into account. Moreover, when the plaintiff applied after the mortgage decree that the amounts due to him as rent should be credited towards the amount of the mortgage-decree, the defendant objected and said that he was only a lessee. The Court executing the decree upheld the contention and directed the plaintiff to file a separate suit for the amount due under Exhibit A. This decision is binding upon the parties and it is not open now to the defendant to plead that the plaintiff should have appealed against that decision of the executing Court. The decisions quoted by the Subordinate Judge related to a case of usufructuary mortgage and have no bearing on the construction of these two documents.

It is not disputed before me that if the defendant is regarded as a lessee, the assign-

ment of the amount of rent due from him will not be obnoxious to section 6 of the Transfer of Property Act. The rent is undoubtedly a debt and it is included in the definition of the term "choses in action" and consequently there can be no objection to the assignment of the amount due under Exhibit A. The decision in *Kocharla Seetamma v. Pillala Venkataramanayya* (2), relied upon by the Subordinate Judge, related to the amount of mesne profits assigned. The definition of the term 'mesne profits' pre-supposes that the person liable to pay it, is a trespasser and consequently it being a claim in tort, is not assignable under section 6 of the Transfer of Property Act.

For the reasons, I cannot uphold the decree of the Subordinate Judge. I reverse his decision and send the case back to him for ascertaining the amount due to the plaintiff and to pass a fresh decree. Costs will abide the result.

Appeal allowed; Case sent back.

(2) 21 Ind. Cas. 387; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918; 38 M. 303.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 1 OF 1915.

September 10, 1915.

Present:—Sir Henry Drake-Brockman, Kt., J. C.

ALI MOHMAD—PLAINTIFF—APPLICANT
versus

THE GREAT INDIAN PENINSULA
RAILWAY COMPANY—DEFENDANT—
RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 30, 31, 115—Railway Company, goods consigned to—Non-delivery—Suit for compensation—Limitation—Cause of action—Common carrier, liability of—Special contract, effect of.
The plaintiff sued the Great Indian Peninsula Railway Company on the 27th April 1914 for compensation in respect of a consignment of grease booked on the 3rd January 1913 from Belanganj (Agra) to Nagpur at owner's risk. The plaintiff alleged that the cause of action arose on or before the 26th January 1913 and that the Company was liable for non-delivery of the consignment, inasmuch as its employees had been guilty of wilful neglect not covered by the risk-note taken from the consignor under sub-section (2) (b) of section 72 of the Indian Railways Act, 1890. The Company pleaded that the suit was barred under Article 21 of the

(1) 6 Ind. Cas. 336; 12 C. L. J. 620; 14 C. W. N. 1001.

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Limitation Act and that the risk-note protected it from liability:

Held, that Article 31 of Schedule I to the Limitation Act, 1908, and not Article 30 or Article 115, applied to such a suit. [p. 476, col. 1.]

Held, further, that the time for delivery must be a reasonable time after the goods were made over to the Company. [p. 476, col. 1.]

Semle:—A common carrier by entering into a special contract limiting his liability does not cease to fill that character. [p. 476, col. 1.]

Civil revision against the order of the Judge, Small Cause Court, Nagpur, dated the 26th September 1914.

Mr. V. Bose, for the Applicant.

Mr. P. Lobo, for the Respondent.

JUDGMENT.—The applicant for revision sued the Great Indian Peninsula Railway Company on the 27th April 1914 for compensation in respect of a consignment of grease booked on the 3rd January 1913 from Belanganj (Agra) to Nagpur at owner's risk. The plaint alleged that the cause of action arose on or before the 26th January 1913 and that the Company was liable for non-delivery of the consignment, inasmuch as its employees had been guilty of wilful neglect not covered by the risk-note taken from the consignor under sub-section (2) (b), section 72, of the Indian Railways Act, 1890. The plaintiff admitted having been offered 31 tins, but pleaded that of these 28 contained castor-oil while three containing grease, were not part of the consignment in question.

The Company pleaded that the suit was barred under Article 31 of the Limitation Schedule and that the risk-note protected it from liability. It was further alleged for the defence that 24 out of the 31 tins offered to the plaintiff contained grease. As to the remaining 7, the written statement is not clear, but the suggestion seems to be that they too formed part of the consignment, the Company having accepted the tins as "said to contain grease."

The following issues were framed on the written pleadings, no oral statements by the parties or their Pleaders being recorded:—

- (1) Is the present claim time-barred?
- (2) Whether the plaintiff has purchased the goods consigned as alleged by him?
- (3) Whether the 31 tins consigned contained grease and whether the tins were shown

to and accepted as such by the defendant's servants at Belanganj?

(4) Does the Railway Receipt passed to the consignor, contain the words "said to contain grease?" If so, whether these words absolve the defendant Company from liability to the plaintiff?

(5) Does the fact of the original consignor having executed a risk-note in Form B absolutely absolve the defendant from all liability as carrier?

(6) Did the defendant wrongfully refuse to accept delivery of 31 tins out of which only three contained grease?

The parties were not asked to adduce any oral evidence. Arguments were heard on the 1st and 5th issues only and the suit was then dismissed, the Judge holding the claim to be time-barred under Article 31 of the Limitation Schedule and the Company to be free from liability by virtue of the risk-note. The document thus relied on, was not produced in the Small Cause Court, but has been put in here: it is admittedly not in the form now current, which will be found reproduced on page 181, Part I, Gazette of India, 1907, in Notification No. 1851, dated the 27th February 1907.

It is contended here "on the plaintiff's behalf that Article 115, not Article 31, of the Limitation Schedule applies to the facts alleged by him. The former relates to suits "for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for," and the argument for the applicant is that by reason of the risk-note, the defendant Company ceased to be a common carrier.

Authority for the applicant's contention exists in *British India Steam Navigation Company v. Hajee Mahomed Esack & Co.* (1), *Kalu Ram Maigraj v. Madras Railway Company* (2), *Mohansing Chawan v. Conder* (3) and *Danmull v. British India Steam Navigation Company* (4). But the Madras and Calcutta decisions were dissented from in *Great Indian Peninsula Railway Company*

(1) 3 M. 107.

(2) 3 M. 240.

(3) 7 B. 478.

(4) 12 C. 477.

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v. *Raisett Chandmull* (5), and subsequently to all these, Article 31 of the Schedule in the Limitation Act of 1877 was amended by the Carriers Act, 1899, which added thereto the words "non-delivery of, or" next before the word 'delay' and reduced the period of limitation from two years to one year. Since that amendment, it has been held by Fulton and Starling, JJ., in *Haji Ajam Goolam Hoosein v. Bombay and Persia Steam Navigation Company* (6) that Article 31, not Article 115, applies to a suit against a carrier for compensation for non-delivery of goods. This decision was followed by a Full Bench of the Punjab Chief Court in *Moti Ram v. East Indian Railway Company* (7). A similar view was taken in *Indian General Navigation and Railway Company v. Nanda Lal Banik* (8) and in *Great Indian Peninsula Railway Company v. Ganpat Rai* (9).

The theory that a common carrier ceases to fill that character if he enters into a special contract limiting his liability, is not supported by any authority. Both the Carriers Act, 1865, and the Indian Railways Act, 1890, expressly contemplate such limitations, and in neither do I find any indication that making a special contract involves the change of status contended for. Moreover, the wording of Article 31, Limitation Schedule, is perfectly general and I can see no reason why its application should be restricted to persons who carry in the course of business as 'common' carriers. I would also observe that the definition of a "common carrier" in section 2 of the Carriers Act, 1865, is framed without reference to the extent of his liability.

The plaintiff's case, as put in the Small Cause Court, is clearly one of non-delivery in respect of the entire consignment sent from Belanganj. There was no suggestion by either side that the 31 tins or any of them were lost. The District Traffic Manager's letter of the 5th May 1913, to which I am referred by the applicant's Counsel, speaks of a 'shortage' extending to 7 tins and insists that 24 tins reached Nagpur and should be taken over by the

consignee: it contains nothing to indicate what had happened to the 7 tins not at Nagpur. In these circumstances, there is no room for the plea, now taken for the first time, that the claim falls under Article 30 of the Limitation Schedule.

It was urged finally that if Article 31 is to be applied, the case should be remanded for a finding as to when the consignment ought to have been delivered at Nagpur. In my opinion, no useful purpose could be served by a remand. The plaintiff himself described his cause of action as having arisen on the 26th January 1913, and it is certain that 23 days is an ample time for the transit between Belanganj and Nagpur. The expression "when the goods ought to be delivered" in the said Article is identical with that used in Article 51, and there being no usage or time fixed, I think the time for delivery must be a reasonable time after the goods were made over to the Company at Agra: cf *Boddonath Shah v. Lalunissa Bibee* (10). The plaintiff allowed three months over and above one year from the 26th January 1913 to elapse before he instituted his suit.

Holding that Article 31 of the Limitation Schedule was rightly applied to the facts alleged by the plaintiff, I dismiss this application with costs. Rs. 15 are allowed as Legal Practitioner's fee in this Court.

Application dismissed.

(10) 7 W. R. 164.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 598 OF 1914.

May 13, 1915.

Present:—Mr. Justice Shah Din and
Mr. Justice LeRossignol.

KISHEN SINGH—DEFENDANT—APPELLANT
versus
BHAGWAN DAS AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

*Caste Disabilities Removal Act (XXI of 1850),
object of—Mortgage by Hindu father—Suit by minor
son for declaration that it shall not affect his rights—
Son meanwhile becoming Muhammadan—Suit, if
maintainable—Alienation for immoral purposes—
Burden of proof.*

(5) 19 B. 165.

(6) 26 B. 562; 4 Bom. L. R. 447.

(7) 104 P. R. 1906; 2 P. L. R. 1907; 30 P. W. R. 1907.

(8) 3 Ind. Cts. 469; 13 C. W. N. 851.

(9) 10 Ind. Cas. 122; 33 A. 544; 8 A. L. J. 543.

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Caste Disabilities Removal Act of 1850 secures to individuals the same right in property after apostasy as they enjoyed before apostasy. Therefore, the right of a minor son to sue for a declaration that a certain mortgage-deed executed by his father should not affect his rights as member of the joint Hindu family after the death of his father is not taken away by the fact of the son having embraced Islam. [p. 477, cols. 1 & 2.]

Where it is shown that an alienor at the time of a mortgage executed by him was living a licentious life beyond his means, was indulging in drinking, prostitution and debauchery and was without any business or occupation on which the money might legitimately have been spent, it is unnecessary to prove that each item of the consideration money was spent on immoral purposes. [p. 477, col. 2.]

Ram Nath v. Bulagi Ram, 17 Ind. Cns. 735; 50 P. R. 1913; 69 P. L. R. 1913; 15 P. W. R. 1913, followed.

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 7th February 1914.

Messrs. *Dhanraj Shah* and *Manohar Lal*, for the Appellant.

Chaudhri Nabi Bakhsh, for the Respondents.

JUDGMENT.—This is a suit by a minor for a declaration that the mortgage-deed executed on the 21st of April 1910 by his father shall not affect his rights as a member of the joint Hindu family after the death of his father. The mortgagor's name is Jagan Nath, but he has recently been converted from Hinduism to the Muhammadan faith and has taken with him into the fold of Islam his minor son, the plaintiff.

The first Court dismissed the plaintiff's suit with costs, but the learned Divisional Judge found that of the consideration money of the mortgage-deed, namely Rs. 3,000, only Rs. 545 were untainted by immorality, and he decreed plaintiff's relief subject to the condition that he should pay Rs. 545 before assuming possession.

In second appeal before us, the first contention raised is that inasmuch as the plaintiff has become an apostate from Hinduism, he cannot maintain the present suit under the cloak of Hindu Law. This same argument was advanced before the Court below, by which it was rejected on the ground that the plaintiff's rights as a Hindu are secured to him even after apostasy by Act XXI of 1850. We have consulted that Act and see no reason for differing from the conclusion of the learned Divisional Judge. It appears to us to be a clear object of that Act to

secure after apostasy to individuals the same rights in property as they enjoyed before apostasy. This first contention is overruled.

It was next pointed out to us that of the consideration for the mortgage, Rs. 2,600 represented antecedent debts, whilst Rs. 400 were cash paid at the time of registration, and it is urged that the exposition of the law by the Divisional Judge in respect of the *onus* lying upon the plaintiff with regard to these two different categories, is incorrect. The learned Counsel for the appellant urges that under the Hindu Law, it is not the duty of the alienee to make reasonable enquiry as to the necessity for the cash taken from him at the time of the execution of the deed. He contends that even if such enquiry is not established, though the mortgage transaction cannot be maintained as a whole, nevertheless, the whole of the mortgage-debt is recoverable from the joint family property, provided the plaintiff is unable to show that the cash taken at the time of execution of the mortgage was taken for an immoral purpose. It is unnecessary for us to labour this point, for the matter was exhaustively considered in *Bahadur Singh v. Des Raj* (1), which concludes the matter.

Next, the learned Counsel took us through the evidence and indicated several items, which need not be detailed here, and urged that they too should have been passed by the Divisional Judge on the ground that they were just items and were untainted with immorality.

Into this question, however, we see no need to enter, for the Divisional Judge has found that the major part of the mortgage-money was spent on immoral objects. He holds that it is unnecessary to prove that each item of the consideration money was spent on immoral purposes, and he holds it sufficiently proved that the alienor at the time of the mortgage was living a licentious life beyond his means, was indulging in drinking, prostitution and debauchery, and was without any business or occupation upon which the money might legitimately have been spent. These are findings of fact and in second appeal, they cannot be challenged. In coming to these findings, he

(1) 53 P. R. 1901 (F. B.); 62 P. L. R. 1901.

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has relied upon *Ram Nath v. Bulaqi Ram* (2).

Appellant's Counsel has attempted to show that there are distinguishing features between the case decided in that judgment and the case now before us. Particularly does he lay stress on the fact that in the reported case, the alienor was engaged in no business. In the case before us, however, it has been found that the alienor, for some considerable time before the execution of the mortgage in dispute, had ceased to pay attention to the business he had inherited from his father. Consequently, the cases are for all practical purposes parallel. The findings of the learned Divisional Judge seem to us to be well considered and in any case they cannot be challenged in second appeal. No other point has been raised before us, and we dismiss the appeal, but in view of the fact that the suit is brought in collusion with the alienor, plaintiff's father, we leave the parties to bear their own costs in this appeal.

Appeal dismissed.

(2) 17 Ind. Cas. 735; 50 P. R. 1913; 69 P. L. R. 1913; 15 P. W. R. 1913.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 59
OF 1914.

September 13, 1915.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Napier.

UPADHAYAYULU YEGNANARAYANA

— PLAINTIFF—APPELLANT

versus

KOTTALANKA MAKAYYA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Decree—Decree prepared at variance with judgment
—*Remedy*—Procedure—Amendment—Appellate Court,
exercise of power of amendment by.

Where a mortgage decree is wrongly drafted as a money-decree, the proper course for an aggrieved party is to apply to the Court which passed the decree for its amendment in order to bring it in conformity with the judgment. An Appellate Court would not exercise that power when it would be inconvenient to do so. [p. 478, col. 2; p. 479, col. 1.]

Aubhoyessury Debee v. Gouri Sunkar Panday, 22 C. 859, referred to.

Civil Miscellaneous Second Appeal against the decree of the District Court of Godavari at Rajahmundry, in Appeal Suit No. 150 of 1913, preferred against the order of the Court of the Additional District Munsif of Amalapuram, in Execution Petition No. 36 of 1913, in Original Suit No. 8 of 1911.

Mr. M. Patanjali Sastri, for Mr. P. Narayanamurthi, for the Appellant.

Mr. V. Ramesam, for the Respondents.

JUDGMENT.—The decree-holder has misunderstood both his rights and remedies. The claim was for the assessment paid by the plaintiff, which ought to have been paid by the defendants. In the plaint, the prayer is that the properties in respect of which the revenue was paid, should be held liable.

We understand this prayer as claiming a mortgage-decree in effect. The decretal portion of the judgment gives a mortgage-decree and fixes a date within which the money should be paid. But in drafting the decree, a mistake was made by giving the decree-holder only a charge on the property. The decree-holder, instead of applying to have the decree amended, moved the Court to attach the property treating the decree in his favour as a money-decree. The District Munsif granted the prayer. In appeal, the District Judge, relying on *Aubhoyessury Debee v. Gouri Sunkar Panday* (1), held that the plaintiff's only remedy was to sue again to enforce the charge. Apparently, it was not argued before him that the decree was in effect a mortgage-decree. It is conceded by the learned Vakil for the respondents before us that it is open to a Court executing the decree to construe it in the light of the plaint and the judgment. In this view, we think that it was intended to give plaintiff a decree enabling him to bring the property to sale. The proper course was to have applied to the Court which passed the decree to bring the decree into conformity with the judgment. It was argued that we should allow this amendment ourselves. Supposing that we have the power, seeing that the decree was treated by the appellant as a money-decree and also having regard to the fact that the

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application for sale should be preceded by an application for a decree absolute, we do not think we can comply with the request of the appellant's Vakil. We feel no doubt that the Court of first instance will direct the amendment, which we think ought to be made in the decree. But as the plaintiff has misconceived his remedy, we must dismiss the Civil Miscellaneous Second Appeal with costs; each party will bear his costs in the two Courts below.

Appeal dismissed.

The service of the ejectment notice was unsatisfactory and incomplete.

I would set aside the proceedings in the latter case, and order that a fresh summons be issued and the case decided *de novo*.

Parties before me to bear their own costs.

HOLMS, S. M.—I agree. The result of the irregularity in the service of notice is that there has been substantial injustice to applicant who should have an opportunity of paying up the arrears.

Application allowed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 18 of 1913-1914.

OF MUZAFFARNAGAR DISTRICT.

March 30, 1915.

Present:—Mr. Holmes, S. M., and
Mr. Campbell, J. M.

KANAHIA—DEPENDANT—APPLICANT

versus

DURGA PRASAD—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, r. 19—Ejectment—Insufficient notice—Ex parte decree—Examination of process-server, necessity of—Material irregularity—Revision.

Before an *ex parte* decree can be passed, the process-server should be examined on oath as laid down under Order V, rule 19 of the Civil Procedure Code.

If an order of ejectment has been made in spite of insufficient service of notice under section 59 of the Tenancy Act, it is such a material irregularity as to justify interference in revision by the Board.

Application for revision of the order of the Collector of Muzaffarnagar, dated the 9th June 1914, in a case of execution of decree.

JUDGMENT.

CAMPBELL, J. M.—(March 17th, 1915.)—I think the Board are justified in interfering in this case on the ground that a material irregularity has been committed by insufficient service of summons on applicant.

The service in the arrears of rent case was fairly complete; but even then the *chaprasi* should have been examined on oath before an *ex parte* decree was given (rule 19, Order V, Civil Procedure Code).

SIND JUDICIAL COMMISSIONER'S
COURT.

SECOND CIVIL APPEAL No. 29 of 1913.

May 10, 1915.

Present:—Mr. Pratt, J. C., and
Mr. Crouch, A. J. C.

VISHINDAS WADHURAM AND ANOTHER—

APPELLANTS

versus

HOTOMAL DITOMAL AND OTHERS—

RESPONDENTS.

Limitation Act (IX of 1908), Sec. 1, Art. 75—Instalment Bond—Test of limitation—Liberty to creditor to sue on failure to pay at stipulated time—Time from when runs.

In a suit on an instalment bond on default of payment of an instalment the test whether or not the period of limitation begins to run is—has the payee or obligee a right to file a suit forthwith for the principal remaining due if he so chooses? [p. 480, col. 2.]

Where an agreement provided for payment of the principal within 12 months with interest payable every month or in case of failure, two months' interest together; and permitted the creditor, in default of payment of the principal on the stipulated date or of monthly interest or two months' interest together, to file a suit immediately for the recovery of the whole amount:

Held, that the limitation began to run from the date of the default in the payment of two months' interest together. [p. 480, col. 1.]

Jethanand Topandas v. Lalamal Sitalmal, 1 S. L. R. 252 at p. 255; Kimatrai Kishiram v. Wadero Sher Mahomed, Khan, 25 Ind. Cas. 938; 8 S. L. R. 63; Amolak Chand v. Baij Nath, 20 Ind. Cas. 933; 11 A. L. J. 664; 35 A. 455, referred to.

Ajudhia v. Kunjal, 30 A. 123; A. W. N. (1908) 36; 5 A. L. J. 72; Maharaja of Benares v. Nand Ram, 20 A. 431; A. W. N. (1907) 139; 4 A. L. J. 336; Shankar Prasad v. Jalpa Prasad, 16 A. 371; A. W. N. (1894) 115; Kishiram v. Pandu, 27 B. 1; 4 Bom. L. R. 688, discussed.

Second appeal against the decision of the District Judge, Sukkur.

VISHINDAS WADHURAM V. BOTOMAL DITOMAL.

Mr. Hindaram Mewaram, for the Appellants.

Mr. Tahiram Maniram, for Respondent No. 3.

JUDGMENT.

CROUCH, A. J. C.—In the suit out of which this second appeal has arisen, plaintiff sued to recover the principal and interest due on a bond, dated the 6th December 1908. The suit was filed on the 6th December 1912. Both the lower Courts have held the suit to be time-barred and the only issue raised in this appeal is whether the suit was so barred.

The portions of the agreement with which we are now concerned are the following:—

"The agreement is that within 12 months from this day, we shall repay the principal amount to the lender. Interest on the above sum is fixed at the rate of 8 annas per cent. per mensem from to-day until repayment, which we shall continue paying every month to the creditor. If we fail to pay interest in any month, then we shall pay the creditor two months' interest together. Should we fail to pay the principal sum on due date as stipulated above, or monthly interest, or two months' interest together to the creditor, then in that case the creditor aforesaid is at liberty to file a suit immediately and to recover the whole of the above amount with interest at the rate of 1 per cent. per mensem until satisfaction."

No interest was ever paid on the bond, and accordingly the creditor was at liberty to file a suit for the principal and interest on the 6th February 1909.

The document is not drafted in technical form, but a skilled conveyancer could embody its terms either in the form of a single bond (*simplex obligatio*) specifying the 6th February 1909 as the day for payment (in certain events), or in the form of a bond subject to a condition, or in the form of a contract to do a certain thing upon the happening of a specified contingency. But, whatever technical form might be given to the document, the practical result would, in every case, (in the events that happened) be the same—the principal and interest would become due and payable and the

creditor would have a right of suit on the 6th February 1909. And, accordingly, whether we apply Article 65, or Article 66 or Article 68, the date from which the period of limitation began to run, was the 6th February 1909. As the suit was not filed until December 1912, it is *prima facie* time-barred.

In dealing with these Articles of the Limitation Act, it is well to remember that they are not separate, arbitrary rules, but are merely concrete examples of two general rules—(1) a plaintiff has three years, and only three years, within which he can file a suit to recover a simple debt; (2) the period commences from the date on which he has the right and is in a position to file a suit.

Article 75 is only another illustration to the general rules. In case of bonds and promissory notes payable by instalments, which provide that, if default be made in payment of one instalment, the whole shall be due, the period of limitation runs from the time when the first default is made, unless when the payee or obligee waives the benefit of the provision and then, when fresh default is made in respect of such waiver. Obviously, if there has been, in the legal sense, a waiver of the right to immediate payment, the right to file a suit does not exist and limitation cannot run.

It matters not by what form of words the right to immediate payment of the principal in default of payment of an instalment, or of interest, is conferred. Every creditor has an option to file a suit or not to file a suit and within certain limits to select his own time for filing it. The test whether or not the period of limitation begins to run is—has the payee or obligee a right to file a suit forthwith for the principal remaining due if he so chooses? The words used in the bond in suit, give to the plaintiff the creditor's ordinary option.

It would, of course, be quite easy to draw a bond in such form that the creditor would not get an immediate right to sue for the principal unless he elected to do so; thus: "In the event of interest being in arrears for two months, the creditor shall be at liberty to serve on the debtor a written notice calling on the debtor to forthwith pay the whole principal and interest then due

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and on such notice being served, the whole principal and interest shall become due."

But Mr. Hirdaram relies on certain reported cases which I will now discuss. In *Ajudhia v. Kunjal* (1), the bond was one payable by instalments with a provision that in default of the payment of any one instalment "it would be within the power of the creditor" to sue forthwith for the whole amount due under the bond. The suit was not for the whole principal, but merely for the instalments due up to date of suit. The Court relying on *Maharaja of Benares v. Nand Ram* (2) and *Shankar Prasad v. Jalpa Prasad* (3) held the suit not time-barred. The case came clearly within Article 75 and the question was whether or not the payee had waived the provision that the whole amount should become due in default of payment of an instalment. The learned Judges did not specifically find that there had been waiver, and the two decisions upon which they relied had reference to sets of facts entirely different from those with which the learned Judges were dealing.

In *Maharaja of Benares v. Nand Ram* (2), there was a bond payable by instalments, but the creditor had accepted payment of instalments after their due dates, and it was held that he had impliedly waived the provision under which the whole principal became due in default. A better foundation for such a ruling is suggested by Sir Lawrence Jenkins, C.J., in *Kashiram v. Pandu* (4).

Shankar Prasad's case (3) was one of construction of a decree. The passage relied on is as follows:—

"In the present case, it appears to us that the intention was that the decree-holder on the happening of any default might, if he wished, execute the decree for all the decretal money then unpaid, but that it was not the intention that on the happening of a default, the decree-holder should be bound to execute the decree once and for all. We consequently hold" etc.

Now, as no decree-holder is bound to execute his decree I am quite unable to

follow the reasoning of the learned Judge. I prefer to follow the rule of construction laid down in *Hemp v. Gar* and [cited in *Jethanand Topandas v. Lalama Sitalmal* (5)]. If the judgment-creditor has the unconditional right to go to the execution department and take out a warrant, then it must be presumed that the decree has directed payment to be made within the meaning of Article 182 (7).

But, as pointed out by Sir Lawrence Jenkins in *Kashiram's* case (4), a decree can be so framed as to make it clear that a judgment-creditor can take out execution for the whole balance in default only if he makes a positive election. That is to say, the order for immediate payment in default may be made subject to a condition precedent, and unless this condition is fulfilled, limitation will not begin to run.

In *Narain Babu v. Gouri Pershad Bias* (6), the facts were very similar to those of the present case. The Court held in a three lined judgment that Article 65 applied, and that the date specified for payment was the date fixed for payment of the principal in the event of the interest being regularly paid. The point that in the case of such bonds there are alternative dates specified for payment, was not taken or considered. The decision can only be justified on the presumption that the Court was of opinion that, on the construction of the bond, there was no implied covenant to repay the whole principal on failure to pay interest as agreed.

I would dismiss the appeal with costs.

PRATT, J. C.—I concur. Jenkins, C. J., in *Kashiram v. Pandu* (4) pointed out that instalment decrees should be so drawn up as to make it clear that the rights consequent in default depend upon a positive election by those in whose interests they are intended to be created. A similar provision could be made by appropriate words in bonds creating an obligation to pay successive sums of money. If the stipulation as to default does not come into operation unless and until the obligee elects to enforce it, then there is, as pointed out in *himatrai Kashiram v. Wadero Sher Mahomed Khan* (7), an alternative contract. But here there is no

(1) 30 A. 123; A. W. N. (1903) 36; 5 A. L. J. 72.

(2) 29 A. 431; A. W. N. (1907) 139; 4 A. L. J. 336.

(3) 16 A. 371; A. W. N. (1894) 115.

(4) 27 B. 1 at p. 12; 4 Bom. L. R. 688.

(5) 1 S. L. R. 252 at p. 255.

(6) 5 C. 21.

(7) 25 Ind. Cas. 938; 8 S. L. R. 63.

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alternative contract for the phrase "is at liberty to file a suit for the whole amount" does not import an election. It merely implies that the whole amount is payable. It has been said that there is no distinction between the phrases "may be sued for" and "shall become due."

The case of *Ajndhia v. Kunjal* (1) was dissented from by this Court in the case already cited and does not seem to have been followed in subsequent cases of *Amolak Chand v. Baij Nath* (8).

Appeal dismissed.

(8) 20 Ind. Cas. 933; 35 A. 455; 11 A. L. J. 664.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 42 OF 1913-1914

OF BASTI DISTRICT.

March 7, 1915.

Present:—Mr. Holms, S. M., and

Mr. Campbell, J. M.

NAGESHAR PRASAD—DEFENDANT—

APPELLANT

versus

MOHAN—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 14—Letting value, meaning of.

For the purposes of section 14 of the Tenancy Act, the letting value to be considered is the letting value at the time of the exchange, and not at the time of the suit for ejectment.

Second appeal from the order of the Commissioner of Gorakhpur Division, dated the 25th June 1914, reversing that of the Assistant Collector of Basti District, in a case of ejectment.

JUDGMENT.

CAMPBELL, J. M.—(January 22nd, 1915)—I think the Commissioner's order is a perfectly correct one. He has found that appellant and his brother cultivated 5 *bighas* 1 *biswa* 8 *dhurs* of land rented at Rs. 16-6 in 1308 and 1309 *Fasli* and then exchanged it for 5 *bighas* 1 *biswa* 14 *dhurs* of land rented at Rs. 15-12 in 1310 *Fasli*, most of the latter land being still in their possession. He has, therefore, held that they have acquired occupancy rights in the land which they have held continuously since 1310 *Fasli*. In this I think he was perfectly right. It is clear also that the land exchanged in 1310 *Fasli* was of approximately the same letting value as the land cultivated in 1309 *Fasli*.

Appellant's argument that the *present* letting value of the land should be compared with the rent of 1309 *Fasli*, is in my opinion an absurd one. What has to be considered is the letting value at the time of the exchange.

I uphold the Commissioner's order and dismiss this appeal with costs.

This case raises an interesting and important point. I should be glad to know if you agree with me.

HOLMS, S. M.—I held this back to find if the point had been dealt with in any previous decisions of the Board. It must have been, but none can be traced. I agree with my colleague, and have held so as the Commissioner of Meerut.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 57 OF 1914.

September 24, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

SULTAN ADI RAJA AHMAD ALI,

RAJA OF ARAKAL—DEFENDANT No. 2—

APPELLANT

versus

CHURIA KUNHI KANNAN AND OTHERS—
PLAINTIFF AND DEFENDANTS NOS. 3 TO 7 AND 9 TO
18—RESPONDENTS.

Malabar Law—Tarwad property—Karnavan—Junior members, right of, to pledge tarwad property—Necessity Motive—Lender, right of, to proceed against tarwad property.

The 1st and 2nd defendants, who were members of a *tarwad*, agreed with the plaintiff to pay a certain remuneration for assisting them in a litigation concerning the *tarwad* property. The 1st defendant who thereafter succeeded to the management of the estate, compromised the suit. The plaintiff was not consulted with regard to the compromise, nor was the 2nd defendant a consenting party. The plaintiff, however, was informed not to do anything in connection with the suit. The suit was consequently dismissed. The plaintiff sued for the remuneration stipulated:

Held, that, in the absence of proof that the defendants acted in the best interests of the family and that there was necessity for promising a large remuneration, the defendants had no authority to bind the family by the agreement. [p. 484, col. 2; p. 486, col. 1.]

Per Wallis, C. J.—Though the *karnavan* has the exclusive right of management he does not hold only for himself, but for himself and all the other members of the *tarwad* and, therefore, to some

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extent in a fiduciary capacity and it is competent to the members next in seniority not only to sue for his removal but also to sue for a declaration that an alienation made by him is not binding on the *tarwad*. [p. 483, col. 1.]

Per *Seshagiri Aiyar, J.*—In a Malabar *tarwad*, unlike in a joint Hindu family, there is no right to proceed against the share of the alienating member and a member of the *tarwad* is not competent to pledge the credit of the others. [p. 485, col. 2.]

Where the *tarwad* is in its normal state, the *karnavan* alone is competent to pledge the *tarwad* credit but where the acts of the *karnavan* are such as to seriously endanger *tarwad* property the junior members have power to act on behalf of the *tarwad*. [p. 485, col. 2.]

If it is proved in a case where the junior members have pledged the *tarwad* property that the money was advanced and utilized for protecting the property from malversation or mismanagement, the lender has a claim on the *tarwad* for the loan. [p. 486 col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of North Malabar, in Original Suit No. 4 of 1913.

Mr. J. L. Rozario, for the Appellant.

Mr. C. Madhavan Nair, for the Respondents.

JUDGMENT.

WALLIS, C. J.—The only question in the case is, whether the agreement sued on is binding on the *pandaram* or family of the defendants. The question of ratification did not arise in the pleadings and the Subordinate Judge was not justified in making that one of the grounds of his decision. At the time the agreement was entered into, the defendants were in the position of junior members of a *tarwad*, who ordinarily have no power to enter into contracts binding on the *tarwad*. But though the *karnavan* has the exclusive right of management, he does not, it is now settled, hold only for himself, but for himself and all the other members of the *tarwad* and, therefore, to some extent in a fiduciary capacity and it is competent, at any rate, to the members next in seniority not only to sue for his removal, but also to sue for a declaration that an alienation made by him is not binding on the *tarwad*.

So, too, if the *karnavan* for the time being was submitting to an infringement by Government of the *tarwad's* right of property, it was in my opinion competent for the defendants Nos. 1 to 3 as the next senior members of the *tarwad* to institute a suit, such as Original Suit No. 17 of 1903, in the District Court of

North Malabar, the plaint in which is Exhibit U. Assuming for the moment, that the circumstances justified the institution of the suit, and assuming, though no express authority has been cited for the proposition, that as incidental to the right to institute the suit, the defendants Nos. 1 to 3 must be taken to have had authority to pledge the credit of the *tarwad* for the purpose of raising the sums necessary to carry on the litigation, it must, I think, be shown in any case that it was necessary to pledge the credit of the *tarwad* in the way in which it was pledged in this particular case, and I am not satisfied that the plaintiff has shown this with regard to Exhibit A, the document sued on. Exhibit A recites that the plaintiff had been *Dewan* or Manager under *karars* or agreements with two previous *karnavans* and had become entitled under those *karars* to special remuneration in the event of his getting back the Laccadive Islands, that the then *karnavan* was entering into arrangements to relinquish the islands to Government and to allow the Revenue Settlement to be introduced into the lands of the family—the *inam* land—contrary to the treaty with the East India Company of the year 1796. It is, therefore, stipulated that if the plaintiff succeeds in getting back the Laccadive Islands, he is to be paid an amount equal to 25 per cent. of the average annual gross income of the islands, and if he succeeds in getting the Settlement operations in the *inam* land cancelled, he is to receive from the family a remuneration of Rs. 8,000 and the necessary proceedings are to be taken at the cost of the defendants. The plaintiff's case is that the defendants were bound to go on with the suit to the end to give him a chance of earning this Rs. 8,000 and that they broke this contract with him by compromising the case and thereby entitled him to sue on a *quantum meruit*. *Prickett v. Badger* (1), *Inchbald v. Western Cilyerry Coffee Plantation Company* (2). These were not cases in which the defendants impliedly bound themselves, according to the case of the plaintiff, to institute, and go on with, a law suit in order to give the plaintiff

(1) 1 C. B. (N. S.) 296; 76 L. J. C. P. 33; 3 Jur. (N. S.) 66; 5 W. R. 117; 140 E. R. 123; 28 L. T. (O. S.) 65; 107 R. R. 668.

(2) 17 C. B. (N. S.) 733; 34 L. J. C. P. 15; 10 Jur. (N. S.) 128; 11 L. T. (N. S.) 34; 13 W. R. 9; 144 E. R. 293; 141 R. R. 603.

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a chance of earning his remuneration, even if it were otherwise in the interests of the parties to come to a settlement, and the legality of such an agreement may possibly be open to question. Apart altogether from this I am of opinion that the plaintiff has failed to show that the agreement was such as was binding on the family. The terms which were accepted by the 1st defendant after the institution of the suit were, as found by the Subordinate Judge, the same as those which had been accepted by his predecessor who had died before they could be carried out. It is not shown that the settlement was one which it was desirable to question in the interests of the family and still less is it shown that it was necessary and desirable in the interests of the family to enter into an agreement of this kind stipulating for exorbitant remuneration to be paid to a so-called law agent—unlicensed practitioner—in addition to the costs which would be otherwise incurred in connection with the suit. Assuming that the junior members of a *tarwad* have authority to bind the *tarwad* for the necessary costs of litigation of this nature, I think they had no authority to bind the family by the agreement Exhibit A. Relief is sought against the representative of the 1st defendant who is dead and against the second defendant personally. I would, therefore, reverse the decree and dismiss the suit with costs throughout. The memorandum of objections is dismissed with costs.

SESHAGIRI AITAR, J.—I entirely agree with my Lord.

The suit is for the recovery of the remuneration promised by the 1st and 2nd defendants to the plaintiff for assisting them in a litigation. The plaintiff was for some time the *Dewan* of the Arakal Rajah of Cannanore. Negotiations were proceeding between the Rajah and the Government of Madras regarding the Laccadive Islands and the introduction of Revenue Settlement in the estate owned by the *swarupam*. Some of the junior members of the family thought that the contemplated agreement with the Government would be detrimental to the interests of the *swarupam*. The senior *anandaravan*, the 1st defendant, and the present 2nd defendant who were entitled to succeed to the management of the *Raj* successively after the death of the then head of the *swarupam*, resolved upon

instituting a suit against the Government for a declaration that the contemplated Settlement operations were illegal. They sought the help of the plaintiff, who was once a Deputy Collector in the British service and who was for some time the *Dewan* of the Rajah. The plaintiff agreed to assist them on certain conditions. Exhibit A was executed on the 3rd of May 1906 to the plaintiff fixing the remuneration at Rs. 8,000, "if his attempts become fruitful." Original Suit No. 17 of 1906 was instituted in the District Court of Tellicherry in October 1906 (Exhibit U), "for a declaration that the introduction of the *ryotwari* Revenue Settlement into the *karar* territory vested permanently in plaintiffs' house under the treaty of 1797 is illegal, unlawful and unauthorised and of no legal force and effect and consequently invalid and inoperative." The 1st defendant advanced the necessary funds for carrying on the litigation till June 1908. Meanwhile, the then head of the family died; and the present 1st defendant succeeded to the management of the estate. In November 1908 a compromise was entered into by the 1st defendant with the Government, and she retired from the suit.

The plaintiff was not consulted with regard to this compromise, nor was the 2nd defendant a consenting party to it; when the suit came on for final hearing the plaintiff did not appear, as he was informed by the 1st defendant on the 2nd of December 1908 that he "need not do anything in connection with the suit No. 17 of 1906 now pending in the District Court of Tellicherry" (Exhibit K-1). The suit was dismissed. The attempt of the 2nd defendant to resuscitate it in the District Court proved unsuccessful. An appeal was preferred to the High Court which was also rejected.

On these facts, the plaintiff claims that as the performance of his part of the contract was rendered impossible by the conduct of the 1st defendant, he is entitled to the full remuneration stipulated in Exhibit A. No personal decree is prayed against the 2nd defendant, as there is no allegation that there was any breach of contract on his part. It is the case for the plaintiff that the 2nd defendant was not expected to provide any funds for the litigation, as he was not then in a position to do so. The 1st defendant died

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after the institution of the suit, and the present 2nd defendant has succeeded to the *Raj*. The relief claimed against him is that he should as the present Manager of the *swarupam* pay the amount claimed from the estate.

The Subordinate Judge gave a decree for Rs. 2,500 on the principle of *quantum meruit*. The 2nd defendant has appealed. There is also a memorandum of objections by the plaintiff. The principal question argued in appeal by Mr. Rozario is, that the contract is not binding on the *swarupam*. Turner, C. J., and Muthusami Aiyar, J., in pointing out the essential difference between the position of the junior members of a joint Hindu family and that of the *anandravans* in a Malabar *tarwad*, say that the *karnavan* has larger powers than the Manager of a Hindu family in the management of the *tarwad* property. There is no doubt that under the Hindu Law as administered in this Presidency, the Manager alone can represent the family in transactions with strangers. In Mayne's Hindu Law edited by Sir C. Sankaran Nair, J., it is stated with reference to *tarwad* property that "it is vested in the head of the family not merely as agent or principal partner but almost as an absolute ruler." The original conception of the rights of the junior members that they have only "rights out of the property and not in it", requires qualification. The decision in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi* (3), lays down that all the members of a *tarwad* have equal interests in the property and that the *karnavan* has no greater beneficial interest in it. In *Moidin Kutti v. Krishnan* (4), Muthusami Aiyar, J., summarises the powers possessed by the junior members of the *tarwad* and characterises them as individual rights. These are certainly not rights of representation. The right to question alienations, to sue to recover property from trespassers, to claim maintenance and to succeed to the *karnavanship* are all personal rights. Mr. Justice Kernan's view in the same case that the *tarwad* is a quasi corporation, does not advance the matter any further.

Mr. Madavan Nair who appeared for the plaintiff suggested that under the general principles of the law of contracts, 1st and 2nd defendants were entitled to represent the *tarwad*, as their object was to avert a danger which threatened the *tarwad*. He contended that the analogy of co-owners of property was more applicable to the members of a *tarwad*. Looking at the transaction as one entered into by two co-owners of property with a view to benefit the entire body of owners, there is no ground for holding that it would bind the others. In Freeman on Co-Tenancy, the rule of law regarding co-owners is thus stated: "As a general rule, no co-tenant has, by virtue of the relation of co-tenancy, any authority to bind his companion in interest by any contract, whether relating to the joint property or otherwise." In another place it is stated: "A pledge of the common property made by one of the co-tenants has no effect on the rights of the others, except to confer on the pledgee the right to retain possession to the extent of the pledger's interest, and no further." In a Malabar *tarwad*, unlike in a joint Hindu family, there can be no right to proceed against the share of the alienating member. It is, therefore, clear that under the law which governs the right of co-owners, any two of them are not competent to pledge the credit of the others.

But the position of the members of a *tarwad* differs in many respects from that of co-tenants. The decided cases already referred to lay down that the *karnavan* is alone competent to represent the *tarwad* in transactions with strangers. I think this rule requires some qualification. When the *tarwad* is in its normal state, the *karnavan* alone is competent to pledge the *tarwad* credit. But where the acts of the *karnavan* are such as to seriously endanger *tarwad* property, it seems to me that it would be legitimate to give the junior members power to act on behalf of the *tarwad*. These members cannot claim their separate shares by partition as in a joint Hindu family. The relationship of the *karnavan* towards the junior members is more like that of a trustee and *cestui que trust* or of guardian and wards. The

(3) 2 M. 328; 5 Ind. Jur. 243.

(4) 10 M. 322.

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decisions have recognised their right to sue to set aside improper alienations. As a corollary to this position, I think they should have the right of reimbursing themselves the expenses rightly incurred by them in protecting *tarwad* property. Outsiders who lend money to *anandravans* for the avowed object of preserving *tarwad* property, run the risk of losing their money if it is found that the purpose of the loan was unnecessary or not beneficial to the *tarwad*. But when it is proved that the money was advanced and utilised for protecting the property from malversation or mismanagement, the lender should have a claim on the *tarwad* for the loan.

But in this case I am not satisfied on the evidence on record that the plaintiff has established his right against the *tarwad*. There was no necessity for promising a large remuneration for a law agent. A recognition of such a right will not be in the interests of the *swarupam*. The payment of authorised legal practitioners and the other expenses incurred in filing and conducting a suit, would stand on a different footing. Further, the plaintiff has not proved that the apprehended danger was of such a character that the intervention of defendants Nos. 1 and 2 was for the benefit of the *swarupam*. Although, therefore, I am not prepared to accept in its entirety the contention put forward by the learned Vakils for the appellant that the contract was beyond the powers of the 1st and 2nd defendants under all circumstances, I do not think that in the present case it has been shown that the defendants acted in the best interests of the *swarupam*.

Another contention of the learned Counsel for the respondent was that as the 1st defendant after becoming the Rajah continued the suit and made remittances, she must be deemed to have ratified the contract as *karnav* and it is, therefore, binding on the *swarupam*. No issue on the question of ratification has been raised and there are no materials for deciding that the 1st defendant, with knowledge of the obligations she was incurring as head of the family, ratified Exhibit A.

In the view that I have taken, the question of *quantum meruit* does not arise.

In the result, the appeal must be allowed and the suit dismissed with costs in both the Courts. The memorandum of objections will also be dismissed with costs.

Appeal allowed; Suit dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 1 OF 1914-1915
OF MEERUT DISTRICT.

April 2, 1915.

Present: Mr. Holms, S. M., and
Mr. Campbell, J. M.
Chaudhri GHANSHIAM SINGH—
PLAINTIFF APPELLANT

versus

MOHAN SINGH—DEFENDANT—
RESPONDENT.

Agra Tenancy Act II of 1901, ss. 11, 34—Tenant holding without consent of landlord—Presumption—Occupancy rights, acquisition of.

A person occupying land shall not be deemed to hold land within the meaning of section 11 of the Tenancy Act until he begins to pay rent therefor and in the absence of very strong evidence the presumption is that a tenant is holding without the consent of the landlord until he begins to pay rent.

Babu Sat Narain Prasad v. Ram Kumar, Selected Decision No. 3 of 1910, followed.

Second appeal from the order of the Commissioner of Meerut Division, dated the 24th July 1914, reversing that of the Assistant Collector of Meerut District, in a case of ejectment.

JUDGMENT.

CAMPBELL, J. M. (March 18th, 1915)—I am unable to agree with the Commissioner in this case. I think that the presumption should be that a tenant is holding without the consent of his landholder until he begins to pay rent, unless he can produce very strong evidence in contradiction of this presumption. In this case there is no such strong rebutting evidence.

Section 34 of the Tenancy Act also seems to me quite clear, that a person occupying land shall not be deemed to hold land within the meaning of section 11 until he begins to pay rent therefor; and that this debars respondent from claiming occupancy rights, as he does not claim to have paid rent for more than 11 years. My reading of the section is supported by *Babu Sat Narain Prasad v. Ram Kumar* (1).

(1) Selected Decision No. 3 of 1910.

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For these reasons I would set aside the order of the Commissioner and restore the order of the Assistant Collector, giving appellant his costs in all Courts.

HOLMS, S. M.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1794 OF 1914.

October 5, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Phillips.

VENKATASUBBIEER AND OTHERS —
DEFENDANTS—APPELLANTS

versus

MUTHUSAMI AIYAR—PLAINTIFF—
RESPONDENT.

Hindu Law—Alienation by widow—Reversioner's consent—Estoppel—Question of legal inference.

Where a presumptive reversioner knowing his position as such consents to an alienation of property by a Hindu female, he is estopped from disputing the validity of the alienation. [p. 488, col. 2.]

Nachiappa Gounden v. Rangasami Gounden, 26 Ind. Cas. 757; 28 M. L. J. 1; (1915) M. W. N. 53; 2 L. W. 69; 17 M. L. T. 87; *Arthanari Gounden v. Ramanasami Gounden*, 20 Ind. Cas. 304; 5 M. L. J. 8; 13 M. L. T. 445; (1913) M. W. N. 418; *Hari Kishan Bhagat v. Kashi Parshad Singh*, 27 Ind. Cas. 674; (1915) M. W. N. 511 at p. 514; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 17 Bom. L. R. 426; 42 C. 576, followed.

Whether on the facts proved, an estoppel can be raised against a reversioner, is purely a question of legal inference and not one of pure fact. [p. 488, col. 1.]

Rajrangi Singh v. Manokarnika Baksh Singh, 30 A. 1; 17 M. L. J. 605; 9 Bom. L. R. 1344; 12 C. W. N. 74; 6 C. L. J. 766; 35 I. A. 1 (P. C.); 3 M. L. T. 1; 5 A. L. J. 1; *Beni Ram v. Kundan Lal*, 21 A. 469 at p. 504; 26 I. A. 58; 3 C. W. N. 502; 1 Bom. L. R. 400; 7 Sar. P. C. J. 523, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Mayavaram, in Appeal Suit No. 852 of 1912, preferred against the decree of the Court of the District Munsif of Shiyali, in Original Suit No. 115 of 1911.

Messrs. L. A. Govindaraghava Aiyar and L. S. Veeraraghava Aiyar, for the Appellants.

Mr. T. R. Venkatarama Sastri, for the Respondent.

JUDGMENT.

PHILLIPS, J.—The suit lands in this case were part of the estate of one Yegnasamy, who

died in 1863. His estate passed to the hands of his mother Subbalu, and in August 1863, she executed an agreement (Exhibit A) by which she gave 3/8ths of the estate to her mother-in-law Chellathammal, reserving 5/8ths for herself. In 1864 Chellathammal purported to sell 1/8th to plaintiff's father (Exhibit VII), 1/8th to Ramanatha Dikshitar (Exhibit VIII), and 1/8th to Subramania Sastri, but it has been found that the transfer was really a gift to the grandsons of her three daughters, i.e., plaintiff, Ramanatha Dikshitar and Subramania Sastri. On 5th June 1871, plaintiff and his father sold 1/8th share to Kuppusawmy Dikshitar (Exhibit I), and on the same day Ramanatha Dikshitar sold his share to the same man (Exhibit II). Subramania Sastri subsequently sold his share in 1909 under Exhibit V. Subbalu did not die until 1911 and now plaintiff sues as reversioner to Yegnasamy to recover his estate. Plaintiff does not claim the share sold by him under Exhibit I, and the only property in dispute in this appeal is the share given by Chellathammal to Ramanatha Dikshitar. Appellants (defendants Nos. 3 to 5 and the legal representatives of the fifth defendant) are the representatives in interest of Kuppusawmy Dikshitar, the vendee of the share under Exhibit II.

2. Plaintiff's claim has been allowed on the ground that the alienation by Subbalu to Chellathammal is not binding on him, as she could only convey her life-interest in the property.

In appeal, it is argued on three main grounds that the alienation is binding on plaintiff, i.e., (1) that plaintiff validated the alienation by giving his consent to it and is thus estopped from disputing it now, (2) that the question is *res judicata*, and (3) that the alienation was merely a family arrangement. Respondent's Vakil wished to argue that the alienation by Subbalu under Exhibit A purported to be an alienation of her woman's estate alone, but as the case had proceeded in both the lower Courts on the assumption that it was an alienation of the absolute interest and as the point was not raised in the pleadings, this question was not allowed to be raised in second appeal.

3. In arguing the appeal, Mr. L. A. Govindaraghava Aiyar who appeared for the first and second appellants, devoted his attention chiefly to the first ground men-

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tioned above. In a recent case before a Full Bench of this Court, *Nachiappa Gounden v. Rangasami Gounden* (1), the question of alienations by a widow and the consent of reversioners thereto was fully considered. After a consideration of the authorities referred to in his judgment, to which we have also been referred, Kumaraswami Sastri, J., deduced the following propositions:—(a) when the alienation is only of a part of the estate, the consent of the next presumptive reversioner is evidence of the necessity or propriety of the alienation, and in the absence of any evidence to the contrary, the Court shall presume that the alienation was proper, (b) the consent of a reversioner will, if given *bona fide* and for consideration, estop and bind the reversioner so consenting, and (c) the assent has a double aspect, not merely raising a presumption, but also raising an estoppel against the person consenting even though he might not have received any consideration or benefit.

These propositions are not seriously disputed by Mr. T. R. Venkatarama Sastri for respondent, and we see no reason why they should not be accepted as correct. The real question, therefore, for consideration is whether plaintiff did give his consent to the alienation by Subbalu for if he did, he cannot now go behind it and claim the suit property for himself. An objection is taken by respondent that this is a question of fact and cannot be gone into by us in second appeal. Apart from the facts that there is no very definite finding by the Subordinate Judge on this point, that he, relying on *Arthanari Goundan v. Ramaswami Goundan* (2), has held that a partial disposition in favour of the next reversioner is invalid and has not considered the effect of the ruling of the Privy Council in *Bajrangi Singh v. Manakarnika Bakhsh Singh* (3), that partial alienations are valid, we do not think that the question is one of pure fact. It is a question of what legal inference is to be drawn from certain facts [*vide Beni Ram v.*

Kundan Lal (4)] 'and this is certainly a point with which we can deal in second appeal.

4. In this case, the facts from which we have to draw an inference are as follows:—

In 1864, plaintiff's father accepted the absolute ownership of part of the widow's estate from Chellathammal under Exhibit VII, and plaintiff acquiesced in that by joining in the sale thereof to Kuppusawmy Dikshitar under Exhibit I, and says as plaintiff's witness No. 1 that he was personally aware of the alienation under Exhibit A, and must have known that the alienation was invalid unless made for proper causes. He was also present when Exhibit II, under which the property in dispute was sold, was executed. Then again in 1873, Kuppusawmy Dikshitar brought two suits, Original Suits Nos. 60 and 61 of 1873 on the file of the Court of the District Munsif of Shiyali, to recover the properties sold under Exhibits I and II. Plaintiff was a party to both suits and in both admitted that the suit property belonged to the respective vendors, i. e., himself and Ramanatha Dikshitar although in the suit against the latter, there was no reason why he should have made any such admission, so far as his interests in that suit were concerned. From these facts, it is clear that plaintiff all along treated the alienation under Exhibit A as valid, but it is contended that, even if so much be conceded, plaintiff did not intend thereby to bind his own interests as reversioner. Plaintiff has been examined as a witness, but gives us no help in arriving at a conclusion as to his intentions, beyond a false statement that he did not know whether Ramanath Dikshitar sold the suit property to Kuppusawmy Dikshitar. This statement is falsified by the judgments in the suits of 1873 (Exhibits III and IV). It must, therefore, be presumed that the plaintiff was not unaware that he was a presumptive reversioner, and must have intended the legal consequences of his acts. We must, therefore, hold, to adopt the language of their Lordships of the Privy Council in *Hari*

(1) 26 Ind. Cas. 757; 28 M. L. J. 1; (1915) M. W. N. 53; 2 L. W. 69; 17 M. L. T. 87.

(2) 20 Ind. Cas. 304; 25 M. L. J. 8; 13 M. L. T. 445; (1913) M. W. N. 448.

(3) 30 A. 1; 17 M. L. J. 605; 9 Bom. L. R. 1348; 12 C. W. N. 74; 6 C. L. J. 766; 35 I. A. 1 (P. C.); 3 M. L. T. 1; 5 A. L. J. 1.

(4) 21 A. 496 at p. 504; 26 I. A. 58; 3 O. W. N. 502; 1 Bom. L. R. 400; 7 Sar. P. C. J. 523.

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Kishen Bhagat v. Kashi Parshad Singh (5), that the evidence is such as to "establish that upon an intelligent understanding of the nature of his dealings plaintiff, concurred in binding his interests as reversioner".

We hold that the consent is proved and the plaintiff is thus estopped from disputing the validity of the alienation under Exhibit A.

5. In this view, we think it unnecessary to deal with the other two points raised in appeal. The appeal is allowed with costs both here and in the lower Appellate Court the District Munsif's decree restored.

AYLING, J.—I agree.

Appeal allowed; Suit dismissed.

(5) 27 Ind. Cas. 674; (1915) M. W. N. 511 at p. 514; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 22; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; 42 C. 876.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1827 OF 1912.

May 20, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Leslie Jones.

MUHAMMAD HAYAT AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

MUHAMMAD ALI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Joint possession—Property belonging to shrine—Mujawars in possession as trustees—Rule of hotchpot, whether applicable.

The principle that one co-sharer who has joint property in his possession cannot seek a decree for joint possession of other property in the possession of a co-sharer-defendant unless and until he brings the property in his own possession into a hotchpot does not apply to a case where property belonging to a shrine is in the possession of *mujawars* as trustees. [p. 490, col. 2.]

Where, therefore, in a suit by certain *mujawars* of the shrine of Data Ganj Bakhsh in Lahore against another *mujawar* for joint possession of certain properties belonging to the shrine, the defendant contended that the plaintiffs must bring into a hotchpot the properties in their possession:

Held, that the rule of hotchpot did not apply and the plaintiffs were entitled to a decree for joint possession with the defendant. [p. 490, col. 2.]

Rahman Chaudhuri v. Salamat Chaudhuri, A. W. N. (1901) 48; *Phani Singh v. Nawab Singh*, 28 A. 161;

A. W. N. (1905) 233, *Watson and Co. v. Ram Chund Dutt*, 18 C. 10 (P. C.); 17 I. A. 110, distinguished.

Ram Charan Rai v. Kauleshar Rai, 27 A. 153; A. W. N. (1905) 199, *Dilbar Sardar v. Hosein Ali Bepari*, 26 C. 553; *Sura Singh v. Sant Singh*, 43 P. R. 1906; 122 P. L. R. 1906, referred to.

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 31st August 1912.

The Hon'ble Mr. Muhammad Shafi, K. B., and Syed Muhammad Amin, for the Appellants.

Bhagat. Gobind Das and Mr. W. C. Asquith, for the Respondents.

JUDGMENT.—The facts of this case are stated clearly and succinctly in the judgment of Rai Diwan Chand, Subordinate Judge, and the pleadings of the parties are also very accurately summarized therein. Plaintiffs and defendant are *mujawars* of the well-known shrine of Data Ganj Bakhsh in Lahore; and plaintiffs now claim joint possession of a *baithak* and certain shops, which belong to the shrine, and their share of the income that has accrued from the said property, all of which has been in possession of the defendant. The Subordinate Judge after an elaborate consideration of all the issues, some thirteen in number, granted plaintiffs a decree for joint possession of the property in question and for 57 shares of the income of the property, the rent of the *baithak* being assessed by him at Rs. 3 a month for the three years prior to suit. Defendant Muhammad Ali appealed to the Additional Divisional Judge, Lahore, who accepted the appeal and dismissed plaintiffs' suit on two grounds. In the first place, he held that plaintiffs as *mujawars* were merely attendants or servants of the shrine and as such not entitled to claim exclusive possession. Before proceeding, we might remark that, though the claim as laid in the plaint would suggest that plaintiffs were seeking exclusive possession of the property, it is well understood in the course of the trial that the suit was for joint possession, and, in point of fact, it was joint possession only that was decreed by the Subordinate Judge. The Additional Divisional Judge was, therefore, somewhat hard upon the plaintiffs in construing their plaint with such strictness and in overlooking the fact that the decree which was under

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appeal before him was one not for exclusive but for joint possession.

The *second* ground upon which the judgment of the lower Appellate Court was based was that, according to the compromise of the 18th of March 1905, the defendant had undertaken to surrender possession, not to the present plaintiffs, but to a *modi or bursar* of the institution, by name Muhammad Amin, and that it was consequently Muhammad Amin alone who could sue to enforce the compromise.

Plaintiffs have appealed to this Court and we have heard arguments at some considerable length on their behalf and on behalf of the respondent. We do not find it necessary to decide whether it would be competent to the plaintiffs to enforce the compromise of 1905, though the strong inclination of our opinion is that plaintiffs would certainly be entitled to enforce it as a contract which was made between them and the defendant. Muhammad Amin was no party to that contract and there is considerable force in Mr. Shafi's argument that he was a mere agent appointed to act for both parties. We need not, however, labour the point, as it is now admitted that the plaintiffs as *mujawars* are clearly entitled to joint possession of the property in suit, and the only plea urged in opposition to the claim is that plaintiffs themselves are in possession of property belonging to the institution, to joint possession of which Muhammad Ali defendant is equally entitled with themselves and that unless and until they bring that property into a hotchpot, they cannot ask for a decree for joint possession against defendant. In our opinion, this contention cannot prevail.

In the first place, beyond a vague allegation of his own that plaintiffs have such property in their possession, there is nothing on the record to support defendant's statement; but assuming that there is such property in plaintiffs' possession, it will be open to defendant to sue plaintiffs for joint possession thereof whenever he is so advised. But in the meantime, this plea of his cannot affect plaintiffs' undoubted right to a decree for joint possession of the property in suit.

It was contended on the authority of certain

cases, *Rahman Chaudhuri v. Salama Chaudhuri* (1), *Phani Singh v. Nawab Singh* (2), *Watson and Co. v. Ram Chund Dutt* (3), that plaintiffs were at most entitled to a decree declaratory of their right to joint possession and could not be granted a decree for actual joint possession, as that would be tantamount to a decree for the eviction of defendant. The decision of the Privy Council was upon an entirely different state of facts and is in no way relevant, and the other authorities cited refer to cases of co-sharers who are owners of property, the principle laid down being that one co-sharer who has joint property in his possession cannot seek a decree for joint possession of other property in the possession of a co-sharer-defendant unless and until he brings the property in his own possession into a hotchpot, and that the proper course in such cases is for a co-sharer to apply for partition. This principle obviously can have no application to a case like the present, where the *mujawars* are not owners of the property but merely trustees of it on behalf of the shrine which is in law the owner, and *Ram Charan Rai v. Kauleshar Rai* (4), *Dillar Sardar v. Hosain Ali Bepari* (5) and *Sura Singh v. Sant Singh* (6) are sufficient authorities for holding that a decree for joint possession can be granted and that it does not involve the eviction of defendant. We accordingly hold that plaintiffs are entitled to a decree for joint possession of the property in suit with the defendant.

The Additional Divisional Judge dismissed plaintiffs' suit on the preliminary ground that they have no *locus standi* and in the ordinary course of things, this appeal would have had to be remanded to his Court for decision on the merits. In the present case, however, the whole of the evidence is on the record and the two questions which alone remain to be dealt with, are very simple and can be disposed of by us without further protraction of this litigation.

The first point is that defendant is entitled

(1) A. W. N. (1901); 48

(2) 28 A. 161; A. W. N. (1905) 233.

(3) 18 C. 10 (P. C.); 17 I. A. 110.

(4) 27 A. 153; A. W. N. (1905) 199.

(5) 26 C. 553.

(6) 43 P. R. 1906; 122 P. L. R. 1906.

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ed to compensation for a shop which he alleges he has built upon part of the land in suit at his own expense. We find from the judgment of the Subordinate Judge (page 5, line 30) that the defendant admitted before him that the shop in question was built after the plans of 1891-1894 had been drawn out but prior to the suit for accounts in 1901. The compromise provides that defendant is to receive Rs. 500 as compensation for an *a'ata* built by him on the open space belonging to the shrine, and as there is no further provision for any compensation, it is only reasonable to suppose that this Rs. 500 was intended to cover everything including the cost of the shop; if not, then plaintiffs made no agreement to pay any compensation for this shop, and the parties must be taken to have agreed that no compensation was payable therefor.

Next, there is the question of the amount of rent realized by defendant in respect of the *baithak*. The Subordinate Judge allowed Rs. 3 per mensem for the three years prior to suit, and presumably relied for this purpose upon the evidence of *Musammal Budhan*, who has been the tenant of the *baithak* for several years past. Mr. Gobind Das asserted that defendant had been put to expenses for repairs, etc., and that these had not been allowed for. But as to this, it is only necessary to remark that no attempt was made by defendant to prove any such expenditure in these respects by him.

The result is that we accept the appeal and, setting aside the decree of the Additional Divisional Judge we restore that of the Subordinate Judge. Defendant Muhammad Ali must pay costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT NO. 64 OF 1914.

September 22, 1915.

Present:—Mr. Justice Bakewell.

ALAMELAMMALL—PLAINTIFF

versus

P. N. K. SURAYAPRAKASAROYA

MUDALIAR—DEFENDANT.

Succession Act (X of 1865), s. 187—Party claiming

under Will, what must prove—Issue of Probate postponed on account of applicant's failure to pay stamp duty—Legatee, when can maintain suit for administration.

A party claiming an interest under a Will must prove the execution of the document and its terms by the particular procedure prescribed by section 187 of the Succession Act. [p. 492, col. 2.]

Lakshamma v. Ratnamma, 21 Ind. Cas. 638; 38 M. 474; 25 M. L. J. 556, followed.

Where, therefore, in a suit by the testator's widow against his executor, it appeared that the defendant did apply for Probate and that the fiat of the Judge was obtained, but that the actual grant had not been issued through the failure of the defendant to pay the stamp duty leviable under the Court Fees Act:

Held, that, as the plaintiff claimed as heir of a legatee, she was under section 187 of the Succession Act in the position of a legatee and must establish her title by production of the evidence required by the section in order to be able to maintain the suit. [p. 492, col. 2.]

Mungaiam Maricai v. Gurusai Nand, 17 C. 347 (P. C.) 16 I. A. 195; 13 Ind. Jar. 449; 5 Sar. P. C. J. 463 distinguished.

Messrs. C. P. Ramaswami Aiyar and N. Chandrasekhara Aiyar, for the Plaintiff.

Mr. V. V. Srinivas Aiyangar, for the Defendant.

JUDGMENT.—The plaint in this suit alleges that the husband of the plaintiff died in 1911, possessed of certain properties and having made a Will appointing the defendant as his executor, who entered into possession and management of the properties immediately after the testator's death but has taken no steps to obtain Probate of the Will. It alleges various acts of mismanagement by the defendant and that the plaintiff is interested as the mother of the testator's son, who died subsequently to the testator and to whose interest the plaintiff has succeeded as heir. The prayer of the plaint is that the defendant may be directed to apply for Probate of the Will, that he may be ordered to account for the administration of the estate of the deceased and the moneys collected by him or that ought to have been collected by him but for his wilful default or negligence, and that an account may be taken of the estate and the same be duly administered under the orders of this Court.

It is stated that the defendant did apply for Probate and that the fiat of the Judge was obtained upon his application, but that the actual grant has not been

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issued through the failure of the defendant to pay the stamp duty leviable under the Court Fees Act, 1870. The Will is one to which the Probate and Administration Act and the Hindu Wills Act apply, and, therefore, the case is governed by section 187 of the Indian Succession Act, which applies to Wills of Hindus under the Hindu Wills Act. In the first place, I think that the fiat of the Judge upon the defendant's petition can only be read as an order that Probate shall issue to the petitioner upon his complying with the statutory provisions and the rules of the Court. One of the statutory provisions with which the petitioner must comply is that he must bring in the necessary stamps. Section 4 of the Court Fees Act directs that no document of the kind specified in the Schedules to the Act shall be received or furnished by any of the High Courts unless the prescribed fees have been paid.

The decision of their Lordships of the Privy Council reported as *Mungniram Maricari v Gursahai Nand* (1) is strongly relied upon by the learned Vakil for the plaintiff as showing that the order of the Court is sufficient without an issue of the actual grant. But it is clear from the observations of their Lordships at page 357 that they were interpreting a particular Act—Act XL of 1858—which was passed prior to the Court Fees Act of 1870—and that they disregarded the latter Act in putting a construction upon the former. The decision may also be distinguished on the ground that in the present case, there has been no actual order for the issue of Probate; and also the point in that case was as to whether a minor had been properly represented or not and their Lordships held that he was, as a matter of fact, represented in the proceedings and they refused to treat them as invalid merely because the formal order had not been carried out. I do not intend to discuss the English cases which have been cited by the learned Vakil for the plaintiff. They relate to cases of executors *de son tort* in which the Court has evidently strained its powers in order to prevent misapplication

of the assets of a testator. I do not think that it is useful to refer to cases decided under a totally different system from that which obtains in India and under Statutes different in wording.

The term "Probate" is defined in section 3 of the Probate and Administration Act as "the copy of a Will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator," and section 187 of the Indian Succession Act provides that, "no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted Probate of the Will under which the right is claimed, or shall have granted Letters of Administration under section 180." The words, I think, are perfectly plain, and the intention of the Legislature is clear that the party claiming an interest under a Will must prove the execution of the document and its terms by the particular procedure which has been laid down by the Legislature. *Lakshamma v. Ratnamma* (2) supports this construction. It is not sufficient if the actual document be produced in the suit and the plaintiff prove it in the way in which ordinary documents are proved; that is what the plaintiff apparently sought to do in this case to go into Court and to put the document in as an ordinary exhibit. The plaintiff claims as heir of a legatee, and is, therefore, under the section only in the position of legatee, and I hold that she must establish her title by production of the evidence required by the section, that is, a grant of Probate issued by a Court of competent jurisdiction. On this ground the suit fails and must be dismissed with costs.

Suit dismissed.

(2) 21 Ind. Cas. 698; 38 M. 474; 25 M. L. J. 556.

1) 17 C. 347 (P. C.); 16 I. A. 195; 13 Ind. Jur. 449; 5 Sar. P. C. G. 463.

NATHA SINGH v. GANDA SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 745 OF 1912.

May 20, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Leslie Jones.NATHA SINGH—DEFENDANT APPELLANT
versusGANDA SINGH AND OTHERS—PLAINTIFFS—
RESPONDENTS.*Custom—Alienation—Sindhu Jats of Mauza Khalra, Tahsil Kasur, District Lahore—Gift in favour of step-son, whether valid in presence of collaterals of 4th degree—Ancestral property.*

Among Sindhu Jats of Mauza Khalra, Tahsil Kasur, of the Lahore District a proprietor cannot make a valid gift of ancestral property in favour of a step-son of a different got in the presence of collaterals of the 4th degree. [p. 494, col. 2.]

Gagan Singh v. Bulaka Singh, 23 P. R. 1888, disapproved.

Natha Singh v. Sher Singh, 47 P. R. 1895; Ralla v. Budha, 50 P. R. 1893 (F. B.); Rattan Singh v. Mala Singh, 4 P. R. 884; Bura v. Man Singh, 82 P. R. 1892; Fattah Singh v. Suchela, 142 P. R. 1893; Ichar Singh v. Lehna Singh, 86 P. R. 1903, 145 P. L. R. 1903, referred to.

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 16th March 1912.

Bhagat Govind Ram and Mr. Beni Parshad, for the Appellant.

Messrs. Ganpat Rai and Hari Chand, for the Respondents.

JUDGMENT.—Surjan Singh, a Sindhu Jat of village Khalra in the Kasur Tahsil of the Lahore District, had a son named Buta Singh by his first wife. On her death, he married a widow, who brought with her a son named Natha Singh. In 1915, after the death of Buta Singh, but in the presence of Buta Singh's son Chanan Singh, who was then a minor of some four years of age, Surjan Singh gifted 70 kanals 8 marlas of land to his step-son Natha Singh. Chanan Singh died shortly afterwards and in 1910, Surjan Singh executed a Will by which he bequeathed the whole of his remaining property amounting to 425 kanals 15 marlas of land to his step-son.

Surjan Singh being still alive, the plaintiffs, who are his collaterals in the 4th degree, have sued for a declaration that these alienations shall not affect their reversionary rights after the death of Surjan Singh.

The suit was dismissed by the Subordinate Judge who relied largely on the ruling reported as *Gagan & Singh v. Bulaka*

Singh (1). On appeal, however, to the Divisional Judge, the suit was decreed. Natha Singh having obtained the necessary certificate, has now preferred a second appeal to this Court.

It was stated by Surjan Singh that Natha Singh is a Jat of the Sindhu got, but this allegation was denied and there is nothing to support it except the bare words of the alienor. We have ascertained that Natha Singh has inherited property from his father in his own village; and that being so, it would have been perfectly easy for him to prove by incontestable evidence that he belongs to Sindhu got if this were really the case. It must be taken then that he belongs to some other got.

The instances adduced by the defendant in support of his contention that a Sindhu Jat in the Kasur Tahsil is entitled by custom to make a gift or a Will in favour of a step-son belonging to a different got have been carefully examined by the Divisional Judge, who found that they were insufficient to discharge the onus of proof which lay heavily upon him. We have ourselves considered these instances in detail. With one exception, they are either extremely vague or insufficiently authenticated, and the remaining case was of a peculiar character. There a step-son was after objection allowed to succeed equally with sons, but the step-son had been adopted before the birth of his half brothers and had also in his favour a registered deed of gift which was 34 years old at the time when succession opened. It would be impossible to hold on the basis of the instances before us that the necessary custom has been established, especially when in the *wajib-ul-arz* of the village, it is laid down that step-sons have no rights even if documents have been executed in their favour; and Counsel for the appellant himself states that the same provision is to be found in the *wajib-ul-araz* of all other Sindhu villages in the Lahore District.

Similarly, in the *riwaj-i-am* of the District, it is stated that step-sons are not preferred to agnates and that they are not entitled

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even to maintenance. This *riwai-i-am*, it is true, was considered in *Gagan Singh v. Bulaka Singh* (1), the judgment on which the first Court relied. It was there held that among *Sindhu Jats* of the Chunian Tahsil, an appointment as heir of one who is not a member of that *got*, is valid by custom and that the person appointed may be a step-son whose father was not a *Sindhu Jat*. This ruling was, however, criticised somewhat severely in *Natha Singh v. Sher Singh* (2)—a case relating to *Sindhu Jats* of the Lahore Tahsil—in which it was held that the adoption of a daughter's son is not valid by custom; and it was pointed out that in the earlier case, the *riwai-i-am* had been held to be incorrect "on the general presumption believed to arise from the reported cases up to date—cases which cannot now be followed in view of the Full Bench ruling in *Ralla v. Budha* (3)."

We may ourselves remark that although in the earlier case, a very full enquiry had been made as to custom, the persons who supported it, had only been able to show two instances, one of which, reported as *Albel Singh v. Vir Singh* (4), related to *Sindhu Jats* of the Ferozepore District. The witnesses for the then plaintiff had roundly asserted that a *Sindhu Jat* could not adopt a person of a different *got* and appealed to the *riwai-i-am*.

There are, we find, numerous rulings such as *Rattak Singh v. Mala Singh* (5), *Bura v. Man Singh* (6), *Fatteh Singh v. Suchela* (7), *Natha Singh v. Sher Singh* (2) and *Ishar Singh v. Lehna Singh* (8), all of which indicate that the power of a *Sindhu Jat* to make alienations is very restricted. In *Ishar Singh v. Lehna Singh* (8)—a case of *Sindhu Jats* of the Tarn Taran Tahsil of Amritsar District—it was held that a proprietor could not transfer by Will even to collaterals in the presence of nearer collaterals. In *Bura v. Man Singh* (6)—a Ferozepore case—a gift to grandsons in the presence of a son was set aside,

and in *Rattan Singh v. Mala Singh* (5)—a case relating to *Sindhus* of the Kasur Tahsil—a gift even to a nephew was disallowed.

There is, we think, no doubt that *Gagan Singh v. Bulaka Singh* (1), based as it was on the different view then obtaining with regard to the *onus* of proof in such cases, is no longer binding, and we have no hesitation in finding that the custom set up by the appellant in this case, has not been established.

The case of *Natha Singh* is doubtless a hard one, as although he was not adopted, he has lived practically all his life with his step-father who regards him with great affection. We ourselves tried to get the parties to compromise, but this the plaintiffs-respondents are unwilling to do. We, therefore, reluctantly dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 274 OF 1914.

October 1, 1915.

Present:—Mr. Justice Bakewell.

KUNTHALAMMAL—PLAINTIFF.

versus

P. N. K. SURYAPRAKASARAYA

MUDALIAR AND OTHERS—DEPENDANTS—

Will—Residuary clause providing for *pooja*, etc.—Fund unknown to testator when making Will, whether governed by the Will—Release of claims against estate under mistake, whether binding.

Where in a suit for an account of the administration of the estate and for its administration under the orders of the Court, it appeared that the Will after stating the property which the testator intended to dispose of and dividing it up amongst the various beneficiaries, provided that "the sum which may be left after deducting the above mentioned legacies and such other expenses, shall be utilised in my name without defect for *pooja*," etc., but that at the time of making the Will, the testator did not know that there was a fund in Court to his credit:

Held, that this fund did not pass under the Will of the deceased but went to the heirs as on an intestacy [p. 496, col. 1.]

(2) that a release of all his claim against the estate executed by the plaintiff under a mutual mistake was not binding on him. [p. 496, col. 1.]

(2) 47 P. R. 1895.

(3) 50 P. R. 1893 (F. B.).

(4) 86 P. R. 1885.

(5) 4 P. R. 1884.

(6) 82 P. R. 1892.

(7) 142 P. R. 1893.

(8) 86 P. R. 1903; 145 P. L. R. 1903.

KUNTHALAMMAL V. SURYAPRAKASAROYA MUDALIAR.

Messrs. C. P. Ramaswami Aiyar and A. Durasami Aiyar, for the Plaintiff.

Messrs. P. Sambandam and N. Chandra-sekhara Aiyar, for the Defendants.

JUDGMENT.—One Dakshinamurthi Mudaliar was entitled to certain moneys in this Court under decree in Suit No. 45 of 1889. By an order in that suit, dated the 27th March 1893, certain moneys amounting to Rs. 4,056-12-3 were directed to be transferred by the Registrar to the Accountant-General for investment. These moneys represented certain jewels which were found to be part of the inheritance of Dakshinamurthi Mudaliar and not to have passed under the Will of his father. At the date of the decree, Dakshinamurthi Mudaliar was a minor, but having attained his majority he applied, in February 1904, for payment out of the funds in Court; and it appears from Exhibits H and H1, the certificate of funds issued by the Accountant-General, that his application was confined to the moneys specified in that certificate. Owing to some mistake on the part of the legal advisers of the plaintiff in that suit, the moneys in the hands of the Registrar of the Court were not transferred to the Accountant-General in pursuance of the order of the 27th March 1893, and were lost sight of when the application was made by the plaintiff for payment out to him.

This is clearly stated by the present 1st defendant in an affidavit filed by him in that suit on the 8th of August 1914, Exhibit C. In paragraph 8, he states: "It appears that the said sum of Rs. 4,056-12-3 which appears to have remained in the hands of the Registrar of this Honourable Court, was not known to exist and was consequently overlooked and I have now come to know that the said sum of Rs. 4,056-12-3 is standing to the credit of this suit". The amount was accordingly paid out of Court to the 1st defendant, who claimed it as the executor of the Will of Dakshinamurthi Mudaliar.

This Will is dated the 5th December 1905, and the testator died in the same month. The 1st defendant was appointed executor of the Will and has been administering the estate of the deceased, and this suit is brought by the widow of the deceased on behalf of herself and the other legatees under the

Will, for an account of the administration of the estate and for its administration under the orders of the Court. The question has arisen as to whether this sum of Rs. 4,000 and odd passed to the residuary legatees under the Will. The Will follows the form, which is very well known in this Court, of first stating the property which the testator intends to dispose of and then dividing it up amongst the various beneficiaries. Clause 2 of the Will reads as follows:—"The house No. 25 in Nattu Pillayar Civil Street and ready money were received (by me) under an order of the High Court according to my adoptive father's Will. Of the amount left deducting the sum spent therefrom, not only is a certain portion lodged in fixed deposit in Arbuthnot's House in my name and in the name of my senior elder brother P. N. K. Suryaprakasaroaya Mudaliar, but the remaining sum is in the shape of secured and unsecured debts and ready money." The testator then proceeds to give various specific and pecuniary legacies, and in clause 13, he says: "The sum which may be left after deducting the above-mentioned legacies and such other expenses, shall be utilised in my name without defect for *pooja* once, that is, daily, and repairs and other charities for the temple of Sri Vaideswarar in Poonamallee". Having regard to the fact that the existence of this sum of Rs. 4,000 and odd was unknown to the testator at the time, and to the statement made by him that he is dealing with a particular house and the moneys which had been already received by him from the High Court, I think that the words in clause 13 refer to the residue of the moneys in his hands which have not been already disposed of by him under the Will, and that the sum of Rs. 4,000 and odd is not disposed of by him. I may point out that the residuary clause in the form in which it appears in English Wills, is practically unknown to the ordinary testator in Madras and that the rules of construction which have been laid down by English Courts, are not applicable.

The defendant has also pleaded a release by the plaintiff of all claims against him but it is clear from the evidence that this

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document was executed by the plaintiff when she was a minor. It is also perfectly clear that it was executed under a mutual mistake and for that reason also it is not binding on the plaintiff.

The plaintiff has called for and put in a book purporting to be an account of the 1st defendant of his administration of the estate. It is not in his affidavit of documents and I think it is obviously a fraudulent concoction. Certain entries which appear in it have been proved, by the evidence called by the plaintiff, to be untrue.

There will, therefore, be a decree declaring that the sum of Rs. 4,056-12-3 did not pass under the Will of the deceased but will go to the plaintiff as on an intestacy, that the estate must be administered by the Court and that the 1st defendant must account from the date of the death of the deceased on the footing of wilful default. The 1st defendant will pay the costs of the suit up to date. The 1st defendant is ordered to pay this sum of Rs. 4,056-12-3 into Court within 10 days.

Suit decreed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 70
OF 1915.

November 1, 1915.

Present:—Justice Sir P. C. Banerjee, KT.
KISWAR ALI KHAN AND ANOTHER—
DECREE-HOLDERS—APPELLANTS

versus

Musammât SALIM-UN-NISSA—JUDGMENT-
DEBTOR—RESPONDENT.

Execution—Suit originally valued at above Rs. 5,000—Decree for less than Rs. 5,000—Execution proceedings, order in—Appeal—Jurisdiction.

Where an original suit out of which an execution proceeding had arisen was valued at over Rs. 5,000 but was decreed for less than that amount, an appeal from an order in the execution proceedings would nevertheless lie to the High Court.

Execution second appeal from the decision of the District Judge of Shahjahanpur, dated 21st November 1914.

Dr. S. M. Suleman, for the Appellants.

The Hon'ble Dr. Tej Bahadur Sapru, for the Respondent.

JUDGMENT.—The objection raised in this appeal is that no appeal lay to the Court below and that that Court had no jurisdiction to entertain the appeal presented to it. It appears that the original suit was valued at a sum exceeding Rs 5,000. The claim was decreed in part and the decree provided that mesne profits should be determined in execution of the decree. An application was made to the Court of first instance for execution of the decree and for determination of the amount of mesne profits. The amount awarded by the Court of first instance was a sum of Rs. 44-4-6. The judgment-debtor appealed to the District Judge and that Court reduced the amount awarded by the Court of first instance. It is clear in view of the provisions of section 21 of Act XII of 1887 that no appeal lay to the District Judge. The value of the original suit exceeded Rs. 5,000, and the proceeding in which the order complained of was made, was a proceeding arising out of that suit. Therefore, as the value of the suit exceeded Rs. 5,000, the appeal lay to the High Court. I accordingly allow the appeal, set aside the decree of the Court below and direct that the memorandum of appeal be returned to the respondent for presentation to the proper Court. As the objection now raised was not put forward in the Court below, I make no order as to the costs of this appeal. I direct that the record be not returned to the Court below for three weeks so that the memorandum of appeal may be promptly taken back and an appeal presented to this Court, if so advised.

Appeal allowed

ALLAH DIN v. SALAM DIN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 2271 OF 1914.

May 26, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge.

ALLAH DIN DEFENDANT—APPELLANT
versus

SALAM DIN—PLAINTIFF—RESPONDENT.

Custom — Succession — Self-acquired property — Paternal aunt's son, whether has preferential right to a near agnate — Onus probandi.

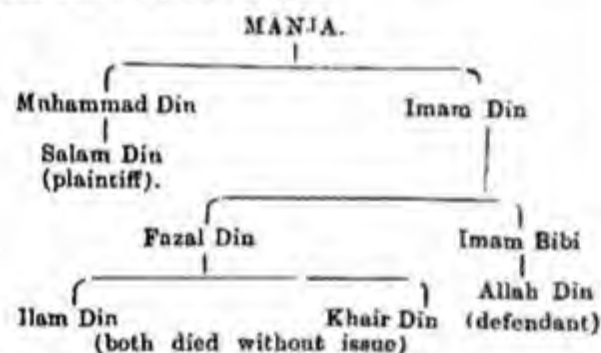
The paternal aunt's son has not, in any tribe in the Punjab, *prima facie* a better right of succession than a near agnate, even where the property is self-acquired and the *onus* is on him to prove such right. [p. 498, col. 1.]

Second appeal from the decree of the Divisional Judge, Lahore Division, dated the 11th June 1914.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellant.

Mr. Oertel, for the Respondent.

JUDGMENT.—The following is the pedigree table in the case:—



The contest is between Salam Din, plaintiff, and Allah Din, defendant, the property in suit being that left by Ilam Din and Khair Din. The first Court drew two issues:—

1—Is the property in suit ancestral?

2—Whether the property is ancestral, or was the self acquired property of Imam Din; has the defendant Allah Din a superior right over the plaintiff?

In the end, it was admitted on all hands that the property was acquired by Imam Din, but the first Court nevertheless left the burden of issue No. 2 upon the defendant and ultimately held that he had not discharged that burden. The plaintiff's suit, therefore, having been decreed, the defendant appealed to the Divisional Court, which affirmed the decree of the first Court and dismissed the appeal with costs.

Defendant has now come up here in second appeal, in which there are two main contentions: *first*, that the Courts below have erred in law in placing the *onus* on the appellant; and *secondly*, that according to the custom of the tribe, the appellant is the heir to the property and not the plaintiff. Mr. Oertel objects that a certificate is required. To this, it was replied that the appeal is not regarding the validity or the existence of any custom or usage, that if the *onus* had been rightly laid, the Courts below would inevitably have decided in favour of the defendant, and that, therefore, the defendant's object is fully gained if this Court will now hold that the *onus* was on plaintiff and then proceed to decide the case on the record. I am very doubtful whether an argument like this, is valid. It is opposed to the *dictum* of Chevis, J., in *Arura v. Imam Bakhsh* (1), and I do not think that it is really supported by the remarks made towards the end of the judgment in *Santa Singh v. Waryam Singh* (2). Mr. Justice Chevis's view is quite clear and fully applies to the present case. It seems to me that, even if I were to accede to Mr. Shafi's request and rule that the *onus* was on plaintiff, it would then become necessary to remand the case in order to allow plaintiff an opportunity to prove a custom. In these circumstances, it is hardly correct to say that this Court would be in a position, after laying down the rule as to *onus*, at once to proceed to judgment on the question of custom; and it seems to me that sub section 3 of section 41 of the Punjab Courts Act was expressly enacted in order to make it necessary for an aggrieved person to get a certificate from the lower Appellate Court on questions of custom or usage.

But, however this may be, I would decline to interfere in any case because in my opinion the *onus* was rightly laid. No doubt it has been held that daughters, especially among *Arains*, have very special rights in respect of self-acquired property, but as has been frequently pointed out by the Judges of this Court, daughters are on

(1) 23 Ind. Cas. 352; 4 P. W. R. 1914; 28 P. L. R. 1914.

(2) 24 Ind. Cas. 381; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914.

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quite a different footing from a sister or a paternal aunt. I am not aware of any authority for the proposition that in any tribe in the Punjab, the paternal aunt's son has *prima facie* a better right of succession than a near agnate even where the property is self-acquired. Further, even if this was not clear and it was doubtful on which party the *onus* lay, one has only to read the judgment of the lower Appellate Court to see that, on the record as it stands, the *onus* certainly has at the least shifted to the shoulders of the defendant. Add to this the negative implication that defendant, finding the duty laid upon him of attempting to prove the custom in his own favour, failed so signally that he was not able to produce a single intelligible instance of succession of a paternal aunt's son in preference to collaterals.

In these circumstances, it seems to me that the defendant's appeal has no force whatever and I dismiss it with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 30 OF 1913-1914

OF ALIGARH DISTRICT.

February 23, 1915.

Present:—Mr. Holms, S. M.

NAWAB SINGH—PLAINTIFF—

APPELLANT

versus

HUKUM SINGH AND OTHERS—DEFENDANTS—

RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 58—Ejectment—Grove—Holding.

A suit for ejectment under section 58 of the Tenancy Act cannot lie in respect of a grove, as a grove does not come under the definition of the holding, not being land let or held for agricultural purposes.

Second appeal from the order of the Commissioner of Agra, dated the 18th April 1914, in a case of ejectment under section 58/63 of Act II of 1901.

JUDGMENT.—The Commissioner seems to me to have taken the right view in this case. The respondent claims to hold the grove as a purchaser at auction from some

previous owner and in view of his long possession, he has established a *prima facie* case and cannot be ejected under section 58. Another point which arises is that even if he paid rent to the appellant, of which there is no clear evidence, the rent can only be paid on account of the grove. This being so, ejectment under section 58 is only from a holding and a grove does not come under the definition of the holding, as it is not land let or held for agricultural purposes.

Appeal dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 625 OF 1913.

September 3, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

WASAPPA TIMAPPA SONAGAR—

PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR IN

COUNCIL INDIA—DEFENDANT—RESPONDENT.

Suit, right of—Criminal Procedure Code (Act V of 1898), ss. 523, 524, distinction between—Claim under section 523 disallowed by Magistrate—Aggrieved person, right of.

The special provisions relating to investigation of claims to property mentioned in section 523, Criminal Procedure Code, do not deprive the person aggrieved of any right of action. [p. 499, col. 1.]

The distinction between a case under section 523 and one under section 524 of the Code of Criminal Procedure suggested by the Judges in *Secretary of State for India in Council v. Vakhatsangji Meghrajji*, 19 B. 668, has no substance. [p. 499, col. 1.]

Second appeal from the decision of the District Judge of Dharwar, in Appeal No. 108 of 1912, reversing the decree passed by the Assistant Judge of Dharwar, in Civil Suit No. 2 of 1911.

Mr. V. R. Sirur, for the Appellant.

Mr. S. S. Patkar (Government Pleader), for the Respondent.

JUDGMENT.—On the 9th of July 1909, the house of the plaintiff was searched by the Police of Dharwar and of the Savanur State in connection with a dacoity which had been committed in that State, and certain property including ornaments specified in the plaint, was attached on suspicion.

SUBRAMANIYAN CHETTY v. RAMASWAMI CHETTY.

On the 30th September 1909, the second class Magistrate issued a proclamation under section 523 (2) of the Code of Criminal Procedure, requiring any person having a claim to the ornaments to appear and establish his claim within six months. On the 17th January 1910, the plaintiff appeared to support his claim to the ornaments. The claim was disallowed and, on the 13th June 1910, an order was issued by the Sub-Divisional Magistrate under section 524 of the Code of Criminal Procedure for sale of the ornaments. The sale-proceeds were credited to the Government.

The plaintiff brings this suit alleging that the ornaments are his property and were illegally attached, and prays that the amount realised by the sale may be awarded to him with interest. The suit was decided in the plaintiff's favour, and a decree for Rs. 258-12-0 was passed by Mr. Varley, the Assistant Judge.

The defendant, the Secretary of State, appealed to the District Court, which held that as under section 524 of the Criminal Procedure Code the property was at the disposal of Government, Government could do what it liked with it and had an absolute right to it, and that the special provisions relating to investigation of claims to property mentioned in section 523 made the decision of the Magistrate final and deprived the person aggrieved of any right of action. We are of opinion that this decision cannot be supported. The case referred to by the learned District Judge, viz., *Secretary of State for India in Council v. Vakhatsangji Meghrajji* (1), did not decide or purport to decide the point. In the judgment, reference was made to a decision in which the point was decided, namely, *Queen-Empress v. Tribhoran Manekchand* (2). It appears to us that the distinction between a case under section 523 and one under section 524, suggested by the Judges in *Secretary of State for India in Council v. Vakhatsangji Meghrajji* (1), has no substance, for the order upon the claim is made under section 523, and thereafter if the claim is rejected, section 524

provides that the property shall be at the disposal of Government, and then as a consequence, Magistrates are empowered to make discretionary orders for sales of such property. Now in *Queen-Empress v. Tribhoran Manekchand* (2), the Court held that although the claim by two accused persons to property seized on suspicion had been decided against them under section 523, that did not deprive them of the right of suit to establish their claim.

The learned District Judge relied in support of his decision upon *Ramachandra v. Secretary of State for India* (3). But that case was properly distinguished by the learned Assistant Judge, who pointed out that the present case has nothing to do with rights created by Statute, for the enforcement of which a special remedy is given. We set aside the decision of the District Judge, and remand the case for disposal upon the other issues. The respondent must pay the appellant's costs of this appeal.

Decree set aside; Case remanded.

(3) 12 M. 105.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 155 OF 1913.

April 9, 1915

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Kumaraswami Sastri.

SUBRAMANIYAN CHETTY—PETITIONER
—APPELLANT

versus

S. R. M. RAMASWAMI CHETTY *alias*
CHINNIAH CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 150—Probate and Administration Act (V of 1881), ss. 56, 76, 98—Probate granted—Inventory, furnishing of—Property transferred by bifurcation of District to another District—Jurisdiction—Court granting Probate, if can demand inventory.

Apart from section 150 of the Code of Civil Procedure, it is the Court which has jurisdiction to grant the Probate under section 56 of the Probate and Administration Act that has also jurisdiction to demand an inventory to be furnished to it under section 98 of the Probate and Administration Act. That jurisdiction cannot be said to have been taken away because by bifurcation of the district, the properties dealt with by the Probate, lie within the jurisdiction of another district. [p. 500, cols. 1 & 2.]

Letters Patent Appeal preferred against the order of the Hon'ble Mr Justice

(1) 19 B. 668.

(2) 9 B. 131.

HALAI V. CHATURBHUI GOPALJI.

Miller, in Civil Revision Petition No. 468 of 1913, dated the 11th November 1913, preferred against the order of the District Court of Madura, in Interlocutory Appeal No. 29 of 1913.

FACTS appear from the following judgment of

MILLER, J.—Section 98 of the Probate and Administration Act enacts that the Court which granted the Probate should receive the inventory. The District Judge of Ramnad granted the Probate and had in my opinion jurisdiction to receive the inventory. The case cited, *Zamindar of Vallur and Guler v. Adinarayudu* (1), is different. The judgment gives no reasons, but section 649 of the Civil Procedure Code and section 35 (1) of the Small Cause Courts Act, IX of 1887, seem to justify the decision. In the present case, I am not without some doubt, but I find nothing to support the view that the District Court of Madura has ceased to be the Court which granted the Probate, and I cannot, therefore, say that the District Judge was wrong in receiving the inventory though I recognise that some inconvenience may arise as to proceedings to be instituted hereafter. Section 150 of the Civil Procedure Code has been cited, but I am not satisfied that it takes away the jurisdiction of the Madura Court.

The objections to the inventory on the merits are not matters which can be dealt with under section 115, Civil Procedure Code.

The petition is dismissed.

Mr. A. Venkatarayaliah, for the Appellant.

Mr. A. Krishnasami Aiyer, for the Respondent.

JUDGMENT.—The learned Judge is clearly right. It is not necessary to decide whether by the operation of section 150 of the Civil Procedure Code, the jurisdiction to receive an inventory has been conferred on the District Court of Ramnad. Having regard to the saving clause in the beginning of the section, the language of section 98 of the Probate and Administration Act is clear and imposes on the grantee the duty of furnishing the inventory to the Court which issued the Probate. Section 76 also shows that the

undertaking is given to the Court which granted the Probate. Under section 56 of the Probate and Administration Act, the Madura District Court had jurisdiction to grant the Probate. That jurisdiction cannot be said to have been taken away, because the properties dealt with in the Probate are within the jurisdiction of another Court by reason of the bifurcation of the district.

We dismiss the appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 10 OF 1915.

August 10, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

W. T. HALAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHATURBHUI GOPALJI—PLAINTIFF—RESPONDENT.

Will—Legacy—Legatee to make good what he owes to the estate before he can take anything

A legatee is bound to make good to the estate of a testator what he owes to that estate before he can claim payment of a legacy out of the same estate. [p. 101, col. 2.]

Where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to it. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained, it must be ascertained in order that the rights of the parties may be adjusted. [p. 501, col. 1.]

In re Taylor, Taylor v. Wade, (1894) 1 Ch. 671; 63 L. J. Ch. 424; 8 R. 86; 70 L. T. 556; 42 W. R. 373, distinguished.

Mr. Desai, for the Appellants.

Messrs. Kanga and Daruwalla, for the Respondent.

JUDGMENT.

SCOTT, C. J. In my opinion the appellants are entitled to succeed.

They are executors of the Will under which the plaintiff was entitled when twenty-one to a legacy of Rs. 5,000 payable out of the testator's general estate.

In answer to a claim for the legacy the executors replied the plaintiff had removed wrongfully a ring worth Rs. 2,700 belonging to the testator.

Correspondence then ensued, which ended in the executors saying that they had no alternative but to impound the legacy till

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the ring and certain other articles were returned or their loss compensated for. In their written statement, the defendants contend the plaintiff is not entitled to the legacy before he returns the ring and they bring into Court the value of the legacy less the estimated value of the ring.

The suit was tried as a short cause: no issues were raised, but the plaintiff's Counsel contended, the defendants could not set off, as under Order VIII, rule 6 of the Civil Procedure Code only a claim in respect of an ascertained sum could be set off. This contention found favour with the learned Judge who, notwithstanding that the defendants' Counsel said he wished to give evidence as to the straction of the ring, passed a decree for the amount of the legacy and interest with costs.

The plaintiff's title to the legacy is not complete against the executors until they have assented to the same: see section 112 of the Probate and Administration Act, 1881. The plaint contains no allegation of assent by the executors to the plaintiff's legacy. on the contrary, the correspondence filed with it, shows they impose as a condition of payment that the plaintiff shall return the ring. This is at most a conditional assent under section 114. Whether the condition could rightly be imposed depends upon the question of fact on which the executors' Counsel wished to give evidence.

Before us, the appellants' case was based on the general principle that where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to it. "It is immaterial," it has been held in *Rhodesia Goldfields, In re, Partridge v. Rhodesia Goldfields* (1), "whether the amount is actually ascertained or not. If it is not actually ascertained, it must be ascertained in order that the rights of the parties may be adjusted." Here the amount claimable from the plaintiff, if the executors' case is true, is the value of the ring, an ascertainable sum, and they are entitled to give evidence on the point. It was argued for the respondent that such a conclusion would be inconsistent with the dictum of Chitty, J., in *In re Taylor, Taylor v. Wade* (2).

(1) (1900) 1 Ch. 239 at p. 247; 79 L. J. Ch. 133; 104 L. T. 126; 17 *Mansour*, 24, 54 S. J. 135.

(2) (1894) 1 Ch. 671; 63 L. J. Ch. 424; 8 R. 183; 70 L. T. 556; 42 W. R. 373.

It was there held that a specific legacy payable out of a specified and sufficient fund could not be withheld on the ground that a debt might be due by the legatee which, if recovered, would increase the residuary estate. Here, however, the ring or its value if recovered would increase the general estate out of which the legacy is payable.

For these reasons, under Order XLI, rule 23, Civil Procedure Code, we set aside the decree and remand the case to the learned Judge for trial on the merits. We hope it may be tried as a short cause. Costs reserved to be disposed of by the learned trial Judge.

DAVAR, J.—I concur in the order of remand which the learned Chief Justice proposes to make in this appeal. I should, however, like to add that in my opinion, the defendants are primarily responsible for the refusal of the learned Judge in the Court below to go into evidence on the question of the ring, which the plaintiff-respondent is supposed to have clandestinely taken possession of when the testator was on his death-bed. The case of *Rhodesia Goldfields, In re, Partridge v. Rhodesia Goldfields* (1) is very clear authority for the contention that a legatee is bound to make good to the estate of a testator what he owes to that estate before he can claim payment of a legacy out of the same estate.

This contention is no doubt specifically raised by paragraph 3 of the defendants' written statement, but it appears from the notes of the learned Judge taken at the hearing and from his judgment that when the case was heard by him, Counsel for the plaintiff assumed that the claim of the plaintiff was resisted on the bare ground of a set-off and the learned Judge rightly held that the value of the ring being unascertained, defendants were not entitled to maintain the plea of set-off. No issue was raised and no authority seems to have been cited before the learned Judge below and his attention was not specifically drawn to the contention set forth in paragraph 3 of the defendants' written statement.

From the judgment it appears that the learned Counsel for the defendants did contend before him that "the plaintiff was

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not entitled to the legacy before he returned the ring." The ground on which the contention was based becomes clear further on in the judgment where the learned Judge sets out what happened before him when the case was called on for hearing.

It seems to me under the circumstances that the learned Judge, on the materials placed before him and the way the case was presented to him, was justified in assuming that the only question before him was whether the defendants were entitled to a set-off, and on this question, he came to a correct conclusion.

Having regard, however, to the fact that the ground on which the appeal was argued before us, was specifically taken in the written statement, I agree in thinking it is in the interest of both parties that the questions in dispute should be disposed of in the present suit.

We have left the whole question of costs to be dealt with by the learned Judge to whom the case is remanded. He will, I have no doubt, have regard to what happened before him at the original hearing when dealing with the question of costs.

Decree set aside; Case remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 871 OF 1913.

September 9, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

J. SUBBIER—CANDIDATE NO. 15—

PETITIONER

versus

M. ABOY NAIDU—CANDIDATE NO. 7—

RESPONDENT.

Religious Endowments Act (XX of 1863), ss. 8, 10—Devasthanam Committee, vacancy in—Appointment by District Judge—Evidence not taken—Order, if legal—Revision, maintainability of—Nature of proceedings—Qualifications laid down in s. 8, if apply to vacancies subsequent—Improper appointments, how set aside—Civil Procedure Code (Act V of 1908), s. 141—Madras Civil Rules of Practice (Mofussil), r. 94, applicability of, to proceedings under s. 10 of Religious Endowments Act.

A District Judge, acting under section 10 of the Religious Endowments Act, XX of 1863, is not bound to take evidence before appointing a person

to the vacancy of a member of the Devasthanam Committee. [p. 504, col. 1; p. 507, col. 1.]

Per Sadasiva Aiyar, J.—Rule 94 of the Civil Rules of Practice (Mofussil), in so far as it goes beyond section 141, Civil Procedure Code, 1908, is *ultra vires* and in so far as it is in conformity with the said section is unnecessary. [p. 503, col. 2.]

The omission in rule 94 of the Civil Rules of Practice (Mofussil) of the qualifying words 'as far as it can be made applicable,' occurring in section 141, Civil Procedure Code, 1908, cannot make the procedure in regard to suits applicable in their entirety to all original petitions, if by the very nature of such petitions portions of the procedure relating to suits cannot be made applicable to such petitions. [p. 503, col. 2; p. 504, col. 1.]

The nature of an application under section 10 of the Religious Endowments Act, invoking the District Judge's power of appointment to the vacancy of a member of the Devasthanam Committee, makes that part of the procedure in the trial of suits which relates to the taking of evidence not obligatory on the District Judge, though there is nothing to prevent his taking such evidence. [p. 504, col. 1.]

Neither appeal nor revision lies against an order passed by a District Judge under section 10 of the Religious Endowments Act, as it is informal in its nature and is one passed outside the Ordinary Civil Jurisdiction of the District Court. [p. 504, col. 1.]

The qualifications contained in section 8 of the Religious Endowments Act, regarding Committee Members apply to vacancies filled up under section 10 of the said Act. [p. 505, col. 1.]

A person improperly appointed under section 10 can be removed either by proceedings by *quo warranto* or by injunction. [p. 505, col. 1.]

Per Napier, J.—Neither section 141, Civil Procedure Code, 1908, nor rule 94 of the Civil Rules of Practice (Mofussil), applies to proceedings under section 10 of the Religious Endowments Act. [p. 506, col. 1; p. 507, col. 1.]

Proceedings under section 10 of the Religious Endowments Act are not judicial proceedings, and they do not amount to a 'case' within the meaning of section 115, Civil Procedure Code. [p. 506, col. 1.]

Quære.—Whether an order passed by a District Judge under section 10 of the Religious Endowments Act, appointing a person to a vacancy in the Devasthanam Committee can be revised by the High Court? [p. 506, col. 1.]

A High Court will not under section 15 of the Charter Act interfere with a carefully considered order of a lower Court. [p. 507, col. 1.]

Petition, under sections 115 and 141 of the Civil Procedure Code, 1908, praying the High Court to revise the proceedings of the District Court of Madura, in Original Petition No. 256 of 1913.

FACTS.—The petition was to revise the order of the District Judge of Madura filling up a vacancy in the Devasthanam Committee, on the ground that the order was vitiated by material irregularity inas-

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much as the learned Judge failed to follow the procedure laid down in section 141, Civil Procedure Code, and rule 94 of the Civil Rules of Practice (Mofussil) and take evidence before making the appointment.

Messrs. T. R. Ramachandra Iyer and T. R. Krishnaswami Iyer, for the Petitioner:—The order of the District Judge has been vitiated by material irregularity. He ought to have followed the procedure laid down for suits and taken evidence. *Vide* section 141, Civil Procedure Code, and rule 94, Civil Rules of Practice (Mofussil). Such orders are revisable by the High Court. *Vide* also *Somasundara Mudaliar v. Vythilinga Mudaliar* (1), *Amdas Miyan v. Muhammad Davul Khan Bahadur* (2), *Gopala Ayyar v. Arunachallam Chetty* (3) and *Vasudeva Aiyar v. Devasthanam Committee of Negapatam* (4). If it is to be held that no revision lies to the High Court, the result will be disastrous. The District Judge may appoint a European or a Christian as a member of the Committee of a Hindu Devasthanam and such a procedure would lead to a revolt. See also *Minakshi Naidu v. Subramanya Sastri* (5).

Messrs. S. Srinivasa Iyengar and K. Rajah Iyer, for the Respondent:—Rule 94 of the Civil Rules of Practice (Mofussil), does not apply to proceedings under section 10 of the Religious Endowments Act. The Civil Rules of Practice purport to have been framed by virtue of powers therein recited. The Religious Endowments Act is not a Special Act, nor does it empower the framing of rules. Section 141 of the Civil Procedure Code has no application either. The proceedings under section 10 of the Religious Endowments Act are not a civil suit, *vide* *Minakshi Naidu v. Subramanya Sastri* (5).

The High Court has no jurisdiction to interfere. The cases in *Somasundara Mudaliar v. Vythilinga Mudaliar* (1); *Gopala Ayyar v. Arunachallam Chetty* (3) and *Vasudeva Aiyar v. Devasthanam Committee of Negapatam* (4) are wrongly decided. The cases in which the High Court

has interfered, are cases under sections 14, 16 and 18 of the Religious Endowments Act. Proceedings under those sections stand on quite a different footing. The Privy Council has held that they are judicial proceedings, whereas proceedings under section 10 are not. Moreover, the interference has been confined to preliminary legal questions giving rise to the exercise of jurisdiction.

JUDGMENT.

SADASIVA AIYAR, J.—This petition is instituted as a petition filed under both sections 115 and 141 of the Civil Procedure Code. Section 141 corresponds to the first paragraph of the old section 647 and is as follows:—

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction."

Mr. T. R. Ramachandra Aiyar, who appeared for the petitioner, admitted during the course of the argument that this revision petition was not filed under both the sections 115 and 141 of the Civil Procedure Code, but only under section 115, corresponding to old section 622, and that section 141 ought to have appeared in the third ground of the memorandum of the Civil revision petition and not in the title of the petition. The memorandum contains another mistake. As corrected, or rather fully expanded, the third ground, according to the contention of Mr. T. R. Ramachandra Aiyar, would be as follows:—

"The District Judge acted with material irregularity in not disposing of the original petition before him in accordance with the provisions of section 141 of the Civil Procedure Code, and according to rule 94 of the Civil Rules of Practice, framed by the High Court under paragraph 2 of section 652 of the old Civil Procedure Code, corresponding to section 122 of the new Civil Procedure Code."

I do not think it is necessary to consider rule 94 of the Civil Rules of Practice as that rule, if it goes beyond section 141, is *ultra vires* and so far as it is in conformity with it, it is unnecessary. While section 141 contains the qualifying words "as far as it can be made applicable," these words are omitted in rule 94 of the Civil Rules of Practice. But such omission cannot make the proce-

(1) 19 M. 285; 6 M. L. J. 92.

(2) 24 M. 685 at p. 687; 11 M. L. J. 326.

(3) 26 M. 85.

(4) 21 Ind. Cas. 451; 25 M. L. J. 536; 14 M. L. T. 354; (1913) M. W. N. 842; 38 M. 594.

(5) 11 M. 26 at pp. 34, 35; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393.

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ture in regard to suits applicable in their entirety to all original petitions if by the very nature of such petitions portions of the procedure relating to suits cannot be made applicable to such petitions. It was on this ground that in a foot-note case in *Amdoo Miyan v. Muhammad Darul Khan Bahadur*, (2), Subramania Aiyar and Davies, J.J., held that in respect of an application under section 18 of the Religious Endowments Act, the ordinary procedure in suits as to giving notice to the other side and to taking evidence before deciding the case had no application, notwithstanding the terms of section 647 of the old Civil Procedure Code (corresponding to present section 141). So in the foot-note case in *Venkateswara, In re* (6), a Full Bench of five Judges held that notwithstanding section 647, no appeal lay against an order passed under section 18 of the Religious Endowments Act. I, therefore, agree with my learned brother that the nature of the application under section 10 of the Religious Endowments Act invoking the District Judge's power of appointment to the vacancy of a member of the Devasthanam Committee makes that part of the procedure in the trial of suits which relates to the taking of evidence by the Court not obligatory on the District Judge, though there is nothing, of course, to prevent his taking such evidence. I am further of opinion, for the same reasons as were given in the foot-note case in *Venkat-swara, In re* (6), that not only are the provisions of the Civil Procedure Code as to an appeal inapplicable to an order passed under section 10 of the Religious Endowments Act, but the provisions by way of revision are also inapplicable. In the Privy Council case in *Minakshi Naidu v. Subramanya Sastri* (5), their Lordships treat sections 14 to 20 of the Act as standing on a somewhat different footing from section 10, and while the proceedings of the Court under sections 14 to 20 are treated as coming within the Ordinary Original Civil Jurisdiction of the District Court, an order of appointment under section 10 is treated as outside the Ordinary Civil Jurisdiction. Hence the appointment order under section 10 is much more informal than the decision given under any of the sections 14 to 20. In the case in *Somasundara*

Mudaliar v. Vythilinga Mudaliar (1), the question whether the High Court could interfere under section 622 of the old Civil Procedure Code with an order under section 5 of the Act XX of 1863 appointing a temporary manager, seems not to have been argued and was not considered in the judgment. As the petition in revision was dismissed on the merits, that case cannot be treated as an authority for the proposition that the High Court had jurisdiction to interfere in revision under section 622 with an order passed under section 5.

As regards the case *Gopala Ayyar v. Arunachalam Chetty* (3), the preliminary objection seems to have been taken in that case that no revision lay, but that was overruled. It was the decision of a single Judge, and though entitled to the greatest respect, it is not binding on us, especially as even on the merits, interference in revision was refused in that case also.

Coming to the case in *Vasudeva Aiyar v. Devasthanam Committee of Negapatam* (4), apart from the fact that that decision is now under appeal to the Privy Council, the order revised in that case under section 115, corresponding to old section 622, was not an order of appointment by the District Judge under section 10 of the Act XX of 1863, but was an order passed by him accepting the result of an election held invalidly by the temple committee, such acceptance being treated as entitling the elected person to be a committee member. Mr. T. R. Ramachandra Aiyar however, argued that if the High Court has no jurisdiction to interfere with an appointment under section 10, grave injustice might result as the District Judge might appoint a European or Christian gentleman as the member of a committee of a Hindu Devasthanam. He even went so far as to say that a popular religious rebellion might be the result of such an appointment and that hence a power of revision is necessary in the High Court. I do not intend to deny the right of the learned Vakil to put his case as strongly as possible, but one might venture to doubt whether, when there was not the slightest inclination on the part of the ordinary Hindu public to raise any objection to the control of the secular affairs and even festivals of Hindu Devasthanams by European gentlemen, who were members of Revenue Boards and Collectors,

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till Christian Missionary agitation brought about their withdrawal from such management (the Hindu public on the other hand being satisfied and even gratified with such official control), the appointment of one of several members of a temple committee by the District Judge (who has the best means of knowing the local opinions and feelings) of a European (official or even non-official), known for his tolerance and sympathy, could lead to such dire results as predicted by Mr. Ramachandra Aiyar, notwithstanding the existence of a very few persons here and there in all countries (whether religious persons or irreligious persons) who entertain an unreasoning hatred (as opposed to the common mild dislike) of everything and everybody foreign. But unless a District Judge was phenomenally ignorant of law or perverse, the question as to what is to be done if a Christian, actively hostile to the Hindu religion, is appointed, cannot arise, as section 8 of the Act XX of 1863 clearly provides that "the members of the said committee shall be appointed from among persons professing the religion for the purpose of which the mosque, temple, etc., was founded or is maintained," and though that section relates to the first appointment of committee members by the Local Government after the passing of the Act, the clear intention of the Act seems to be that when vacancies are filled up under section 10, the qualification for membership prescribed in section 8 will continue to apply. If against the clear intention of the Act as signified by section 8, the District Judge appoints a bigoted Christian gentleman to fill a vacancy, their Lordships suggest in *Minakshi Naidu v. Subramanya Sastri* (5) that it may be that the person so improperly appointed "could be removed by proceedings equivalent to proceedings by *quo warranto* in England." (It may be that an injunction suit might also lie.) But I might put another case which is far more likely to occur, namely, the District Judge might appoint a very bigoted Vaishnavite as a committee member for a Saivite Temple or a very bigoted Tengalai sectarian for a Valagalai Devasthanam. We know that sectarians of the same religion sometimes hate each other more than they hate an alien religionist. I was this danger that this High Court wanted to prevent by their attempt at inter-

ference in the case in *Minakshi Naidu v. Subramanya Sastri* (5). Turner, C. J., and Muthuswami Aiyar, J., say (see page 29) that the order appointing Minakshi Naidu as a committee member of the Madura Minakshi Sundareswarar Devasthanam (a Saivite institution) ought to be set aside "because he" (Minakshi Naidu) "has pronounced himself actively in favour of the cult of Vishnu." But their Lordships of the Privy Council did not accept Mr. Doyne's contention that a person, "very improper and unfit by reason of his religious qualifications or moral conduct, might be appointed by the District Judge and that there must be a right either by appeal against the Judge's order or by suit or in some other way to remove the person so appointed." In that case, no doubt, the question directly in point was whether there was a right of appeal against the order of appointment. But the reasons given by their Lordships to veto the right of appeal also apply in full force to the right of interference by way of revision. If I understand the report of the arguments in that case rightly, Mr. Doyne, who appeared against Minakshi Naidu before the Privy Council, seems to have referred to the powers of the High Court under section 622 (the revision section in the old Code) during the course of his arguments as justifying the High Court's interference with the District Judge's order of appointment (see page 31 of the report) and their Lordships do not refer to that section; they say generally that "there was an inherent incompetency in the High Court to deal with the question brought before it."

I would, therefore, dismiss the petition with costs.

NAPIER, J.—This is a petition under sections 115 and 141, Civil Procedure Code, to revise the proceedings of the District Judge of Madura making an appointment to fill a vacancy in a temple committee, the ground for revision being an alleged material irregularity in the procedure of the Judge in that he did not proceed with the case in accordance with rule 94 of the Civil Rules of Practice and also did not take evidence. It is common ground that it is not the practice to apply rule 94 and that this procedure followed by the District Judge is

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the usual one and has never been challenged before. In reply, it is urged by Mr. S. Srinivasa Aiyangar that the High Court has no jurisdiction to interfere and that rule 94 does not apply to such proceedings as these. As to the right to revise, there are some reported cases of the exercise of this power, *Somasundara Mudaliar v. Vythilinga Mudaliar* (1), *Amdon Mayan v. Muhammad Darul Khan Bahadur* (2), *Gopala Ayyar v. Arunachallam Chetty* (3), *Vasudeva Aiyar v. Devasthanam Committee of Negapatam* (4), but Mr. S. Srinivasa Aiyangar seeks to distinguish them on two sets of grounds, namely, (1) that proceedings under sections 5 and 10 of the Act stand on a different footing to those under sections 14, 16 and 18 and (2) that where the Court has interfered under the above sections, it has been on a preliminary legal question giving rise to the exercise of the jurisdiction. For reasons that will appear later I feel the force of the first distinction, but I am unable to accept the latter and think that if we are to uphold his contention that no revision lies, we must hold that *Somasundara Mudaliar v. Vythilinga Mudaliar* (1), *Gopala Ayyar v. Arunachallam Chetty* (3) and *Vasudeva Aiyar v. Devasthanam Committee of Negapatam* (4) are wrongly decided. Mr. S. Srinivasa Aiyangar is quite prepared to argue that they are wrong, relying on the decision of the Privy Council in *Minakshi Naidu v. Subramanya Sastri* (5). I have to observe that in each of the three cases *Minakshi Naidu v. Subramanya Sastri* (5) was relied on and in one case this point was not taken and in the other two it was overruled by the Court. I desire to express no decided opinion on the point myself as I think the petition fails on the second point, but I have the gravest doubts whether these proceedings are a "case" within the meaning of section 115. In my view rule 94 is inapplicable in proceedings under section 10 of the Act. These rules are made under the Civil Procedure Code, under a number of special Acts, and under all other powers of the High Court. The Religious Endowments Act is not one of the Special Acts, for it contains no provision for the making of rules. It is sought, however, to find the power in section 141 of the present Code, but to invoke the aid

of that section, we have to ascertain first whether the procedure in the Code *can* be made applicable. This must depend on the nature of the proceeding and the materials on which the order or decision is to be based. I do not think that rule 94, read with the definitions in rules 4 (8) and (9), carry us any further. It is urged that under the old rules, there were no such definitions as appear in rule 4, although both sets of rules were made under the same Code, which contains section 647 in the same terms as section 141 of this Code and though the rule-making power existed under section 652, and that, therefore, the necessity for an original petition could not have been insisted on prior to 1905; but this argument is hardly permissible, as the High Court may have intended to extend the scope of the rules in 1905. I think that what we have to decide is as stated above and that we must look at the Act in light of the decision of the Privy Council to decide whether section 141 makes the Code or any rules made under the Code applicable to these proceedings. Now *Minakshi Naidu v. Subramanya Sastri* (5) clearly decides one thing, namely, that there is no "Civil suit" in proceedings under section 10 and that the order is not a decree within the meaning of the Code of 1879, which first introduced the language now adopted, with slight modification. The Privy Council, dealing with the exercise of the powers under section 10, calls it "the right of appointing a member of the committee." This phrase seems to me indicative of its nature. It is not a right to apply nor a duty of the Court to appoint, and it is not a matter of "Ordinary Civil Jurisdiction." These phrases used by the Privy Council seem to me to be inapt for judicial proceedings. Again, the Privy Council clearly identify the Court with the Judge, saying so in so many words. Then how is the right to be exercised? It is "discretionary": that may not carry the matter very far; but it is to be exercised by "a person who has the best means of knowing the movements of local opinion and feeling." If the Privy Council meant that the selection is to be made on these considerations, the petition must obviously fail, for there can obviously be little or

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of sworn evidence when the Judge has to apply what he could not use in ordinary proceedings, his own knowledge by hearsay, repute or otherwise of local opinion and feeling. I venture very respectfully to say that this test is to be gathered from the terms of the section. The appointment is to be filled up primarily by election; failing that, by selection either by the Committee or by the Judge. Election and selection by the Committee are surely intended to procure the person most desirable according to the local opinion and feeling. Again, section 8 lays down that the committee members are to be appointed "as far as can be ascertained in accordance with the general wishes of those interested." It seems to me that these words are but reproduced in another form in the language of the Privy Council. No evidence is taken by the Committee in selecting. Why should evidence be taken by the Judge? No procedure is laid down for the Committee and none for the Judge and yet the Legislature was careful to provide the procedure when dealing with arbitration under section 17 and sanction to sue under section 13 (*Vide* also section 14, power to direct special performance). For the above reasons I am clear that no part of the procedure in a suit is applicable and that, therefore, section 141 of the Civil Procedure Code and the Rules of Practice do not affect these proceedings. We are asked to interfere under the Charter Act and obviously when the Judge has, as in this case, carefully considered the rival claims such an application could not be contemplated by the petitioner. I would dismiss this petition with costs.

Petition dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 25
OF 1915.

August 16, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Batchelor.

MAHOMED HAJI ESSACK—CREDITOR—

APPELLANT

versus

Shaikh ABDUL RAHMAN—INSOLVENT

—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 8

—Protection order—Appeal—Aggrieved person—
Application for protection to be judged on merits.

An interim protection order made under the insolvency jurisdiction is a judicial order and appealable. [p. 508, col. 1.]

The Legislature does not appear to have put any limitation upon appeals made from original orders of a Judge except perhaps orders regulating procedure. [p. 508, col. 1.]

A creditor who has not obtained a decree may be an aggrieved person within the meaning of section 8 of the Presidency Towns Insolvency Act (III of 1909), especially when the insolvent has himself prevented the creditor from attaining that position by opposing proceedings instituted by the creditor for the purpose. [p. 508, cols. 1 & 2.]

Each application for protection after refusal or suspension of discharge must be judged on its merits. If the insolvent has acted recklessly and dishonestly, the fact that he cannot pay is no reason for depriving the creditor of the power of punishing him by attachment and imprisonment to the extent the law allows. [p. 509, col. 1; p. 511, col. 1.]

Mr. Bahadurji, for the Appellant.

Mr. Desai, for the Respondent.

JUDGMENT ON PRELIMINARY POINTS.—Two preliminary objections have been taken to this appeal. First, it is said that this is an order which, under the Presidency Towns Insolvency Act, III of 1909, is not appealable. Section 8 deals with appeals. It is headed with the introductory title of appeals. Clause (1) provides that the Court may review, rescind or vary any order made by it under its Insolvency Jurisdiction. Clause (2) states that orders in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal as follows: An appeal from an order made by an officer with delegated powers under section 6, which order under that section is to be treated as an order of the Court, lies to the Judge assigned under section 4 to dispose of insolvency matters, and no further appeal lies. The other orders, being orders made by the Judge himself as original orders, are appealable, and shall lie in the same way and be subject to the same provisions as appeals from orders made by a Judge in the exercise of the Ordinary Original Civil Jurisdiction. Now, it is to be observed that the first clause deals with any orders made under the Insolvency Jurisdiction. The second clause deals with orders in insolvency matters; and there does not appear to us to be any reason for limiting them so as

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to include something less than orders referred to in the first clause. Clause (a) does not indicate that the Legislature wished to put any limitation upon appeals from orders made by the delegated officer; and similarly it does not appear to us that it wished to put any limitation upon appeals made from original orders of a Judge except perhaps orders regulating procedure. Those appeals must be preferred in the same way and subject to the same provisions as Original Side Appeals. "In the same way" would refer *inter alia* to the filing of a memorandum of appeal in the Prothonotary's Office and so forth, as provided by the Original Side Rules.

"Subject to the same provisions" would be subject to the law of limitation and other Statutes enacting adjective law. We do not think it should be held that this order made as an original order by the Judge exercising jurisdiction under the Act, is not appealable. Of course, there may be orders which are merely orders regulating procedure for the convenience of the Court or for the convenience of the parties. Such orders, we take it, are not affected by these provisions. The orders made must be judicial orders intended to decide some point judicially. It cannot be contended that the present order is not a judicial order.

Then, it is said that an appeal only lies at the instance of any person aggrieved, and it is contended that the appellant, who filed this appeal, is not a person aggrieved. The order complained of is an order which granted protection, although refusing discharge, to the insolvent; and it is said that such an order only affects the interests of creditors who have obtained decrees and, therefore, would otherwise have the right of arresting the judgment-debtor. But the only reason why the appellant is not himself a judgment-creditor is that the insolvent, since the filing of the appeal, has prevented the creditor-appellant from attaining that position by opposing proceedings before the Original Side Judge, which were actually suggested by the Insolvency Court in order that the appellant might put himself in the position of an aggrieved person. The view that the appellant is not

an aggrieved person is one which this Court is not disposed to regard with favour under the circumstances; but as Counsel for the appellant appears also on the instructions of the Alliance Bank, a judgment-creditor and opposing creditor, who would undoubtedly be an aggrieved person and consents to be added, and actually applies to be added, as a party appellant in this appeal, we, in pursuance of the powers vested in Courts under section 107 of the Civil Procedure Code and Order I, rule 10, clauses (2) and (3), and Order XLI, rule 33, direct that the Alliance Bank be joined as appellant in this appeal.

The appeal must proceed.

JUDGMENT ON MERITS.

SCOTT, C. J.—This case comes before us on appeal from an order of Mr. Justice Davar sitting as Judge in Insolvency dated the 16th of April 1915 whereby the insolvent after refusal of his discharge and notwithstanding opposition by a judgment-creditor was given an order protecting him from arrest till April 1916.

The order refusing the insolvent's application for discharge was passed on a judgment of the 8th of April, in which the reasons for refusing discharge were stated and it was shown that numerous facts falling within the categories (a), (b), (c), (d), (f) and (j) of section 39 (2) of the Presidency Towns Insolvency Act had been proved against the insolvent. It was found *inter alia* that on the day preceding his petition in insolvency, the respondent to make good certain defalcations assigned a debt worth Rs. 9,000 and properties worth over two lacs to creditors whom he had defrauded by breaches of trust. The learned Judge stated that he would have tried the insolvent in respect of these assignments under the penal section 103, if it had not been for the decision of the House of Lords in *Sharp v. Jackson* (1), which seemed to render a trial on a charge of fraudulent preference hopeless. Nevertheless, the learned Judge, because he believed that in almost all cases where the discharge was suspended under the present law, the insolvent

(1) (1893) A. C. 19; 65 L. J. Q. B. 863; 81 L. T. 841; 6 Manson 264; 15 T. L. R. 418.

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had, as a matter of course, been granted protection for the period of suspension, granted protection for 12 months out of the period of two years which would elapse between the order refusing discharge and a fresh application for discharge by the insolvent.

It is clear that the Court has a discretion in the matter. If an application for protection was necessary in April under section 25, the Court could have refused it for good cause. If ever there can be such good cause, it seems to me to exist in the present case. There is nothing to be said for the insolvent in face of the findings of the learned Judge. We are, moreover, informed by the Official Assignee that the learned Judge is mistaken in thinking the insolvent's assistance is required for the purpose of realizing assets. All known assets of value had been recorded before the application for discharge. It would, in my opinion, be dangerous as well as unnecessary to adopt any such rule of practice as the learned Judge believed to exist. Each application for protection after refusal or suspension of discharge must be judged on its merits. The Court has no longer power to permit the imprisonment of an insolvent for two years at the suit of a judgment-creditor as it had under section 51 of the Indian Insolvent Debtors Act: the period of six months is the maximum term of civil imprisonment under the Civil Procedure Code. But if the insolvent has acted as here recklessly and dishonestly, the fact that he cannot pay, is no reason for depriving the creditor of the power of punishing him by attachment and imprisonment to the extent the law allows: compare *Morris v. Ingram* (2) and *In re Gent, Gent-Davis v. Harris* (3), cases under the English Debtors' Act of 1849. In my opinion the order of protection now under appeal should be set aside.

BACHELOR, J. This is an appeal in insolvency proceedings from an order made by the learned Commissioner granting the insolvent protection from arrest under section 15 of the Presidency Towns Insolvency Act, 1909. The appellant before us is the Alliance Bank of Simla, a judgment-creditor in the sum of Rs. 50,000.

The respondent was adjudicated insolvent (2) (1879) 13 Ch. D. 338; 40 L. J. Ch. 123; 4 L. T. 63; 25 W. R. 43.

3 (1878) 40 Ch. D. 190 at p. 195; 38 L. J. Ch. 162; 60 L. T. 365; 87 W. R. 161.

on 27th October 1913. On 10th February following, he filed his schedule, showing liabilities amounting to Rs. 2,20,499. The realisable assets are stated to come to Rs. 2,90,000, but the amount recovered up to the time of Official Assignee's report is only Rs. 1,37,000, and between that date and this the further sum realised is, we are told, the mere dribble of Rs. 4,000.

On 8th April 1915, the learned Commissioner refused the insolvent's discharge for reasons which he explained in an exhaustive judgment, in which he animadverted in severe terms on the insolvent's recklessness, extravagance and numerous malpractices. On the 16th April 1915, the same learned Commissioner made the order now under appeal granting the insolvent protection from arrest. The question is whether that order should be affirmed.

The order is, under the Act, a discretionary order; in this case it was made by my learned brother, Davar, J., whose experience in the administration of the law of insolvency is far greater than mine. It is, therefore, with sincere diffidence that I find myself compelled to take another view; and since we are differing from Davar, J., I desire to state my reasons in my own words. The conclusion which I reach is based entirely on Davar, J.'s judgment as to the character of this insolvency and on the consequences which seem to me to follow from that character. On this point I rely on the following passages in which the learned Commissioner has given his reasons for refusing the respondent's discharge:—

"The Official Assignee in his report says that the insolvent mixed up the moneys received by him as Receiver with his own moneys. The insolvent on 26th October 1913, a day before he filed his petition in insolvency, assigned over and transferred a good debt due by Maneklal Panachand to himself to the heirs of Esa Khalifa, of whose estate he was Receiver. And by this act, a sum of Rs. 29,000 was disposed of a day before his insolvency. It further appears that, during the time the insolvent was carrying on business, he was entrusted by various Arab merchants with their pearls for the purpose of sale. The insolvent pledged those pearls and used the moneys realised by such hypothecation for his own purposes. Again

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on 26th October, a day before his insolvency, he executed four writings, whereby he assigned over and transferred all his interest in certain properties at Basra to secure payment of about Rs. 2,10,000 to the Arab merchants whose pearls he had wrongfully and unjustifiably pledged. Denuded of all extraneous circumstances, the facts which cannot be denied are that the insolvent, during the time he was carrying on business as a merchant, committed offences of criminal breach of trust in respect of property entrusted to him as Receiver, and in respect of property entrusted to him for sale as a broker or commission agent. In order to save himself from criminal prosecutions which, he apprehended, would be started against him on its being known that he was insolvent or unable to meet his liabilities, he parted with properties worth approximately Rs. 2,40,000 on the day preceding his insolvency... I have to take into consideration certain facts admitted by the insolvent himself. In addition to doing the pearl business, he kept a racing stud. The Official Assignee in his report says that these racing expenses came to seven lacs of rupees spread over a period of six years. The statement as to seven lacs is correct, but the statement as to the period is not correct. To be exact, it appears that he spent a sum of Rs. 6,98,340 from November 1910 to October 1913 on his racing stud.... He was living in style and expending moneys (in a way) which I venture to think very few citizens of Bombay have done, even though they may be admitted millionaires... His books give no indication as to what his profits were, or whether there were profits at all, and in what year there were profits or losses. He has kept books, but he might well have omitted keeping books at all, because the books that he has kept are of no value whatever. The books are not balanced, balances are not drawn, nor are they carried forward, and quite light-heartedly the insolvent admits that entries in respect of all payments and receipts do not appear in his books. If they do not, the value of those books is absolutely nil... It seems to me that a man who is capable of regarding money in the light in which the insolvent has regarded it, and of dealing with his own and other people's moneys in the reckless manner in which he has done, that such a man as a

merchant is a danger to the public. His assets are not equal to four annas in the rupee. The Official Assignee reports that in his opinion, the insolvent cannot be held liable for his assets not being equal to four annas in the rupee on his unsecured liabilities. I differ from that conclusion altogether. It seems to me there can be no question whatever that the insolvent is solely and wholly responsible for his present state of affairs... There can be no question that the insolvent continued to trade when he must have well known that he was in insolvent circumstances. A man does not incur debts to the extent of twenty-nine lacs of rupees without realising that he is insolvent, and a debt of this description is not incurred in a day or a month. His indebtedness and insolvency must have been growing and growing continuously as every month of his reckless life progressed, and he must have been conscious, long before he filed his petition, that he was living a riotous and extravagant life at the expense of his creditors. He continued his business right up to the end with the fullest knowledge that he was dissipating his creditors' money."

The learned Commissioner concluded by finding against the insolvent that there was complete proof of the facts mentioned in clauses (a), (b), (c), (d), (f) and (j) of subsection 2 of section 39 of the Act, and by expressing his regret that he could inflict on him no higher punishment than the refusal of his discharge. From this judgment there was no appeal, and this, therefore, is the state of facts in which we have now to decide whether this insolvent is entitled to a protection order.

It is, I think, certain from the judgment of Davar, J., that the only reason why he felt himself unable to enforce the penal provisions of the Act was that, in view of *Sharp v. Jackson* (1), he reluctantly concluded that criminal proceedings could not succeed as it would be open to the insolvent to plead that his immediate and direct motive in benefiting some creditors at the expense of others was to save himself from the criminal prosecution, to which his own acts had exposed him. I agree with Davar, J., that, under the law as it stands, such a plea would suffice to save the insolvent, and, since that is the law, we must give effect to it; whether it is a satisfactory condition of the

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law, must be left to the authorities whose province it is to consider such matters. What concerns us now is to decide whether the character of the insolvency has, or has not any bearing upon the question whether the insolvent is entitled to protection: if it has, then, I think, it follows without further argument that this insolvent is disentitled. The contention for the insolvent goes, and must necessarily go, to this extent, that when once the Court finds itself for whatever reason, technical or substantial, unable to enforce the penal provisions, it must shut its eyes altogether to the character of the insolvency, and must consider exclusively the financial interests of the general body of the creditors. I can find nothing in the Act to countenance this view, though of course the interests of the creditors must receive some consideration. As I understand section 25, a protection order, though *prima facie* the insolvent is entitled to it, is still a privilege, to be granted or withheld as the Court in its discretion may determine, and the proposition on which I found my judgment is merely this, that, in exercising that discretion, it is relevant and proper for the Court to have regard to the character and circumstances of the insolvency. Here the insolvency was, as I have shown, of a flagrantly culpable kind, being the result of gross extravagance accompanied by grave malpractices and a total disregard of the creditors whose money was squandered. That protection should ordinarily be granted, does not signify here, for this is an extraordinarily bad case; and if it is not refused here, it must follow that it could never be refused, a consequence which, in my opinion, would conflict with the provisions of the section. I must add that the recent commercial history of Bombay is not such as to encourage the Courts to interpret the Act in a manner calculated to favour reckless speculation with other people's money; and that, I think, would be the effect of allowing insolvents to suppose that, to whatever lengths they may go in misconduct or dishonesty, they may count on immunity from the one fear that might act as a deterrent, the fear of the stigma of imprisonment. It is, in my opinion, no answer to say that the creditors would be better off if the insolvent were at large,

for I can see no very appreciable difference to the creditors whether he is at large or in jail; nor does it appear that there is any concealed property which the insolvent could produce. Moreover, I think that even if his freedom could be shown to be of some advantage in the collection of assets, that advantage might well be sacrificed for the more obvious need of showing the Court's disapproval of the insolvent's conduct. Lastly, I do not feel embarrassed by the contention that the refusal of protection would merely confer a special advantage on the appellant Bank to the possible disadvantage of the general creditors. It seems to me that a creditor who has put himself in a position to invoke and to deserve the exercise of certain powers conferred on the Court, is entitled to the Court's order in his favour. In fine, all these possible disadvantages, more or less remote, must be taken to have been within the contemplation of the Legislature, which yet has seen fit to empower the Court to refuse protection in suitable cases; and I can scarcely imagine a more suitable case than this. As to *In re Meghraj Gangabai* (4), that being the decision of a single Judge is not binding on this Bench, and there the only point decided was as to the grant of protection pending the inquiry into the insolvent's conduct prior to the Court's decision on his application for discharge. It is true that certain general observations are to be found in the judgment, but they must, I think, be read as limited by the facts then before the Court, and the case cannot, in my opinion, be properly cited as an authority for any hard and fast rule.

For these reasons, I agree that the protection order granted in this case should be set aside.

Order set aside.

(4) 7 Ind. Cas. 448; 35 B. 47; 12 Bom. L. R. 517.

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LOWER BURMA CHIEF COURT.

CIVIL REFERENCE NO. 4 OF 1913.

June 22, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge,
Justice Sir Henry Hartnoll, Kt., Mr. Justice
Twomey and Mr. Justice Ormond.

MAUNG YE NAN O AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

AUNG MYAT SAN—DEFENDANT—

RESPONDENT.

Burmese Buddhist Law—Joint property—Partition—Pre-emption—Right of pre-emption, whether exists after partition—Trees attached to land, effect on.

Per Curiam (Hartnoll, J. dissenting).—Under the Burmese Buddhist Law the co-heirs who take part in the partition of immoveable ancestral property have not a right of pre-emption as regards such property after the partition has been effected. [p. 515, col. 1; p. 521, col. 1; p. 526, col. 2.]

Per Sir Charles Fox, C. J., Ormond J. and Twomey J.—The right of pre-emption amongst co-heirs must be recognised only to the extent laid down in section 97 of part 2 of Spark's Code which professes to be a Code of Burmese Law and of the *Lex Loci*, viz., if a person wishes to sell his share in an undivided ancestral estate he should first offer it to all the co-heirs. They may buy the share jointly or each his separate portion of the share, or one may buy it in trust for the whole according as the heirs may decide among themselves; the seller shall have no voice in the decision and shall not be at liberty to sell his share otherwise than they or a majority of them shall decide. [p. 514, col. 2; p. 523, col. 1.]

Nga Mying v. Mi Baw, (1874) S. J. 39; *Ma Ngwe v. Lu Bu*, (1877) S. J. 76; *Ibrahim Saib v. Muni Mir Udin Saib*, 6 M. H. C. R. 26, referred to.

Per Hartnoll, J.—In the case of inherited land inclusive of trees permanently attached to the land, a joint inheritor of such property has a right of pre-emption in respect of such inherited property in the event of one of the joint inheritors desiring to sell his share of such property or such part of the inherited property as he has obtained possession of, in whole or in part, and whether it is joint, undivided or partitioned estate, but in the event of a sale having taken place such right must be asserted promptly and within a reasonable time or it is lost for ever. In asserting such right against a buyer the sum offered must be the sum which the land has cost him. [p. 517, col. 2.]

Shwe Eik Ke v. Tha Hla Aung, 1 L. B. R. 144; *Ma Ngwe v. Lu Bu*, (1877) S. J. 76; *Maung Shwe Nyun v. Ma So*, U. B. R. (1897-1901), II, 135; *Nga Tin v. Shwe On*, 2 U. B. R. (1907); *Buddhist Law Inheritance Pre-emption I*, *Ibrahim Saib v. Muni Mir Udin Saib*, 6 M. H. C. R. 26; *Ebrahim v. Arasi*, P. J. 26; *Apana Charan Chowdhry v. Shwe Nu*, 4 L. B. R. 124; *Gobind Dayal v. Inayatullah*, 7 A. 775 at p. 815; *A. W. N.* (1845) 228; *Nga Mying v. Mi Baw*, (1874) S. J. 39; *Ma Nain Bwin v. U Shwe Gona*, 23 Ind. Cas. 433; 7 Bur. L. T. 105; (P. C.); 16 Bom. L. R. 377; 27 M. L. J. 41; 18 O. W. N. 1121; 18 M. L. T. 14; 20 C. L. J. 264; 41 O. 887; 1 L. W. 914; 18 L. B. R. 1, referred to.

FACTS of the case appear from the following

ORDER OF REFERENCE.

PALETT, J.—(May 19th, 1913.) The second plaintiff Ma Nyein E and the 1st defendant Mg. Tha E are first cousins, being the grand-children of Po Da Lu and Ma Nyein. Upon the death of Po Da Lu and Ma Nyein, certain trees devolved in equal shares upon their son Di Lan and their two grand-children Tha E and Ma Nyein E. The property was first divided five or six years before the suit. Di Lan sold his share to Tha E, who thus became possessed of 2/3rds of the property. Tha E sold his 2/3rds share to the 3rd defendant, who is a stranger. The plaintiffs, Ma Nyein E and her husband, claimed the right of pre-emption. The Township Court held that they had the right but upon appeal by the 3rd defendant the District Court reversed this decision, and the plaintiffs now prefer this second appeal.

The District Court based its decision upon the case of *Shwe Eik Ke v. Tha Hla Aung* (1), where it was held that upon the division of property amongst children, each child took the particular lot or lots which fell to him or her, free from all obligations as regards pre-emption. It is now contended that that case is distinguishable from the present in that there the litigants were not, as here, the co-heirs who divided the joint property among them, but their descendants, and that the decision was merely that there is no authority for holding that before a Burman Buddhist can sell his property to others, he is bound to offer it first to every one of his relations including those of remote degree. This appears to be the case, but at the same time the expression of opinion referred to above by which the District Judge held himself bound, cannot be regarded as an *obiter dictum* inasmuch as it formed the basis of the decision that the descendants of the co-heirs who divided the property were free of all obligations as regards pre-emption.

The previous case of *Ma Ngwe v. Lu Bu* (2) was not referred to in the judgment and was certainly not expressly dissented from. In that case the learned Judicial Commissioner held that after division of ancestral estate the holder thereof being

(1) 1 L. B. R. 144.

(2) (1877) S. J. 76.

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a member of the family wishing to sell the land falling to his share must offer it first to his co-heirs and a sale to a stranger, without such offer being made, is invalid. A similar decision had also been come to in Upper Burma in *Maung Shwe Nyan v. Ma So* (3), which has been affirmed in the later case of *Nga Tin v. Shwe On* (4), where it was held that a widow has the right of pre-emption if her co-heirs to her deceased husband's estate wished to sell. The actual decision in *Shwe Eik Ke v. Tha Hla Aung* (1) has not, so far as I am aware, ever been challenged, but the ground on which it was based, namely, that the right of pre-emption is extinguished by partition of property, appears to me to conflict with the earlier decision in *Ma Ngwe v. Lu Bu* (2) and with the Upper Burma decisions. I therefore refer for the decision of a Bench of this Court the question:

Have the co-heirs who take part in the partition of immoveable ancestral property, a right of pre-emption as regards such property after the partition has been effected?

Maung Kin, Maung May Oung, and Maung Pu, for the Appellants.

Mr. Rahman, Maung Gyi and Maung Chit Hlaing, for the Respondent.

JUDGMENT.

Fox, C. J.—We have had the advantage of having had the question referred, argued by six learned Advocates.

Those who argued in favour of a negative answer contended that there was no right of pre-emption among Burman Buddhists either before or after partition, in that the rulings which recognised such right, were based on a misunderstanding of the texts on which they were based, and they were not justified by the texts. They contended further that their right of pre-emption was not a matter of inheritance, and that it was not a right which should be enforced in the exercise of justice, equity and good conscience.

It is clear that no text of any Dhammathat explicitly provides for such a right, whether it is called a right of a co-heir as such to demand that another co-heir shall sell

to him in preference to a stranger to the family, or a right of a co-heir to enforce against one who is not a co-heir a re-sale to him of jointly inherited land sold to him by another co-heir.

The 1st reported ruling of a Court affirming the right, namely *Nga Myaing v. Mi Bar*, (5) on the face of it professed to be the learned Judge's conclusion from certain passages in the *Manugye Dhammathat* which do not directly deal with the matter. The 1st text quoted in the judgment enjoins one who has bought land to sell it, if he has to sell it, to the sons and grandsons of the original owner (meaning, I take it, the person from whom he bought) and not to sell to others unless these do not wish to buy it.

This was the Customary Law of the land in 1756 when the *Manugye* was compiled or issued, but no instance has been cited of any son or grandson of a seller having claimed to exercise, at any time within living memory or since the annexation of any part of Burma by the British Sovereign, a right such as the text would appear to involve. Such a right has nothing to do with inheritance or rights of co-heirs or inherited property.

It applied to all property which had been sold and bought, whether the seller acquired it by his own exertions, or whether he inherited it either solely or jointly with others. In the case of inherited lands sold by a co-heir, the injunction in the text would apply not to the 1st seller, the co-heir, but to the 2nd, the buyer, from him. It seems to me difficult to see how this text could form the basis or even part of the basis of the conclusion that a co-heir as such had a right to demand that a co-heir shall sell to him in preference to a stranger. It was admitted by the learned Advocates arguing for an affirmative answer to the question referred, that the law or custom embodied in this text was not an enforceable law or custom at the present time.

Whatever meaning the author of the passage in the 1st section of the 8th book of the *Manugye* intended to convey, it is clear that he did not in any part of this section state that a co-heir was not at

(3) U. B. R. (1897—1901), II, 135.

(4) 2 U. B. R. (1907), *Buddhist Law, Inheritance, Pre-emption* p. 1.

(5) (1874) S. J. 39 at p. 41.

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liberty to sell land he had inherited with others to a stranger without first offering it to his co-heirs and giving them the refusal of it.

This text again does not purport to be confined to the inherited property; it embraces all property which a person may have obtained in any way whatever. The second paragraph deals with the case of a sale to the seller's relations and to a sale to "persons interested" (whatever the expression may mean), and imposes on the would-be seller the duty of first offering it to all these respectively. The law in 1756 was that an owner of land, however he may have obtained it, was obliged, in case he proposed to sell it to any of his relations or to persons interested, to offer it to every one of these respectively.

From these texts, which did not deal directly with the questions before him, Mr. Sandford concluded that in 1874 the possessor of land bought or obtained from a person who had inherited it, was obliged, if he wished to sell it, to offer it first to those who had a right of inheritance in the land. What he exactly meant by "a right of inheritance in the land" is not explained. He went on to draw the further conclusion that a co-heir of undivided ancestral property was bound, under the law contained in the passages he cited, to first offer any such property he wished to sell to those who had a joint right of inheritance with himself. Three years later in *Ma Ngwe v. Lu Bu* (2), he drew the further conclusion that even after division of ancestral estate the holder of land who obtained portion of it, was bound, if he wished to sell it, to offer it, first, to his co-heirs. The question before him was whether a right of pre-emption existed amongst Burmese Buddhists at the time the case was before him. It could only exist by reason of it being part of their Customary Law. He had no evidence before him proving such a custom, nor had he before him any other materials, recognized by the Evidence Act or by rulings of Courts as materials on which a decision as to the existence of a custom can be based, except two texts which dealt with the rights of alienating property in the Burmese Kingdom more than a century before. He assumed that this part of the Customary Law had

continued under both the Burmese and British rules and that it was still prevalent. From this unsound premise, he drew the conclusion that co-heirs had a right, which later on one of his successors confidently asserted, was a right of inheritance.

If the question of the right of pre-emption among co-heirs depended solely on the reasons given in favour of it in Mr. Sandford's judgments, I should be prepared to hold that these were decisions which should not be followed, because they are not founded on materials recognized by law as the basis for a decision that a binding custom prevailed at the time the question as to its existence had to be decided.

There was, however, at the time material upon which he might have legitimately held that our Courts must recognize a right of pre-emption amongst Burmese Buddhist co-heirs to a limited extent. After the annexation of the province of Pegu to the British dominions, the British Authorities instituted enquiries as to the prevailing customs of the people of the country with a view to affording some guide to the Courts in the administration of justice among them. The result appears in what is known as Spark's Code, the correct title of which is "Civil Code of the Province of Pegu sanctioned by resolutions of His Honour the President in Council recorded on the 4th November 1859 and 17th January 1860." The rules embodied in it were at the time equivalent to legislation. It may be taken as certain that they were followed by the Courts. In clause or section 97 of Part II, which professed to be a code of Burmese Law and of the *lex loci*, it is laid down that if a person wished to sell his share in an undivided ancestral estate, he should first offer it to all the co-heirs. They may buy the share jointly or each buy his separate portion of the share, or one may buy in trust for the whole according as the heirs may decide among themselves; the seller shall have no voice in the decision and shall not be at liberty to sell his share otherwise than they or a majority of them shall decide.

In view of the British authorities, having at an early stage recognized and adopted these rules as being parts of the Customary Law of the land, I am of opinion that to the

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extent laid down in this section of Spark's Code, but to this extent only, the right of pre-emption amongst co-heirs must be recognized by our Courts. If any one claims to have it farther extended, he must prove in one or more of the recognized modes of proving a custom that the right is now greater than what it was declared to be in that Code. I may remark that in the case in which this reference has been made, the Burmese District Judge who dealt with the case was, at the time, one of the oldest of the Burmese officials. His view was that the right of pre-emption among co-heirs ceased after partition of the inherited or ancestral property.

It appears to me unnecessary to enter into the question of whether the matter is one of inheritance. Even if it is not, it is one in which the Customary Law must be applied.

In regard to the contention that the right is not one which should be enforced in the exercise of justice, equity and good conscience, the case is not on all fours with the case which the Madras High Court had to deal with in *Ibrahim Saib v. Muni Mir Udin Saib* (6). In that case, the learned Judges entered into the question of whether the Muhammadan Law of pre-emption was consistent with equity and good conscience, only because they stated that the Muhammadan Law had not been received in that province as one of the sources of law in regard to the rights of alienating land. In this province the Customary Law as regards pre-emption has been received and adopted, and it is not open to this Court to disregard it on the ground that it is opposed to justice, equity and good conscience.

For the reason I have previously given, I answer the question referred in the negative.

HARTNOLL, J.—The question which has been referred to us for decision is:—

Have the co-heirs who take part in the partition of immoveable ancestral property a right of pre-emption as regards such property after the partition has been effected?

The facts as set out in the reference show that the question refers to the case of Burman Buddhists, and that the reference has been considered necessary in that the learned Judge considered that there is

a conflict of authority between the cases of *Shwe Eik Ke v. Tha Hla Aung* (1) and *Ma Ngwe v. Lu Bu* (2). He has also pointed out that the decision in the case of *Ma Ngwe v. Lu Bu* (2) has been followed in the cases of *Maung Shwe Nyun v. Ma So* (3) and *Nga Tin v. Shwe On* (4). It has been urged that the matter is not one for decision according to the rule of Buddhist Law, but that it should be decided according to the ordinary Civil Law. Having regard to the provisions of section 13, clause 1, of the Burma Laws Act, 1898, the point arises as to whether the matter is one of inheritance or not. If it is, by the provisions of that section, the Buddhist Law must form the rule of decision, and the general considerations put forward by Holloway, C. J., in the case of *Ibrahim Saib v. Muni Mir Udin Saib* (6) cannot, in my opinion, be allowed to prevail. If the rule of Buddhist Law is applicable and the present conditions of society in Burma are unsuited to such rule of law, it is open to the Government to legislate and alter the law: but where the rule of Buddhist Law is to be followed as laid down in the Burma Laws Act, this Court has no option but to follow such rule. The question of whether the right of pre-emption as claimed by Burman Buddhists is one concerning inheritance has been pronounced on in several cases, namely, *Ibrahim v. Arasi* (7), *Apana Charan Chowdhry v. Shwe Nu* (8), *Maung Shwe Nyun v. Ma So* (3) and *Nga Tin v. Shwe On* (4). The second case quoted is one of my own. The right of pre-emption need not necessarily be one concerning inheritance at all. For instance, in Muhammadan Law according to the definition of it given by Petheram, C. J., in the case of *Gobind Dayal v. Inayat Ullah* (9), the matter cannot be said to be one of inheritance; but the right as claimed by Burman Buddhists as co-heirs seems to me to be beyond doubt one that concerns inheritance. It is not claimed by co-heirs on the ground that they possess neighbouring lands, but on the ground that they are co-heirs and it relates to inherited property—property that has descended from a common ancestor

(7) P. J. 26.

(8) 4 L. B. R. 124.

(9) 7 A 775 at p. 815; A. W. N. (1885) 228

(6) 6 M. H. C. R. 26.

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or that has come from a common relative. It is by virtue of relationship to such a person and co-heirship that such a right is claimed and, therefore, the right seems to me to be an incident of the law of inheritance. I, therefore, consider that the Buddhist Law should form the rule of decision in deciding the question asked us.

It was then urged that the property to be dealt with in the reference is trees and the rule of Buddhist Law only applied to land and not to trees. The property in dispute is not the produce of the trees but the trees themselves, which are immoveable property being permanently attached to the earth.

The text on which the Burman Buddhists' right of pre-emption is based, may be said to be as follows:—

1. Manukye—the 36th section of the 7th Book and the 1st section of the 8th Book.

2. A passage from the Manu Wannana.

3. A passage from the Manu Thara Shwe Myin.

4. A passage from the Winicchaya Pakasani.

5. The texts collected under section 309 of the Kinwin Mingyi's Digest, Volume I.

As regards the Manukye, I have had translations made of the two sections from Mr. Richardson's text of the Manukye and from the copy that belonged to the Kinwin Mingyi that is kept in the Bernard Free Library. They have been made and checked by Maung Tan Nyein, Government Translator, and Maung Tha Zan Aung, Assistant Registrar of this Court. They are attached to this judgment.

Translations of the passages from the Manu Wannana and Manu Thara Shwe Nyin will be found in the case of *Ng Myaing v. Mi Baw* (5). A translation has been made of section 93 of the Winicchaya Pakasani Dhammathat and is attached to this judgment. As has been laid down recently by their Lordships of the Privy Council in the case of *Ma Nhin Bwin v. U Shwe Gone* (10), most weight has to be attached to the Manukye Dhammathat.

The wording of the Dhammathat is not (10) 23 Ind. Cas. 433; 7 Bur. L. T. 105 (P. C.); 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C. L. J. 264; 41 C. 887; 1 L. W. 94; 8 L. B. R. 1.

too clear in its meaning. In section 1 of the 8th Book, the important passage is that beginning with the words "Excellent King, as regards the lands called 'Myethe' and 'Myeshin.'" They are explained and amplified by the passages from the other Dhammathats. According to Dr. Forchhammer's essay on the sources and development of Burmese Law from the era of the first introduction of the Indian Law to the time of the British occupation of Pegu, the Manukye was compiled about the year 1756, A. D., by Mahasiri Uttamagoya, minister of military works, and the Manu Thara Shwe Myin in 1771, A. D., by the nobleman Kyaw Din, the same author compiling the Wunnana a few years later and also the Winicchaya Pakasani. The latter three books were therefore compiled not long after the Manukye. Taking the texts together, the general principle apparent is that the land is to be kept in the same family, if possible. Even an original purchaser or his children are to sell the land back to the family of the original vendor. It is not claimed that so wide a custom as this last one now exists—indeed learned Counsel Maung May Oung and Maung Kin, who appear to support the right, state that it has fallen into desuetude: but it is claimed that if a man wishes to sell inherited property, the custom that he must give his co-heirs the option of purchasing it first, whether the property is joint undivided property or partitioned estate, still exists, and it is urged that such a custom has not fallen into desuetude. The passage in the 1st section of the 8th Book of the Manukye beginning with the words I have set out above, as explained by the passages in the different Dhammathats but especially that of the Winicchaya Pakasani, seems to me to support the contention that the Buddhist Law in the Dhammathats is as claimed. It should be noted that the 1st section of the 8th Book of the Manukye makes "Myethe" and "Myeshin" lands include all sorts of inherited lands. The words of the section are no doubt involved, but the passage I have referred to above seems to me to give co-heirs a right of pre-emption and this is the more apparent when the words are compared with the passages from the other Dhammathats. There is

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no indication that I can see that the right is confined to undivided estate, indeed the indications are the other way. Each and every relative is to be asked and the right is extended to a purchase by the heirs of the original seller from the heirs of the original buyer. As regards the custom having fallen into desuetude, the case of *Ma Ngwe v. Lu Bu* (2) is one relating to partitioned estate. It is not quite clear whether the case of *Manug Shwe Nyun v. Ma So* (3) applied to partitioned estate. But in all probability it did. That of *Nga Tin v. Shwe On* (4) clearly refers to partitioned estate. As far as my knowledge of the custom goes (and I have been in the province since 1853, being an administrative officer up to 1906), I have heard of the custom from time to time and though I cannot give specific instances where it has been applied to partitioned estate other than judicial decisions, I have certainly had the impression that it is not confined to the case of undivided ancestral property, and the desire to keep the property in the family is widespread and acted on by the Burman Buddhists. I would, therefore, hold that the fact that inherited property has been the subject of partition, should not operate to prevent it being subject to the right claimed.

The word "ancestral" used in connection with the right seems to be a misnomer; for the word "ancestral" should be substituted the word "inherited". It was also allowed at the hearing that the head-note to the case of *Ma Ngwe v. Lu u* (2) is too wide in declaring that a sale to a stranger without the offer first being made to co-heirs is invalid. This appears to be the case. The sale is only voidable at the option of co-heirs as long as they object to the sale within a reasonable time and offer to pay and pay the price for which the property has changed hands. Otherwise, the sale is valid and cannot be impugned. The provision that the right must be claimed promptly and without unreasonable delay, is the great safeguard against injustice and the abuse of it. The question of what persons should be included under the term "co-heirs" as possessing the right, remains for consideration and is not an easy one to decide generally, but for the purpose of this reference, it is not a difficult one. In the

present case, we are only concerned with persons who have jointly divided ancestral property.

As regards the point whether the right should be extended to trees as well as land, considering that trees are permanently attached to the land I think it reasonable and convenient to hold that if the right exists at all, it should also extend to trees.

I would, therefore, answer the reference as follows:—

In the case of inherited land inclusive of trees permanently attached to the land, a joint inheritor of such property has a right of pre-emption in respect of such inherited property in the event of one of the joint inheritors desiring to sell his share of such property or such part of the inherited property as he has obtained possession of, in whole or in part and whether it is joint, undivided or partitioned estate, but in the event of a sale having taken place, such right must be asserted promptly and within a reasonable time or it is lost for ever. In asserting such a right against a buyer, the sum offered must be the sum which the land has cost him.

ORMOND, J.—The question referred is:—Have the co heirs who take part in the partition of immoveable inherited property, a right of pre-emption as regards such property after the partition has been effected? From the case submitted, it is clear that the question refers to the right of pre-emption in respect of a sale by a co-heir and does not refer to a sale by a purchaser from a co-heir. It is admitted that in respect of a sale by a purchaser from a co-heir, any right of pre-emption would not now be recognised.

In 1877 Mr. Sandford, the Judicial Commissioner of Lower Burma, in *Ma Ngwe v. Lu Bu* (2) held that ancestral immoveable property that had been partitioned, was liable to the right of pre-emption in the same manner as if it had not been partitioned.

In 1901 Mr. Justice Fox in *Shwe Eik Ke v. Tha Hla Aung* (1) held that there was no right of pre-emption after partition. *Ma Ngwe's* case (2) was not cited, but the case upon which it was based viz., *Nga Myaing v. Mi Baw* (5), was cited.

In 1901 Mr. Justice Hartnoll in *Mo Thi v. Tha Kwe* (11) followed the decision in *Ma* (11) 4 L. B. R. 128; 14 Bur. L. R. 205.

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Ngwe's case (2) and held that where a widow after partition sold her share to a stranger, her son had the right of pre-emption as to the whole.

Ma Ngwe's case (2) has been referred to apparently with approval in (*obiter dicta*), in other cases, but *Ma Thi's* case (11) is the only reported case that I can find in Lower Burma [besides *Ma Ngwe's* case (2)] in which it has been actually held that there is a right of pre-emption in respect of partitioned inherited property.

In Upper Burma, *Ma Ngwe's* case (2) has been followed by Mr. White, Judicial Commissioner, in *Maung Shwe Ngun v. Ma So* (3) and by Mr. Shaw in 1906 in *Nga Tin v. Shwe On* (4), who disregarded the decision in *Shwe Eik Ke's* case (1) because *Ma Ngwe's* case (2) had not been considered. In *Nga Tin's* case (4), it was held that where three sons inherited property which was partitioned and two of them sold their portions to a stranger, the widow of the other son had a right of pre-emption. The fact that the widow had a son who was a grandson of the father of the three sons is mentioned, but it does not affect the principle of the decision. In the case of *Maung La Dok v. Ma Po* (12) (which related to the sale of an undivided share), Mr. White held that the fact that portions of the estate had been previously sold to strangers without protest, did not affect the right of pre-emption in respect of subsequent sales. From these decisions, it would seem that if, say, three sons inherited property, one of whom died leaving only a widow who married again and then died, this second husband would have the right of pre-emption in the case of a sale by either of the other two sons, although he is in no way connected with the family and although he or his deceased wife or her former husband may have sold to a stranger the whole or part of the former husband's partitioned share in the ancestral property; and this clog is put upon the free transfer of land because of the principle enunciated by Mr. Sandford in *Ma Ngwe's* case (2) of maintaining intact the family estate. And if a Burman who has inherited land wishes after partition to sell his land, he must either obtain the consent of all those who inherited other lands from the same previous owner and their successors by inheritance and the prospective heirs of these

(12) U. B. R. (1897-1901), II, p. 162.

persons, or the purchaser takes the land subject to the right of pre-emption in any of these persons. Mr. Sandford at page 77 says, "Although I am unwilling to extend this doctrine of pre-emption beyond its strict limits, yet I cannot see my way to disallow the appellant's argument." His reasoning is confused, for he speaks of land sold by an original owner as "once ancestral and separated from the family estate by the sale to the purchaser from the original owner." If property once ancestral had become separated from the family estate by a sale to a stranger, the vendor must have been, not the original owner, but an heir, and the property sold must have been partitioned. But if co-heirs have a right of pre-emption after partition, they had the right at the time of the sale to the stranger.

The '*ratio decidendi*' in *Ma Ngwe's* case (2) is as follows: a purchaser, if he wishes to sell, must offer the land to the heirs of the original owner; an heir after partition is in the position of a purchaser; therefore, if he wishes to sell, he must offer it to the heirs of the last owner, i. e., to his co-heirs.

But it is only the purchaser from an original owner that has to offer the land to the 'successor' or 'descendants' of his vendor, if he wishes to sell. The purchaser from a derivative owner, takes the land outright and free from any right of redemption which would show, I think, that he takes it free from any right of pre-emption. It cannot be held, therefore, by analogy that an heir, if he wishes to sell his partitioned share of inherited land, is under a duty to offer it first to his co-heirs.

The texts upon which Mr. Sandford bases his decision have not been discussed in later decisions, but in my opinion they show, as regards '*Myeshin*' land, with which alone we have to deal, that it is only the purchaser from an original owner that has to offer the land (if he wishes to sell) to the successor or descendants of the original owner: and that in all other cases (which would include a sale by an heir after partitions) the purchaser has a full right to the land. The texts relied on by Mr. Sandford are the 36th section of the 7th Book of the *Manukye Dhammathat*, the 1st section of the 8th Book and passages from the *Manu Wunnana* and *Manu Thara Shwe Myin Dhammathats*. They are set out in *Nga Myaing v. Mi Baw* (5).

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I have had the first section of the 8th Book translated as literally as possible and the following is an epitome, so far as the section affects the question before us, which I have arranged in paragraphs for the sake of convenience.

1. It specifies what are '*Myethe*' lands and what are '*Myeshin*' lands. '*Myethe*' lands are redeemable at any time by the true sons or descendants or partner of the former owner; though the original grantee sell the land outright or mortgage it, they have the right to do so.

2. '*Myeshin*' lands are of six kinds:—(i) inherited lands which are not '*Myethe*'; (ii) lands purchased; (iii) lands obtained on another's going away and abandoning them; (iv) lands obtained by open occupation without interruption for 10 years; (v) lands obtained by clearing the forest and cultivating them and (vi) lands obtained by allotment from a public authority, e. g., a *Thugy* or land measurer, etc.

3. If the original owner of '*Myeshin*' lands of the last four descriptions sells them, the seller or, if he is dead and has left a successor, his 'successor' may redeem them at the buyer's death, but not during the life time of the buyer.

4. As to '*Myethe*' and '*Myeshin*' lands generally (subject presumably to what has been stated above) if lands are sold outright, the buyer has a full right to them, according to the terms of his contract of sale—they are not redeemable by the relations or descendants of the original owner.

5. If any of the aforesaid lands are to be sold even among relations, let the vendor offer the land to every one of his relations who is a heir. If it is sold to one relative, and another relative, having previously refused to buy, comes in within a year and wishes to buy, he may join in the purchase, "as they are relatives and the sale must be effected as among relatives."

6. If a sale of land is to be made to one having an interest, the vendor should offer it to all who have an interest: they shall decide which of them is to buy and the vendor shall not sell to any one else.

7. If 'this paddy land' has been mortgaged to one, all those interested may take over the mortgage in equal shares, provided they come in within a year if the mortgage was made openly.

8. If 'this land', after having been mortgaged for a long time with one, is sold, let all those that have an interest buy it outright.

The rules relating to '*Myethe*' land are different to those relating to '*Myeshin*' land. And a sale by an original owner is on a different footing to a sale by a person who has acquired the land by inheritance or by purchase. Thus in the case of a sale of '*Myethe*' land, it is redeemable at any time by the descendants or by the partner of a former owner unless it was sold by the original grantee. In the case of a sale of '*Myeshin*' land by a person who had obtained it as an original owner in any of the following ways, viz., on another's going away and abandoning it, by open occupation without interruption for 10 years, by clearing the forest and cultivating it, or by allotment from a public authority—the land is redeemable by the vendor or by his 'successor' at the buyer's death. And in all other cases (paragraph 4 above) the buyer has a full right to them.

In the present case we are dealing with a sale of '*Myeshin*' land which the vendor obtained by inheritance.

The first part of the above section (represented by the first 4 paragraphs above) deals with the right of redemption and not with the right of pre-emption. The right of redemption is, of course, different to the right of pre-emption—it is a right to buy back the land at the original price though the owner may not wish to sell it. But this part of the section throws some light on the law of pre-emption; for the original owner or his successor, having the right of redemption at the purchaser's death, would naturally have the right of pre-emption in respect of a sale by the purchaser in his life-time. The latter right would be merely a corollary of the first. And the passage from the *Manu Wunnana* reads as if the right of pre-emption during the purchaser's life-time is dependent upon or is derived from the right of redemption after his death. Both this passage and the 36th section of the 7th Book of the *Manukye* clearly refer to a contemplated sale by a purchaser from an original owner only. The passage from *Manu Thara Shwe Myin* expressly states that it refers to the law on the sale and purchase of '*Myethe*' land with which we are not concerned.

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There is, therefore, nothing in these passages to show that a purchaser of a 'Myeshin' land from a derivative (*i. e.*, not an original), owner, cannot sell to whom he chooses.

It is stated in section 1 that the purchaser of 'Myeshin' land takes it free from any right of redemption during his life-time, if he bought from an original owner; and takes it absolutely free from any right of redemption in all other cases. At the time that he buys it, therefore, whether from an original owner or from a derivative owner, (*e. g.*, an heir after partition), there can be no right of pre-emption in any one, for that would be in effect a right of redemption as against the purchaser at the time of his purchase. If this view is correct, the first portion of the section shows that there was no right of pre-emption as contended for in this case.

The matter dealt with in paragraph 5 above is quite distinct, I think, from the matter dealt with in paragraph 6:—the first deals with a sale (presumably by a sole owner) to a relation; the seller is directed to offer the land to every one of his relations who is an heir, if the land is sold to a relation, any other relation of the seller (who is an heir) may come within a year and join in the purchase, but there is nothing to prohibit the seller from selling to a stranger instead of a relation, if he wishes. The object of this provision is apparently to prevent family disputes and jealousies which might arise if the seller was allowed to sell to one relation (who is an heir) in preference to another.

The second case (paragraph 6) deals with the sale of a partial interest in land; the seller is directed to offer it to all the others who are interested in the land, and they are to decide who is to buy; if the seller refuses to sell to their nominee, he is expressly precluded from selling to another. This provision would apply to joint owners, *i. e.*, co-heirs before partition; and it is, I think, the ground for the rule of pre-emption in respect of a sale by an heir before partition. After partition the former co-heirs cannot be said to be interested in the shares of the other former co-heirs, and, therefore, this passage would not apply to a sale of partitioned inherited property. An heir after partition is virtually in the position of a stranger who has purchased part of the inherited lands with the consent of all those

interested in the inheritance. Ordinarily in a partition, one co-sharer, in consideration of giving up his rights over the whole, is allotted by the other co-sharers a portion which he is to enjoy separately and without interference by them;—and I see no reason why this should not be the case in a partition of inherited property.

The passage from the Vinicchaya Pakasani Dhammathat cited by Mr. May Oung does not, I think, throw any light on the question before us. It merely shows that where co-heirs have a right of pre-emption, their right of pre-emption takes precedence of a right of pre-emption in adjoining or neighbouring owners.

The case in support of the right of pre-emption as contended for in this reference is based upon the passage referred to in paragraph 5 above:—the passage is taken as referring only to the case of a sale by an heir of inherited property; and because an heir wishing to sell 'even' to a relation is directed to offer the land to every one and all of his relations who are heirs (the word "heirs" is taken to mean "heirs of the previous owner"), a general right of pre-emption is taken to be implied in co-heirs when an heir is about to sell to a stranger. If this is correct, the right of pre-emption would not be in the co-heirs generally, but in such of the co-heirs only as were related to the seller.

But the passage expressly applies to a sale of 'any of the aforesaid lands' and in my opinion it applies equally to a sale by a purchaser as to a sale by an heir. If so, it is clear that the word "amwezaing" must mean the heirs of the seller. The word 'relations' clearly means the relations of the seller and grammatically the word 'heirs' would also mean heirs of the seller:—and it has been so construed, I think, both by Mr. Sandford in *Nga Mying v. Mi Ban* (5) and also by Mr. Richardson in his translation of the *Manukye*. It is clear also that neither Major Spark in 1860 nor Mr. Sandford deduced from this passage any right of pre-emption in co-heirs. If there had been a recognised right of pre-emption in co-heirs after partition, it is almost impossible to suppose that the compiler of section 1. Chapter VIII, when laying down directions in the case of a seller to a relation, should not have

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enunciated the rule in a direct manner; or that Major Spark in his Code of Burmese Law should not have stated the rule of pre-emption as applying to all sales of inherited property. The effect of the word 'even', is, I think, to show that the rule there laid down is a special rule which is applicable only in the case of a sale to a relation. There is nothing in this passage to show that a seller (including an heir) may not sell to a stranger in preference to a relation or heir, if he wishes to do so.

For the reasons stated above, I do not think there is any right of pre-emption in respect of a sale of inherited land after partition and I would answer the question referred to us in the negative.

TWOMEY, J.—It is only if the right of pre-emption by co-heirs is a matter relating to inheritance that the Buddhist Law forms the rule of decision under section 13, Burma Laws Act. Such a right was first authoritatively recognized by our Courts in the rulings of Mr. Sandford, Judicial Commissioner, and he seems to have taken for granted that it was a matter of inheritance. In all subsequent rulings also, the applicability of the Buddhist Law has been regarded as beyond dispute. Mr. Hosking, Judicial Commissioner, in *Ebrahim v. Arasi* (7) said definitely "the right of pre-emption among Buddhists is an incident of the law of inheritance and succession and cannot be separated from it." At the hearing of the present reference, some arguments were brought forward in opposition to this assumption. It was contended that a sale of land by a co-heir is a matter relating not to inheritance, but to the transfer of immoveable property. The same might be said with nearly as much force of a sale of land by a Burmese Buddhist widow. Yet if she sells without the consent of her eldest son, he has a right under the law of inheritance to avoid the same as regards his $\frac{1}{4}$ th share. In both cases, the matter is primarily one of transferring immoveable property, but in the one case as much as the other it may be said that the matter also relates to inheritance inasmuch as the transfer can be impugned by a co-heir other than the transferor. Then, it is pointed out that the rules as to pre-emption are not found in Book X of the Manukye which deals specially with inheritance, but in Book VIII, and that the Kinwun Mingyi in compiling his Digests of

the Dhammathats omitted to include any text on the subject of pre-emption (except in section 309 of the Digest to which I will refer later on). No inference can be drawn from the fact that the rules in question are in one book rather than another. Colonel Horace Browne, Commissioner of Pegu, pointed out that the Manukye is destitute of all attempt at arrangement, resembling other Dhammathats in this defect: "The provisions relating to adoption, for example, are found in four or five different parts of the work, those on divorce in a dozen different places in juxtaposition with some other uncongenial subjects such as debts or bailments, as if the book were simply a collection of *placita* of different judgments in chronological sequence, and not according to the subject-matter of the judgments".* Professor Forchammer in the Jardine Prize Essay also commented on the "variegated appearance" of the Manukye and pointed out that "it does not attempt to arrange the subject-matter or to explain or reconcile contradictory passages".† As a matter of fact Book X is clearly not exhaustive, for there are further rules for the partition of property after the owner's death in Book XI. To explain the omission from the Inheritance Digest of the rules about pre-emption in Manukye, Book VIII, and the cognate rules in other Dhammathats, it may be conjectured that the Kinwun Mingyi regarded them as matters relating to inheritance only in a secondary sense and wished to confine his compilation to the texts dealing with the partition of property on the owner's death. The same remark applies to the Kinwun Mingyi's Attathankepa Wunnana, the latest of all the Dhammathats which contains no reference at all to the subject of pre-emption. In my opinion the view hitherto taken by this Court and the Judicial Commissioner's Court of Upper Burma is correct. The right of a co-heir as such to demand that another co-heir shall sell to him in preference to a stranger, is part of his inherited right and may properly be classed as a matter of inheritance.

The law to be applied is the Buddhist Law. As to what that law is, the following

* Preface to Manu Wunnana, U. Thet To's Edition 1878.

† Jardine Prize Essay, p. 103.

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passage from Col. Horace Browne's preface to the *Manu Wunnana* (U Tet To's Edition printed in 1878) is of interest:—

The Buddhist Law, properly so-called, is contained in the "Pie-ta-gat-thoon-boon" (the three baskets) divided into the Thoot-tan, Wie-nee and Abhid-hamma (or discourses on discipline and pre-eminent truth). Of this, Wie-nee contains many passages that are law with regard to the religious usages of the people but the rules that govern inheritance, marriage, divorce, etc., among the laity are contained in totally distinct works known generally as "the Dhammathat" or "the Dhammathat of Manu", which form no part of the Buddhist Law. These works in fact, as stated before, are more Brahminical than Buddhist and the term "Buddhist Law" when applied to them is a misnomer.

Mr. Justice Irwin also dealt with the matter in *Thein Pe v. U Pet* (13) and remarked that the Buddhist Law to be administered under section 13, Burma Laws Act, is "not the Dhammathats pure and simple but on the contrary that it is a Customary Law or, in other words it is the body of customs observed by the Burmese Buddhists, and that the Dhammathats form one of the most important sources of information about that body of customs. Further, customs have a tendency to change and the texts of a Dhammathat cannot be assumed to be a perfectly correct exposition of existing customs."

In his preface to the *Inheritance Digest*, the *Kinwan Mingyi* defines a Dhammathat as "a collection of rules which are in accordance with custom and usage and which are referred to in the settlement of disputes relating to persons and property." This is in accordance with Professor Forchammer's description of the *Manukye* as a careful record of the laws, usages, customs and habits actually existing in the dominions of *Alompra**.

It is not necessary to consider how far the Dhammathats are of Buddhistic origin. The Burmese certainly regard them as the chief repository of their personal law as Buddhists and they will no doubt continue to be the main guide of the Courts in deciding matters covered by section 13, Burma Laws Act, with the reservation, however, that a rule or a

practice which is shown to have fallen into desuetude will not be enforced.

It has also been argued that the right of pre-emption hitherto recognized by the Codes has no real basis in the Buddhist Law and it is necessary to deal with this point at some length. Mr. Sandford's two chief rulings on the subject are *Nga Myaing v. Mi Baw* (5) and *Ma Ngwe v. Lu Bu* (2). In the former, the learned Judicial Commissioner held (a) that when ancestral land has passed into the hands of third persons, the heirs of the original owner have a right to the first offer, should the possessor wish to sell and (b) that one of the co-heirs of an ancestral undivided estate, should he wish to sell his share, is bound to offer it first to his co-heirs. In the second decision, the application of the rule was extended to land which has been actually partitioned amongst the co-heirs. The Judicial Commissioner relied on section 36 of Book VII and section 1 of Book VIII, *Manukye* section 458, *Manu Wunnana*, and section 211, *Manu Thara Shwe Myin**. These Dhammathats do not lay down explicitly that a man wishing to sell inherited land to an outsider must first offer it to his co-heirs. But section 36, Book VII, *Manukye*, certainly provides that when a man who has bought land wishes to re-sell it, he is bound to give the first refusal to the sons and grandsons of the original owner. Mr. Sandford considered that it would be illogical to hold that a member of the family is less bound to regard the family interest in severing the family estates than a stranger. Hence his ruling in *Ma Ngwe's* case (2). Though the rule requiring a stranger to give the first refusal to the descendants of the original owner is mentioned, in the above cases, the question of validity of the rule did not actually arise as they were cases in which the seller was a co-heir. The rule has never been authoritatively recognized by our Courts as having validity at the present day and it is admitted by the learned Counsel in the present case to be no longer part of the custom of the country. However explicitly a particular rule may be laid down in the Dhammathats, it is clear, I think, that our Courts will not

*Jardine Prize Essay, p. 103.

*See U Tet To's Editions of *Manu Wunnana* and *Manu Thara Shwe Myin*, printed in 1878 and 1879.

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adopt it if it is admitted on all hands to have fallen into desuetude. The rule binding strangers being, therefore, no longer enforceable, it becomes a question whether the rule which Mr. Sandford deduced from it so as to restrict a co-heir alienating his share, should not also be abrogated. There might be good grounds for abrogating it if it depended only on section 36 of Chapter VII. But the effect of Chapter VIII, section 1, has also to be considered. It is true that this section provides no more than section 36 of Chapter VII for the case of a co-heir selling to a stranger, but it clearly curtails a co-heir's power of alienating to another co-heir, by requiring him to offer the land first to the general body of co-heirs and to let them decide which of them is to buy or whether more than one should buy in equal shares.

It is noteworthy that the law of pre-emption based on Chapter VIII, section 1, was officially recognised by the British Government in 1860, when Major Spark's Code was issued in a Government publication called "Civil Code of the Province of Pegu". It is described in the preface as "an attempt to combine into one harmonious Code the written law (i.e., as contained in the Manukye Dhammathat) with the *lex loci* or local custom". The preface goes on to say that "experienced natives have been consulted, former judicial proceedings and precedents have been considered and every endeavour has been made to prepare such a Code of law as will be welcomed by the people and become the standard law of the Province".

Section 97 of Major Spark's Code is as follows:—

SALE AND RIGHT OF PRE-EMPTION.

"If a person wish to sell his share in an undivided ancestral estate, he should first offer it to all the co-heirs. They may buy the share jointly or each buy his separate portion of the share, or one may buy in trust for the whole, according as the co-heirs shall decide among themselves; the seller shall have no voice in the decision, and shall not be at liberty to sell his share otherwise than they, or a majority of them, shall decide".

There is a reference to Manukye, Book VIII, section 1, in the margin as the authority on which section 97 is based. It will be

noticed that Major Spark's Code applies the rule only to undivided ancestral estate. Also it may be noted that section 97 is not included in Major Spark's chapter on Inheritance (Chapter VI) but in a chapter headed "Of immoveable property" (chapter VII). I mention this matter only as showing that shortly after the annexation of Pegu, the law of pre-emption was regarded by the British Authority as part of the existing Customary Law.

Section 1 of Chapter 8, Manukye, begins with a classification of lands into *Myethe* (literally *dead land*), and *Myeshin* (literally *live land*). *Myethe* lands are those which were held as an appanage or emolument of some office (e.g., lands attached to the office of village headmen) or by some feudal tenure (e.g., lands assigned to a company of soldiers for their subsistence). *Myeshin* lands are all kinds of private land. The *Myethe* lands were impartible, descending lineally whether in the male line or the female line with the office or service in respect of which they were allotted and they were not liable to partition among the heirs of a deceased holder. The distinction between *Myethe* and *Myeshin* is now of merely historical interest. There are still *Thugyis'* lands (headmen's allotments), but such lands are altogether inalienable. In Upper Burma they are a species of State land, while in Lower Burma they are held by the headmen as lessees from Government on special conditions. In the present case as in all cases where a right of pre-emption is claimed, we are concerned only with private land which in former times would have fallen in the category of *Myeshin*.

The section deals with two cases in which a right of pre-emption is given. The first is a case of sale amongst blood relations (* * * * *). In such a case the land has to be offered to all those of kindred (* * * Amyo) with the seller who have an interest in the inheritance (* * * Amwezain) i.e., the inheritance to which the land appertains. I think the seller's co-heirs are clearly indicated by the term *Amyo Amwezain*. If one of them has bought while another has refused, the latter can still come in within a year and claim an equal share (*) in the purchase. From the concluding words (* * * * *)

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* * *) as well as the opening words cited above, it is clear that the seller and the purchaser all belong to the same family. The second case relates to transactions between "persons interested" (* * *).

The seller cannot sell to one of the persons interested without first offering to all of them and they are to decide amongst themselves which of them is to purchase. In this case also, it seems that the transaction contemplated, is between consanguineous relations, for it is provided that if the seller refuses to abide by the decision of the "persons interested" as to who should buy, he must bear all the expenses of the resulting litigation and "may not plead as an excuse descent from a common great-grandfather."

The passage "he may not sell to another" (* * *) appears to be merely an amplification of what precedes. By "another" (* * *) in this context, I understand the writer to mean another of the "persons interested." It is not equivalent here to (* * *) a stranger. I cannot understand the writer's object in stating the second of the two cases, for it seems to be already covered by the first. "Relations interested" are all included in "relations interested in the inheritance."

It is necessary to note that according to the Kinwun Mingyi's palm-leaf text in the Bernard Free Library, the case which I have referred to as the second case does not relate exclusively to land but to animate or inanimate property.

Richardson's translation of section 1, Book VIII, is incorrect and the translation given in *Nga Myaing v. Ma Baw* (5) also contains mistakes. I have prepared a fresh translation of the relevant parts of the section and append it to this judgment.

It is remarkable that while a co-heir is expressly restricted if he proposes to sell to another co-heir, there should be no express rule curtailing his power of alienation to strangers. The explanation is probably that the case of a sale among relations is to be taken as an extreme case and this conjecture is to some extent supported by the occurrence of the word (* * even) in

the introductory clause. The clause (* * *) means "even amongst blood relations" and Mr. Sandford was, I think, justified in inferring that if such a restriction is imposed on a co-heir selling even to another co-heir, the same principle should apply with added force where he proposes to sell it to a stranger. This seems to be a reasonable and equitable construction having regard to the want of precision in the Dhammathats and the elliptical language of this and many other passages.

The extracts given in *Nga Myaing's* case (5) from the *Manu Wunnana* and the *Manu Thara Shwe Myin* are hardly relevant, for the actual texts show that they relate only to *Myethe* land. It may well have been the policy of the ministers and others who compiled the Dhammathats to give special facilities for pre-emption in the case of *Myethe* lands which formed the means of subsistence of large classes of State servants. Moreover, these texts do not touch the case with which we are immediately concerned, namely, that of a co-heir selling his property to an outsider. The *Wunnana* text relates to the case of an outside purchaser's children who desire to re-sell the land. The *Thara Shwe Myin* deals with the right of redemption from the outside purchaser by the children of the original owner, a right which admittedly does not exist at the present day.

Section 93* of the *Winichaya Pakasani* is relied upon by Mr. May Oung as supporting the view taken in Mr. Sandford's rulings. But no great weight can be attached to it. It provides in general terms that if land is to be sold, the co-heirs (* * *) should be preferred as purchasers to neighbouring house-holders and land-owners. But it lays down no procedure for pre-emption like the procedure in the *Manukye*, Book VIII, section 1, and it reads more like a moral precept than a positive rule of law.

The only other authority cited at the hearing is section 309 of the *Inheritance Digest*, which gives an abstract of *Manukye*, Book X, section 56, and of

*or "Common Ancestor",

*U, Tet To's Edition 1880.

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the cognate texts in other Dhammathats. The texts in section 309 provide that when a childless husband and wife die one after the other *i. e.*, at a considerable interval, certain distant relatives of the last to die shall inherit the whole of the joint estate, but the relatives of the first to die are given a right of pre-emption as regards his or her hereditary property. The words "hereditary property" in the English translation of the Manukye, section 56, corresponds to the expression (* * *) in the Burmese and the same expression occurs in the Dhamma and Amweban extracts, while the Dayajja uses the form (* * *). From the use of the word (* *) (meaning in the context "line of succession"), I think, that the hereditary property referred to here is the impartible property which descends from father to son as an appanage or emolument of office, *cf.* texts in section 30 of the Digest. In the case of land this would, of course, be *Myethe*. It may, therefore, be inferred that the right of pre-emption spoken of in section 309 applies only to *Myethe* and as already remarked, we are not now concerned with rights of pre-emption which existed in respect of such land.

It may be said, therefore, to sum up this branch of the matter, that the Manukye Book VIII, section 1, is the only text which furnishes substantial basis for Mr. Sandford's rulings about pre-emption so far as *Myeshin* lands, *i. e.*, ordinary heritable and transferable lands are concerned. But looking to the pre-eminent authority of the Manukye, I think the Courts should continue to recognize the right as an integral part of the Buddhist Law of inheritance.

It has been urged that the custom is archaic and that it is unsuited to the present order of society. It is archaic in the sense that it is of ancient origin, but there is no reason to hold that it has become obsolete. With reasonable limitations, the custom should not operate as a serious clog on transfers of land, and in any case we cannot reject it merely on this ground if it is found to be an integral part of the Buddhist Law.

Touching the origin of the right I doubt whether it is derived from the alleged

desire to keep the family estate in the possession of the family (except perhaps in the case of *Myethe* lands). The ordinary rules of inheritance in the Dhammathats do not specially favour the concentration of land in the same family. They provide for the partition of the estate among sons and daughters on the death of their parents. Each son who marries, starts a new household of his own and the married daughters leave their original family altogether and become merged in the families of their husbands, taking their shares of the land with them. And so the family estate in the ordinary course is broken up. It seems more likely, therefore, that the rules as to pre-emption and the rules (now admittedly obsolete) relating to re-purchase by relatives of the original seller were founded on a general equitable notion that members of the original owner's family ought to be preferred to mere strangers. The wording of section 93, Winicchaya Pakasani, gives colour to this view: "This man is our kith and kin; this land is the land of our family. If he desires to sell he should sell to us (rather than to strangers)." Or it may be that the law of pre-emption was taken bodily from the Hindus and incorporated in the Dhammathats without any distinct perception of its object or effect.

Turning now to the particular question raised in Mr. Justice Parlett's order of reference, I think the decision must depend on the construction of the Manukye, Book VIII, section 1. Mr. Sandford's ruling in *Nga Myaing's* case (5) admittedly goes too far in recognizing the archaic rule in Book VII, section 36, as existing law and we have to decide whether he went too far also in *Ma Ngwe's* case (2), in recognizing a right of pre-emption as regards family property after it has been partitioned among the co-heirs. Mr. Sandford cited no express authority for this decision. He appears to have thought that the right of a member of the family to re-purchase land that was formerly part of the family estate was a necessary corollary of the now obsolete rule requiring a stranger who wishes to re-sell to give the first refusal to members of the former owner's family. In *Shwe Eik Ke v. Tha Hla Aung* (1), Mr. Justice Fox refers

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only to *Nga Myaing's* case (5) and does not mention Mr. Sandford's ruling in *Ma Nague's* case (2) at all. He held that "upon the division of the property amongst the children of the plaintiff's grand-parents each child took the particular lot or lots which fell to him or her free from all obligations as regards pre-emption, and *a fortiori* the descendants of each child also took the lot or lots which devolved on each of them respectively free from such obligation." But it was not necessary to go to this length in *Shwe Eik Ke's* case (1), for the plaintiff was not a co-heir with the defendants and had no right of pre-emption even according to the principles deduced by Mr. Sandford.

The subject was again discussed in the Upper Burma Judicial Commissioner's judgment in *Nga Tin v. Shwe On* (4). Mr. Shaw dissented from the decision in *Shwe Eik Ke's* case (1) and decided that the Dhammathats contain provisions which give a right of pre-emption to co-heirs in respect of divided as well as undivided property. The learned Judicial Commissioner did not mention the portions of the Dhammathats on which he relied as establishing this proposition. The only texts referred to in the judgment are those abstracted in section 309 of the Digest and as remarked above, these texts contain internal evidence that the right of pre-emption which they give, relates only to impartible property falling under the heading of *Myethe*. For pre-emption as regards *Myeshin* land, we have to fall back on the Manukye, Book VIII, section 1. The persons who are given the right in that section are all those of the same family "interested (or concerned) in the inheritance." (* * * * *). I would translate these words compendiously by the English term "co-heirs." It would include all the relations of the seller who have inherited the property jointly with him from a common ancestor. Ordinarily each co-heir has an interest in the common inheritance until the separate shares are ascertained and distributed, but once he has acquired his individual share, his interest in the rest of the inheritance is at an end. It might possibly be held that the words of the Dhammathat are not inconsistent with the survival after partition of a contingent interest in the other co-heirs' shares limited

to the exercise of the right of pre-emption in case of sale. But this would certainly be a strained interpretation, and I am not prepared to say that we should be justified in acting upon such a very slender basis. As noted above, the rule as embodied in Major Spark's Code, applies only to undivided property. In *Ma Nague's* case (2) Mr. Sandford extended the rule to partitioned property, because under the Dhammathats a stranger who has obtained possession of land by purchase was bound when re-selling it, to offer it first to the original owner's heirs, and because it seemed illogical to apply a different rule to a co-heir selling land which he had acquired by partition. He thought that the principle of the rule, namely, the maintenance intact of a family estate applied equally to both cases. But the rule requiring a purchaser of land who re-sells to offer it first to the original owner's heirs, is admittedly obsolete and was probably obsolete at the time of Mr. Sandford's judgment. Also I have mentioned some reasons for thinking that the supposed principle—the maintenance intact of the family estate—has no real existence. In the absence of any clear authority to the contrary in the Dhammathats, I think it should be held that a co-heir on partition acquires his individual share free from any obligation as regards pre-emption.

I would, therefore, answer Mr. Justice Parlett's reference in the negative.

As the existence of any right of pre-emption has been questioned in this case, it appears desirable to lay down explicitly the extent to which the Courts can recognize such a right. Premising that it applies only to undivided inherited lands, I would deduce from the Manukye that it is exercisable by the co-heirs collectively. The following remarks of the Judicial Commissioner, Upper Burma, (Mr. Thirkell White) on this point appear to me to express the intention of the Manukye correctly:—"The law does not expressly allow one of several co-heirs to require a proposed sale of land to be made to him individually. The offer has to be made to the co-heirs and they must decide among themselves whether they or any of them will exercise the right; if they cannot agree, apparently the owner would be free to sell as he thinks fit. But no doubt one of several

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co-heirs can sue to set aside a sale to a stranger and to enforce the right to pre-empt, making all the other co-heirs parties to the suit'. *Maung Shwe Nyun v. Ma So* (3).

I would deduce further that the right can be enforced only against the person who inherited the land jointly with the claimants, that it lapses on his death and that his heirs take the land free from all obligation as regards pre-emption. The persons who can claim pre-emption are the surviving joint inheritors and the heirs of any who have died. The right must be asserted promptly and the full price paid by the purchaser must be tendered. A sale to an outsider is not invalid *ab initio*; it is valid and holds good unless avoided by the co-heirs in the exercise of their right of pre-emption as above.

Reference answered in the negative.

Appendix to Mr. Justice Twomey's judgment.

(TRANSLATION OF RELEVANT PASSAGES FROM MANUKYE, BOOK VIII, SECTION 1.)

Excellent ruler, lands are of two kinds as regards rights of ownership in them: *Myethe* (i.e. dead lands) and *Myeshin* (i.e. live lands). *Myethe* lands are soldiers' lands, lands given to companies of soldiers, lands allotted with definite boundaries by the monarch for the subsistence of headmen, governors, land measurers, forest officers, clerks and other officials, lands worked and enjoyed by superior officials and descending lineally from father to son for many generations. *Myeshin* lands are lands other than the aforesaid *Myethe* lands. They comprise ancestral lands obtained by inheritance, lands obtained on the former occupier running away, land which has been worked openly and without interference for ten years, (waste) land obtained by clearing the jungle, land allotted (*lit.* given) by revenue officials, land measurers or superior officials. Thus it is said as regards land allotted by revenue officials, land measurers or superior officials, land worked without the former owner's interference, land worked after clearing the jungle, if the owner of any such land sell it outright, let the buyer have the right to work and enjoy it. During the seller's life-time he shall not redeem. If, however, the buyer dies in the seller's life-time, the seller may redeem. If the seller has died (i.e., before the buyer) and there is an office-bearer

(* * *) let him redeem if he wants to (i.e., after the buyers's death.)

Excellent ruler, as regards the aforesaid *Myethe* and *Myeshin* lands, even if (the claimants are) parents, grand-parents, relations, children, grandchildren, great-grandchildren, brothers or sisters, they shall not redeem any such land. If the land has been sold outright, let it be owned (by the buyer.) Although (the claimants are) truly within the seven degrees of kindred or sons or grandsons, they shall not redeem the land. As it has been sold, so let it be owned.

If there be a sale of (any of) the aforesaid lands even among relations (* * *) let every one of the related co-heirs (* * *) be asked. Whichever says he will not buy, let him remain. Whichever says he will buy, let him buy. If any of the relations who, on being asked, said he would not buy, says, after another (of the related co-heirs) has bought, "let me share equally in the purchase"—if a year has elapsed since the time of buying and working (the land), let only the person who originally bought own (the land). Owing to the delay let the person who said he would not buy, have no claim to share in the purchase. If only a day or a month has elapsed since the buying and selling and one of the related co-heir says "I said formerly that I would not buy. Now I will buy," the person who has bought shall not refuse to sell on the ground that there was formerly a public refusal to buy. (The two parties) are relations; let those concerned buy and sell as becomes relations.

A person interested (* * *) is about to sell animate or inanimate property* and he says to all those who are interested:—"Please buy. I am in debt and have to pay up." If there is to be a purchase (in such circumstances) let all who are interested purchase in equal shares. Otherwise, if one should say "It is well to sell to me alone, I alone should buy", let the purchasers decide among

The words "animate or inanimate property" (* *) do not occur in Richardson's text. These words, however, are in the Kinwun Mingyi's palm leaf copy of Manukye, which is probably authentic.

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themselves who should buy and who should not buy. He (*i.e.* such an individual claimant) shall not address himself to the seller. Otherwise if there is a sale to one only (of those interested) without the knowledge of the others, the seller is at fault. (In such a case) the buyer having been ejected, let them (*i.e.*, all those interested) decide whether he should buy or not, and let the seller take back his own. Let (those interested) decide who should buy and let there be a sale according to their decision. If the seller then says he will not sell (*i.e.* to the person so selected) and a law suit follows, let him bear the costs. Let him not sell to another. As to the costs, he shall not plead descent from a common ancestor, let him pay them.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2373 OF 1914.

September 24, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Bakewell.

MUTHU GOUNDAN—DEPENDANT NO. 1—

APPELLANT

versus

ANANTHA GOUNDAN—PLAINTIFF—

RESPONDENT.

Easements Act (V of 1882), s. 15, scope of—Limitation Act (IX of 1908), s. 26—Prescriptive easement, acquisition of—Peaceable and open enjoyment, meaning of—Verbal dispute by servient owner, whether prevents enjoyment by dominant owner from being peaceable.

Mere verbal disputes by a servient owner, which do not cause interruption or obstruction to the enjoyment of an easement by the dominant owner, do not prevent its enjoyment from being peaceable so as to bar the acquisition of a prescriptive title thereto. [p. 530, col. 2.]

Knowledge and acquiescence on the part of a servient owner are not necessary for the acquisition of a prescriptive easement under the Limitation Act. [p. 531, col. 2.]

Per Sadasiva Aiyar, J.—The expression 'peaceable enjoyment' means that the dominant owner has neither been obliged to resort to physical force himself at any time to exercise his right within the 20 years expiring within two years of the suit, nor had he been prevented by the use of physical force by the servient owner in his enjoyment. [p. 532, col. 1.]

Dalton v. Angus, 6 App. Cas. 740; 50 L. J. Q. B. 689; 44 L. T. 844; 30 W. R. 141; 46 J. P. 132, referred to.

Sections 26 and 27 of the Limitation Act do not apply to cases arising in territories to which the Indian Easements Act, 1882, applies. [p. 532, col. 1.]

Section 15 of the Indian Easements Act, is only remedial in nature and is neither prohibitory nor exhaustive. It does not exclude or interfere with other titles and modes of acquiring easements. Where open enjoyment has taken place for a long series of years, title by prescription is acquired independently of the Statute and a suit to establish the right can be brought within 12 years after the obstruction. [p. 532, col. 2.]

Kacupan Zamindar v. Merangi Zamindar, 5 M. 253; 6 Ind. Jur. 455; *Aeni Jagirdar v. Secretary of State for India*, 5 M. 226; *Panja Kurari v. Bai Kurar*, 6 B. 10; *Achal Mahta v. Rajan Mahta*, 6 C. 812; *Koylash Chunder Ghose v. Sonatun Chong Barooie*, 7 C. 132; 8 C. L. R. 281; *Charn Suenokar v. Dokouri Chunder Thakoor*, 8 C. 956; 10 C. L. R. 577; *Azzan v. Rakhal Chunder Roy Chowdhury*, 10 C. 214; *Haryorandas Lakhmadas v. Bajibhai Jijibhai*, 14 B. 222 and *Eshan Chandra Samanta v. Nil Moni Singh*, 35 C. 851, followed.

An easement by statutory prescription cannot be acquired under section 15, paragraph 5, of the Indian Easements Act unless and until the claim thereto has been contested in a suit. [p. 533, col. 1.]

Sultan Ahmad v. Walliullah, 17 Ind. Cas. 22; 10 A. L. J. 227; *Rajenp Kuer v. Abul Hossain*, 7 C. L. R. 529; 7 I. A. 249, 6 C. 394; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530 and *Hyman v. Van Den Bergh*, (1908) 1 Ch. 167; 77 L. J. Ch. 154; 98 L. T. 478, followed.

Per Bakewell, J.—The words 'peaceably and openly enjoyed by any person' occurring in the third paragraph of section 15 of the Indian Easements Act, mean that the person who claims a right over the property of another must not have deprived him of that right by the use of force or secretly, or in other words, the use must be '*pace vi nec clam*'. The words 'peaceably' and 'openly' indicate the manner in which the dominant owner must conduct himself in his use or enjoyment of the servient tenement. The conduct of the servient owner is immaterial, except so far as it goes to show the nature of the user by the dominant owner. [p. 533, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Appeal Suit No. 471 of 1912, on the file of the District Court of Trichinopoly, preferred against that of the District Munsif of Karur, in Original Suit No. 670 of 1911.

FACTS.—The suit was for the establishment of a right of way over the defendants' land and for a permanent injunction restraining the defendants from interfering with the plaintiff's right of way. Both the lower Courts upheld the plaintiff's right. The 1st defendant appealed to the High Court.

Mr. K. S. Ganesa Iyer, for the Appellant:—The right claimed being a prescriptive easement, the suit is clearly barred by section 15 of the Easements Act and section 26 of the Indian Limitation Act. The enjoy-

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ment relied upon has not been peaceable but contentious. Oral protests and criminal proceedings, though subsequently compromised, are sufficient to prevent the acquisition of a statutory easement [*Dalton v. Angus* (1), *Eaton v. The Swansea Waterworks Co.* (2), *Muhammad Maroof v. Sultan Ahmad* (3), *Kedar Nath v. Sohan Lall* (4), *Goddard on Easements*, page 261, and the cases therein cited. *Vide* also the definition of 'peaceable' in *Stroud's Judicial Dictionary*]. Such protests and criminal proceedings evidence the want of acquiescence, which forms the basis of the theory of lost grant under the English Law. *Vide Dalton v. Angus* (1) and *Peacock on Easements*, page 148. Again, the suit is not in time, as it has not been brought within two years of such peaceable enjoyment. Further, a prescriptive right such as the present can only be acquired and perfected by a suit and decree and in the absence of any such, the present suit for injunction does not lie. *Sultan Ahmad v. Waliullah* (5), *Haji Umarani Kachi v. Ganeshbhat Purshatambhat* (6), *Hymen v. Van Den Bergh* (7).

Mr. V. Rameswaramaiah, for the Respondent, argue: *contra* and contended that what was set up was a *mamul* or customary right and not statutory prescription and that on the facts found by the Courts below, the decision in plaintiff's favour was quite correct.

JUDGMENT.

SADASIVA AIYAR, J.—The 1st defendant is the appellant. The suit was brought claiming the following reliefs:—

(1) The establishment of the plaintiff's right of way, marked A-B in the plaint plan, through the land of the defendant on to the plaintiff's land;

(2) For an injunction to the defendants to remove the fence which they put up across the path about 10 months before the suit;

(1) 6 App. Cas. 740; 50 L. J. Q. B. 689; 44 L. T. 844; 30 W. R. 191; 46 J. P. 132.

(2) 117 E. R. 1282; 20 L. J. Q. B. 482; 15 Jur. 675; 17 Q. B. 267; 85 R. R. 455.

(3) 24 Ind. Cas. 126; 12 A. L. J. 415.

(4) 25 Ind. Cas. 406; 12 A. L. J. 693.

(5) 17 Ind. Cas. 22; 10 A. L. J. 227.

(6) 9 Bom. L. R. 1101.

(7) (1908) 1 Ch. 167; 77 L. J. Ch. 154; 98 L. T. 478.

(3) For the issuing of a permanent injunction against the defendants' obstructing the path.

The lower Appellate Court (as I read its judgment) came to the following conclusions:

(a) The plaintiff and his predecessors-in-title to the dominant tenement, were using the plaintiff path for much longer than 20 years before the interruption took place in September 1910 by the act of the defendants putting up the fence. (The suit was brought in July 1911 and the evidence of the plaintiff's 2nd witness speaks to the enjoyment for 40 years).

(b) Though the 1st defendant objected to the plaintiff using the way in 1907 or 1908, the plaintiff did actually continue to enjoy the right of way till the fence was put up in September 1910. The plaintiff says in his evidence "the path was not closed" till 1910; "the pathway was closed only five or six days prior to the filing of the suit." I think the word "suit" in this sentence is a mistake for the criminal complaint which was filed in August or September 1910. "Before that the defendants were objecting orally."

(c) The suit was not barred by the two years' period of limitation prescribed by the Limitation Act as the cause of action arose only in 1910 within a year before the suit and not in 1908 or 1907, the plaintiff not having had any interruption or restriction in the enjoyment of his rights.

On these findings, the decree of the District Munsif in plaintiff's favour was confirmed by the lower Appellate Court. Mr. K. S. Ganesa Aiyar, Vakil for the appellant, argued

(a) that the oral objections and disputes admittedly raised by the 1st defendant (see Exhibit III) in 1907 and 1908 prevented the plaintiff from acquiring a right of easement by prescription under section 26, clause 1, of Act IX of 1908;

(b) that section 26, clause 1, of Act IX of 1908, means (if I understood his contention aright), that a suit brought more than two years after such oral objection and dispute raised by the defendant

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entailed the dismissal of such a suit as barred by limitation.

It must be pointed out that sections 26 and 27 of the Limitation Act are not applicable to cases arising in territories to which the Indian Easements Act, V of 1882, applies. (See section 29, clause 3, of the Limitation Act.) The question even as regards an easement right claimed under the statutory prescription is, therefore, strictly not one of limitation as was supposed by the lower Courts and as seems to have been contended by the learned Vakil. The question when what might be called an easement by statutory prescription is claimed by a plaintiff, is whether under section 15 of the Easements Act (which applies to the Madras Presidency), the prescriptive right by enjoyment for 20 years has been acquired by the plaintiff. As pointed out by Chamier, J., in *Sultan Ahmad v. Waliullah* (5): "The fifth paragraph of section 15 of the Easements Act seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit." See also *Rajrup Koer v. Abdul Hossein* (8) and the judgment of Lord Macnaghten in *Hyman v. Van Den Bergh* (7) construing similar provisions of the English Prescription Act. As Peacock says in his book on Easements at page 435: "The right is created upon the bringing of the first action in which, by reason of the claim having been brought into question, it becomes necessary for the person claiming such right to possess it for the purpose of his action or defence."

Hence the question is not one of limitation as I said before, but is one as to whether the enjoyment which is necessary to acquire the prescriptive right, has been peaceable enjoyment and enjoyment as an easement without interruption for 20 years or more and all these to end *within two years before suit*.

Mr. Ganesa Aiyar next contended resourcefully that the enjoyment in the present case could not be considered peaceable (see the first paragraph of section 15 of the Easements Act) up to *within two years before suit*, as there were wordy (8) 6 C. 394 (P. O.); 7 C. L. R. 529; 7 I. A. 249; 4 Shome. L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530.

quarrels from the end of April 1907, when the 1st defendant purchased the servient tenement, till July 1909, when the period of two years before the institution of the suit began. The short question, therefore, remaining for consideration (assuming that the plaintiff claims his easement right by reason of the statutory prescription) is whether the verbal disputes which caused no interruption to the enjoyment of the easement right claimed by the plaintiff prevented the enjoyment being "peaceable" so as to prevent the acquisition of such prescriptive right.

It is rather curious that there seems to be no clear and sufficient authority on the question, whether verbal disputes which do not cause interruption or obstruction to the enjoyment of the easement prevent the enjoyment from being peaceable, so that the plaintiff is precluded from relying on such enjoyment as forming part of the 20 years' peaceable enjoyment necessary to give him a prescriptive title.

Mr. Ganesa Aiyar based several of his arguments upon the history of the origin of prescriptive rights in English Law. I shall say a few words on that question, as they seem to be required to clear the ground of irrelevant matters. There was, in the first place, the fiction in England that easement rights, where they do not really arise from an express grant, must be supposed to have originated in some lost grant from the owner of the servient tenement. The very widely differing opinions (about eighteen were received) given by the learned English Judges in the three stages through which the case of *Angus v. Dalton* (1) passed [See *Angus v. Dalton* (9), *Angus v. Dalton* (10) and *Dalton v. Angus* (1)] show the subtleties and hair-splitting which even the most powerful intellects have to resort to, when rights are based upon patently false fictions instead of natural rights. The presumption of a lost grant made in the old English cases is said by Thesiger, L.J., in the Court of Appeal to be "not a *presumptio juris et de jure*, that is, not an absolute and conclusive bar, and that the

(9) 3 Q. B. D. 85.

(10) 4 Q. B. D. 162.

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correct view on this point is that the presumption of acquiescence and the fiction of an agreement deduced therefrom in a case, where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct." See Peacock on Easements at page 148. Then there are old English cases in which it was said that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, will prevent the presumption of an easement by lost grant. Cotton, L. J., said in *Angus v. Dalton* (10) that "Twenty years' enjoyment does not confer an absolute right, but raises a presumption of a modern lost grant which is not capable of being rebutted by an admission of evidence that there was in fact no grant, unless supported by additional evidence that the adjoining owner was incapable of making a grant, or by any other rebuttable evidence."

In the 6 House of Lords case not only did the five Law Lords including Lord Chancellor Selbourne take part at the second hearing, but the opinions of seven Judges of the High Court had been invited and forwarded to the House of Lords. Bowen, J., in the course of his opinion [See *Dalton v. Angus* (1)], says that enjoyment which is capable of interruption is, therefore, capable of ripening into a right of easement where such interruption does not occur. Then he adds: "It might, perhaps, be added with some show of reason that the user ought, to be neither violent nor contentious. The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised." And then he refers to *Eaton v. Swansea Waterworks Company* (2), though in that case what took place was not a mere verbal protest by the servient owner but

actual physical obstruction added to the prosecution and conviction of the servant of the dominant owner for trespass. [See the *Eaton v. Swansea Waterworks Co.* (2).] The House of Lords in *Dalton v. Angus* (1) held among other things that *de facto* enjoyment of the easement of support for 20 years raised an absolute presumption in favour of the dominant owner which cannot be rebutted by proof that a grant had not been made. To use the language of Peacock in his book on Easements, page 413: "In the early part of the nineteenth century, when war was made on all legal fictions and that of a lost grant fell into disfavour, the Legislature determined to remove the blot on the administration of justice which arose from thus forcing the consciences of juries, and to substitute a direct for an indirect method of lessening the period of prescription." Then it was that Acts 2 and 3 of William IV, known as the English Prescription Act and Lord Tenterden's Act, were passed. In *Arzan v. Rakhal Chunder Roy Chowdhry* (11) decided in 1883, Garth, C.J., refused to follow the view put forward in some English cases as to the necessity of knowledge and acquiescence on the part of the servient owner for the acquisition of a prescriptive easement under the Limitation Act of 1877. If I may say so with respect, I entirely agree with him. As regards the question when a statutory prescriptive right has been acquired under the Easements Act, it seems to me neither necessary nor proper to go into the questions of lost grants, acquiescence, consent and so on, which occupy so much space in the English Reports. I think it cannot be argued that when a man has been openly and adversely and yet peaceably enjoying the easement as of right without interruption for 20 years till two years before date of suit, the fact that the servient owner was a lunatic or was in jail, could prevent the acquisition of the title by prescription under the Easements Act.

As regards the meaning of the word 'peaceable', I am inclined to hold that it

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means that the plaintiff who claims to be the dominant owner has neither been obliged to resort to physical force himself at any time to exercise his right within the 20 years expiring within two years of the suit, nor had he been prevented by the use of physical force by the defendant in his enjoyment of such right. I do not think that oral oppositions and oral expressions of dissent by the defendant can prevent the enjoyment being peaceable. The word "contentious" used in some English cases is of very ambiguous significance. Though I have not been able to find any English case where mere verbal contentions (without resort to litigation) have been held to prevent the enjoyment from being peaceable, it seems that in Roman Law, the acquisition of prescriptive right will be interrupted even by verbal contentions (See Gale on Easements, page 231). Assuming, however, that I am wrong in my above view and that even verbal contentions will prevent the acquisition of a prescriptive right under the Statute Law, that is Act V of 1882, I am quite clear that in this case, the lower Courts were not justified in reading the plaint as if it claimed the prescriptive right of easement only or even mainly under the Statute Law. There is not a word said about the Easements Act or the Limitation Act in the plaint. The 5th paragraph mentions the use of the path by the plaintiffs and their ancestors for 30 years. The path is called "a mamul" path in paragraph 13 of the plaint.

It has been held by the Privy Council in *Rajrup Koer v. Atul Hossein* (8) that a plaintiff need not rely upon the statutory prescriptive right given to him under the Limitation Act of 1871, section 27 (which corresponds to section 26 of the later Limitation Acts, and to section 15 of the Easements Act). As their Lordships state at page 403: "The object of the Statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of 20 years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire

a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that, in this case, there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time."

That being so, the plaintiff does not require the aid of the Statute and his right, therefore, is not in any degree interfered with by the provisions of section 27 (that is, as to the period ending within the two years before suit upon which the District Munsif relied). Hence it has been held in numerous cases that where open enjoyment has taken place for a long series of years, title by prescription was acquired independently of the Statute and a suit to establish that right can be brought within 12 years after the obstruction. In a case in *Karupan Zemindar v. Merangi Zemindar* (12) an enjoyment for 18 years which ceased seven years before suit was held to give a prescriptive right. I think I am bound by the decision in *Karupan Zemindar v. Merangi Zemindar* (12), which has never been dissented from. See also *Arvi Jagirdar v. Secretary of State for India* (13), *Punja Kuarji v. Bai Kuar* (14), *Achul Mahta v. Rajan Mahta* (15), *Koylash Chunder Ghose v. Smatun Chunder Barooie* (16), *Charu Surnokar v. Dukouri Chunder Thokoor* (17), *Arzan v. Rakhal Chunder Roy Chowdhry* (11), *Hargovandas Lakhmidas v. Bajibhai Sijibhai* (18) and *Eshan Chandra Samanta v. Ni Moni Singh* (19).

As in this case more than 20 years' enjoyment before 1907 has been proved, even assuming the validity of the defendant's contention that the obstruction by word of mouth which took place in 1907 will prevent the acquisition of the statutory right of prescription, an easement by prescription

(12) 5 M. 253; 6 Ind. Jur. 465.

(13) 5 M. 226.

(14) 6 B. 20.

(15) 6 C. 812.

(16) 7 C. 132; 8 C. L. R. 251.

(17) 8 C. 956; 10 C. L. R. 577.

(18) 14 B. 222.

(19) 35 C. 851.

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not depending upon the Statute had been acquired by the plaintiff before 1907 and the limitation for a suit for the possession of such right is 12 years. If the suit is treated as a suit for declaration and injunction, even then the period of limitation would be six years. Hence this suit was not barred by limitation. I would, therefore, dismiss the second appeal with costs.

BAKEWELL, J.—The question in this case is as to the meaning of the words "peaceably and openly enjoyed by any person" in the third paragraph of section 15 of the Indian Easements Act, 1882. The adverbs *peaceably* and *openly* qualify the verb *enjoyed* and indicate the manner in which the dominant owner must conduct himself in his use or enjoyment of the servient tenement; the conduct of the servient owner is immaterial, except so far as it goes to show the nature of the user by the dominant owner. If it be desired to amplify the expression, which seems to me to be scarcely necessary, I would paraphrase it as follows:—"the person who claims a right over the property of another must not have deprived him of that right by the use of force or secretly": in other words, the user must be "*nec vi, nec clam*."

The noise and clamour on the part of the servient owner only go to show to my mind that the user was not secret.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1817 OF 1912.

May 15, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice LeRossignol.

MUHAMMAD BAKHSR—DEFENDANT—

APPELLANT

versus

MUHAMMAD AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Custom—Succession—Sials of Jhang District—Ancestral property—Daughter's preference to collaterals in 10th degree—Power of daughter to alienate by Will—Sister, status of.

Among Sials of the Jhang District, a daughter is entitled to succeed in preference to collaterals in the 10th degree and can alienate ancestral property by Will, the collaterals having no right to contest such alienation. [p. 534, col. 2.]

A sister, though intended to inherit, does not take a full estate and cannot alienate [p. 535, col. 2.]

Musammal Sabhan v. Ghazi, 50 P. R. 1885; *Bakhu v. Amir*, 47 P. R. 1896, dissented from.

Allah Ditta v. Beg. 2 Ind. Cas. 79; 72 P. W. R. 1909; 122 P. L. R. 1909; 48 P. R. 1909, distinguished.

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division at Sargodha, dated the 4th June 1912.

Mr. Fazl-i-Hussain, for the Appellant.

Messrs. Santanam, Marghub Ahmad and Ghulam Yasin, for the Respondents.

JUDGMENT.—The pedigree-table in the paper-book and the judgment of the first Court show what the nature of the dispute is; but it should be noted here that in the pedigree-table there are some mistakes and omissions which we have made good in our copies of the paper-book. In the judgment there is also this small error that plaintiffs are really ten degrees from the deceased last male-holder, Nur Ahmad, and Muhammad Bakhsr is eleven degrees away, not nine and ten respectively, as the first Court puts it.

The first Court framed seven issues, found it unnecessary to decide the two which were concerned with Nur Ahmad's sister, Allah Jawai, and held—

(1) that plaintiffs had *locus standi*, as being collaterals of Nur Ahmad, to contest the alienation by *Musammal Daulat Bibi* in favour of defendant, her husband;

(2) that plaintiffs had a right of succession to so much of the property as was ancestral or which reached *Musammal Daulat Bibi* from *Musammal Fateh* through Nur Ahmad;

(3) that Muhammed, also a reversioner, like plaintiffs, had validly relinquished his claims in favour of plaintiffs;

(4) that *Musammal Daulat Bibi* could only alienate to her husband the property she herself purchased in *Mauza Bagh*, and that plaintiffs have failed to prove that she made the purchase out of the income of ancestral property;

(5) that plaintiffs are not entitled to produce claimed nor to moveables claimed,

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Decree was passed on these findings and both parties appealed. The lower Appellate Court dismissed each appeal on its own way and found the first Court's decree correct. In his appeal the defendant urged that plaintiffs were too distant to contest the case; that *Musammāt Allah Jawai* aforesaid excluded plaintiffs and had made a Will in favour of defendant; that at least the house was not proved to be ancestral; that the property which reached *Musammāt Daulat Bibi* from her father *Ahmad* and her "aunt" (really her mother-in-law) *Musammāt Fateh* was not ancestral and was *Musammāt Daulat Bibi's* absolutely and she had full power over it. The Court found against all the contentions.

The plaintiffs' several contentions as to produce and moveables and investment of income of ancestral property were likewise overruled; and now defendant has filed a second appeal here, while plaintiffs rest content with what they have got.

The question for decision is mainly one of custom, namely, what are the rights of women in the position of *Musammāt Daulat Bibi* and *Musammāt Allah Jawai* in the presence of collaterals so remote as the plaintiffs; and our inclination is to find on the whole against the plaintiffs. The officer presiding in the first Court at time of judgment had not heard the case himself, and this probably accounts for the fact that he has apparently entirely overlooked the *riwaj-i-am*, and the instances in support of it. Some of these instances were actually mentioned in the edition of 1880 of the *riwaj-i-am*, though the later edition of 1905, which states the rules in the same way as the earlier edition, omits the instances. One has only to read questions and answers Nos. 15, 18 and 25 to see how strong is the position of *Sial* females in this district. Then, several instances of females succeeding in preference to collaterals have occurred even within this not very large family—*Muhammad*, son of *Nasrat* (see pedigree), was succeeded by his three daughters; *Ahmad*, son of *Nazi*, by his two daughters, of whom one at least (*Aisha*) was married; *Musammāt Fateh*, married to *Sher*, father of one *Nur Ahmad*, certainly succeeded to her brother *Nur*;

another *Musammāt Daulat Bibi*, daughter of *Chaugkata*, succeeded to her father and married one *Nur*, but kept the property and alienated it here and there without opposition from any one. Again, though this is only indirectly in point, *Azam's* widow, *Musammāt Nurai*, so long ago as 2nd November 1875, willed some of her late husband's property, and left two other properties by similar instruments, no one apparently raising any objection. All this, coupled with the statements in the *riwaj-i-am* in which daughters are so much favoured that, unmarried, they are preferred even to uncles and first cousins, and, married, they are preferred to collaterals not descended from deceased's great-grandfather, shows that it might even be contended that collaterals in the tenth degree are in this tribe really not in an effective way heirs at all, and at all events shows that any right claimed by them to control the acts of daughters would never be recognised. It was certainly for plaintiffs to prove this alleged power of control and preferential right of succession by positive instances, and herein they have wholly failed.

Here we may note what the landed property in suit is and where it came from. *Ahmad*, *Musammāt Daulat Bibi's* father, got 165 *kanals* in *Mauza Khurara* and 19 *kanals* in *Mauza Bagh* by Will from *Musammāt Nurai* aforesaid. *Ahmad* died in 1899 and the *Khurara* land was mutated to his two daughters *Daulat Bibi* and *Fatima* as such, while the little plot of land in *Mauza Bagh* was mutated to the widows of *Nur Ahmad*, his nephew, i. e., to the same *Daulat Bibi*, and to *Musammāt Ghulam Bibi*. There is no specific explanation of this distinctive treatment, but it may be readily believed that the land in *Mauza Bagh* being of trifling value and extent and the mutation going through in the absence of interested persons, a mistake was made as to it. The *Khurara* land on the death of *Musammāt Fatima* in 1904 was mutated to her husband, *Muhammad*, plaintiff, so that this may almost be taken by itself as a further instance of daughters taking as full heirs and passing on property to their husbands. No doubt, *Muhammad*, plaintiff, subsequently shared the land with

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is brothers, but this does not substantially reduce the value of the precedent.

The lands coming to *Musammāt Daulat Bibi* through her husband came in three ways—(a) gift to her husband by her father; (b) purchase by her husband in *Mauza Maghiana* from her father; (c) by succession of her husband to his mother *Fateh*, who, as already stated, inherited the estate of her brother *Nur*.

It is strongly urged that the *Khurara* property (and in reality the 19 *kauals* in *Bagh*, though the aforesaid mistake as to it was made) came to *Musammāt Daulat Bibi* as a daughter pure and simple and that by custom she was entitled to keep it, though married, as against 10th degree collaterals; that the gift (a) must either be looked upon as meant for the benefit of the donor's daughter, or if it be taken as an ordinary gift to *Nur Ahmad* for himself and issue, then on the extinction of donee's line, the land reverts to donor's line, in which *Musammāt Daulat Bibi*, the daughter, was undoubtedly the first heir and (not so conclusively) that the land (b) was a self-acquisition and so a daughter, though not of the acquirer yet of the acquirer's nearest agnate, has, even apart from the peculiar customs of this tribe, a superior right to distant collaterals: *Bholi v. Kahna* (1) and that the land (c) taken by right of custom by *Musammāt Fateh* as a sister descended to her son *Nur Ahmad* and all rights of collaterals ceased to exist.

As regards all this *Mr. Santanam* quotes first *Musammāt Sahban v. Ghazi* (2) and *Bakhu v. Amir* (3) of same tribe, in which it was held that daughters do not succeed as against collaterals generally. Examination of those rulings shows that they cannot stand as authorities for us in this case in which we have so much positive evidence of custom. The earlier ruling loses much, if not all, of its value by the fact that, while the remand order mentions the *riwaj-i-am* of 1880 as a valuable document and evidently contemplates taking it as a starting point, the final

order lays the onus on the daughters, overlooks the *riwaj-i-am*, and finds for the collaterals solely on the ground of variations found to exist in the custom. *Bakhu v. Amir* (3) blindly follows *Musammāt Sahban v. Ghazi* (2).

The next ruling quoted, *Allah Ditta v. Beg* (4), seems to us negligible, being concerned with a different tribe, the *Dhab Jats* of *Jhang*.

Mr. Santanam then goes into a good many details into which we need not follow him; and he also successfully shows that the house in suit really belonged to *Ahmad* and *Nur Ahmad* in equal shares, that *Ahmad* in 1892 sold his one-half to *Nur Ahmad*, and that *Musammāt Daulat Bibi* got it as his widow. No deed of sale is forthcoming, only an entry in a petition-writer's register, but there seems no doubt that *Ahmad* and *Nur Ahmad* were joint owners. *Musammāt Daulat Bibi* may have taken her father's half as a daughter, though it is more likely that *Nur Ahmad* being a very near collateral indeed would take it before her. We think, therefore, that the lady did take the house as a widow pure and simple, and, therefore, plaintiffs should have it, for we do not go so far as to say definitely that the plaintiffs are not heirs at all, or that a widow's estate ceases to be such in this tribe when the nearest collaterals are of the 10th degree.

We have so far said nothing of the effect of the existence of *Musammāt Allah Jawai*, sister of *Nur Ahmad*, who on 10th July 1909, 18 days before her death, willed certain properties, as having come to her from *Nur Ahmad*, to defendant. We feel that on the authorities the position of a sister is by no means so strong as that of a daughter; and though we have accepted as a correct statement of custom certain entries as to daughters in the *riwaj-i-am* in view of the support lent to those entries by what must in the circumstances be deemed a considerable and sufficient number of instances, we are not prepared to allow that the very unusual custom is established that a sister not only inherits but takes a full estate and can alienate. No doubt we have the one

(1) 1 Ind. Cas. 695; 35 P. R. 1909; 45 P. L. R. 1909; 32 P. W. R. 1909.

(2) 50 P. R. 1885.

(3) 47 P. R. 1886.

(4) 2 Ind. Cas. 79; 48 P. R. 1909; 72 P. W. R. 1909; 122 P. L. R. 1909.

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nstance of the succession of *Musammatt Fatch* to her brother *Nur*; but that land is on a different footing from (b) and (c) here. That land came to *Nur* from his and *Musammatt Fatch's* father, whereas (b) and (c) were never owned by *Nur Alimad's* father. There is nothing to show, further, that *Musammatt Allah Jawai* ever had possession of any of her deceased brother's estate, and the Will was simply a device. The fact of the lady making it, is not the smallest indication that she had any right to do so.

The net result, then, seems to be that plaintiffs should have the house and (b) and (c), while defendant takes the *Khurara* (165 *kanals*) and *Bagh* (19 *kanals*) lands and (a).

We accept the appeal and pass a decree accordingly, the plaintiffs to pay one-half of defendant's costs in this Court.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 98 OF 1914.

October 26, 1915.

Present:—Mr. Justice Coutts-Trotter.

RATNAM *alias* NANJUNDA CHETTY AND
OTHERS—DEFENDANTS—PETITIONERS

versus

KOLANDAI RAMASAMY CHETTI—

PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Limitation Act (IX of 1908), Sch. I, Act. 158—Award—Objections filed in time—Refusal by Court to hear as being filed out of time—Revision, competency of—Jurisdiction.

Where a District Munsif declined to hear certain objections to an award filed by the petitioner on the ground that they had been filed out of time, while as a matter of fact they had been filed in time:

Held, that the decision amounted to a declination of a jurisdiction by the lower Court and that the same could be revised under section 115, Civil Procedure Code. [p 536, col. 2]

Petition, under section 115 of Act V 1908, praying the High Court to revise the decree of the Court of the District Munsif of Dharmapuri, in Original Suit No. 1004 of 1912.

FACTS of the case appear from the judgment.

Mr. V. C. Seshachariar, for the Respondent, raised a preliminary objection that the revision was incompetent and relied on *Amir*

Hassan Khan v. Sheo Bakhsh Singh (1), *Kojira Becriammall v. Fathma Biviammal* (2), *Karmam Sama Row v. Roddam Vencoba Row* (3) and *Venkata Subbia v. Seshachalam* (4).

Mr. S. Ranganatha Iyer, for the Petitioners:—The question is not one of an erroneous decision on a point of law. The objections having been filed in time, the lower Court was bound to hear the same and has improperly declined to exercise its undoubted jurisdiction.

JUDGMENT.—In this case, certain matters in the suit were referred to arbitrators who duly returned their award into Court. The petitioners filed objections to this award and the Judge declined to hear them on the ground that they were out of time. A glance at his diary, and at the section of the Limitation Act, shows that they were not out of time.

Now it is said that my discretion in this matter is restricted by rules of law, and that in obedience to the principle laid down in the decided cases I must decline to interfere. What that principle exactly is, has not been made very clear to me either by Mr. V. C. Seshachariar's researches or my own. But it seems to me formulated in some such way as this: you must not interfere with errors of fact or errors of law or wrong decisions as to limitation. You must only interfere where the lower Court has either purported to exercise a jurisdiction which it does not possess, or declined to exercise a jurisdiction which it does possess. The difficulty to my mind in applying such a rule is that it appears to make the erroneous assumption that every case will fall exclusively into one or other of these categories. This very case is certainly an instance of error either of fact or law, possibly of both: it is a decision on a question of limitation; and it is a clear declination of a jurisdiction which the lower Court possessed and was bound to exercise. In my opinion, the latter feature is the most predominant, and I think the petitioners have been deprived of a hearing

(1) 11 C. G. 11 I. A. 237; 1 Sar. P. C. J. 519; *Rafique and Jackson's* P. C. No. 83.

(2) 24 Ind. Cas. 779; 1 L. W. 230

(3) 6 Ind. Cas. 745; (1910) M. W. N. 211.

(4) 12 Ind. Cas. 173; (1911) 2 M. W. N. 257; 15 M. L. T. 549; 22 M. L. J. 136.

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to which they were entitled. I, therefore, allow the petition and remit the case to the District Munsif's Court to hear and to determine the objections according to law. I may say in conclusion that I view with alarm and distrust judicial limitations of a discretion imposed in general terms upon the Courts by the express words of Statutes. In this instance, I do not think that any decided case precludes me from doing what I think right. The petition is allowed with costs.

Petition allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 804 OF 1912.

May 18, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Leslie Jones.

ROBERT SKINNER AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

MRS. JAMES SKINNER—DEFENDANT—

RESPONDENT.

Registration Act (XVI of 1908), s. 17, sub-s. (2), cl. (i)—Petition embodying terms of compromise incorporated into judicial record—Registration, whether compulsory—Evidence, admissibility in.

A widow applied for Letters of Administration as being the person solely entitled to the estate of her deceased husband, but the application was opposed by the relations of the deceased and she filed a suit for a declaration that she was in possession of the estate and entitled to the whole of it. The parties, however, came to terms and drew up a draft agreement. A petition was then presented to the Court embodying *verbatim* the terms agreed upon and praying for a decree in terms of the compromise. Subsequently the plaintiff withdrew from the suit on the basis of the compromise and the suit was dismissed. The defendants then sued the widow for rendition of accounts of the estate and it was conceded that their claim must fail unless they could put in evidence the terms of the agreement entered into between the parties in the previous suit.

Held, that the petition embodying the terms of the compromise formed part of the pleadings of the parties in the case and being incorporated as such into the judicial record, did not need registration in order to make it admissible in evidence for the purpose of this suit. [p. 538, col. 2; p. 539, col. 1.]

Pranal Anni v. Lakshmi Anni, 22 M. 508 (P. C.); 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147; *Hindesi Naik v. Ganga Saran Sahu*, 20 A. 171 (P. C.); 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273; *Sellappa Koundan v. Gurumurti*, 26 Ind. Cas. 794; 27 M. L. J. 396; *Janardan Missie v. Maharani Janki Kuer*, 22 Ind. Cas. 687; *Raghubans Mani Singh v. Mahabir*

Singh, 28 A. 78; A. W. N. (1905) 195; 2 A. L. J. 564; *Ghinda Chandra Pal v. Dwarka Nath Pal*, 7 C. L. J. 492; 12 C. W. N. 849; 35 C. 837; *Wazir Ali v. Asa Rao*, 95 P. R. 1891, referred to.

Second appeal from the decree of the Divisional Judge, Delhi, dated the 19th February 1912.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellants.

Messrs. Kirkpatrick and Ralli, for the Respondent.

JUDGMENT.—Upon the death of the late Mr. James Skinner of Delhi, who appears to have left a large estate, both real and personal, there was a contest between various persons who claim to succeed. The widow, Mrs. James Skinner, applied for Letters of Administration as being the person solely entitled to the estate, but her application was opposed by a number of relatives of the deceased and she thereupon instituted a suit praying for declaration to the effect that she was in possession of the said estate and entitled to the whole of it. In that suit, the defendants were the persons who objected to the grant of Letters of Administration and they contested the widow's claim for a declaratory decree. Before issues were framed, however, the parties came to terms, and on the 10th December 1904, a document was drawn up embodying all the terms of the agreement which had been arrived at. This document which is written on ordinary paper and bears no stamp, was signed by the various parties to the suit and also by Mr. Arthur Grey, "Counsel for the objectors," and by Mr. Clarence Kirkpatrick, who was Counsel for Mrs. James Skinner. Before proceeding we may at once clear the ground by stating that we have no hesitation in holding that this document was a mere draft and was intended as a basis for the petition which was to be drawn up and presented to the Court.

On the 19th December 1904, a petition embodying *verbatim* the terms of what we have described as the draft agreement, was drawn up and presented to the District Judge. This petition bears an eight-anna Court-fee and is headed "In the District Court, Delhi—Mrs. James Skinner, plaintiff, versus Mrs. Orde and another, defendants—claim for declaratory decree that plaintiff is entitled to the whole estate of the late Mr. James Skinner of Delhi."

ROBERT SKINNER V. JAMES SKINNER.

"The parties in the above case have effected the following compromise, namely" (Here follow the terms of the compromise). The petition concludes as follows:—"Therefore pray that this Court will order this petition to be filed with the record, that a date be fixed for further hearing of the case, and that a decree in terms of the compromise be passed." The petition is signed by Mr. Kirkpatrick as Counsel for the plaintiff and by certain defendants on behalf of themselves and for others.

On the petition itself the District Judge passed the following orders:—

(1) "File with the record, 8th February fixed.

(Sd.) H. HARCOURT,
District Judge.

19th December 1904."

(2) "Adjourned to 8th March.

H. HARCOURT.

8th February 1905."

(3) "For 10th, parties not ready.

H. HARCOURT.

8th March 1905."

(4) "For 28th April.

H. HARCOURT.

10th March 1905."

On the 28th of April 1905, there is the following order of the Court:—

"Mr. Kirkpatrick for plaintiff announces to-day that his client withdraws from the suit on the basis of the compromise filed in the case on 19th December 1904. Each party to pay its own costs. Suit dismissed.

H. HARCOURT,
District Judge."

Plaintiffs (who were the defendants in the declaratory suit) have now sued Mrs. James Skinner for rendition of accounts of the estate, and it is conceded that their claim must fail unless they can put in evidence the terms of the agreement entered into between the parties in the previous suit. The Courts below have held that neither the document of the 10th December 1904, (described by us as the draft) nor the petition presented to the Court on the 19th December 1904, can be admitted in evidence, inasmuch as they are both unregistered and relate to property which is admittedly above the value of Rs. 100.

The question whether both or either of these documents is admissible in evidence has been argued at some considerable length before us and authorities *pro et con* have been cited by the learned Counsel who appeared for the appellant and the respondents respectively. After giving the question our best consideration, and a careful examination of the authorities cited, we are of opinion that the petition of the 19th December, did not require registration. It is clear from its very terms that it was intended to be a petition upon which the Court should take action, and the parties expressly asked the Court to grant a decree in accordance with the terms of the compromise, all the said terms being set forth in full in the petition. As a matter of fact, it would have been difficult for the Court, in a suit such as that before it where the plaintiff prayed for a declaratory decree to the effect that she was the sole owner of the property, to grant a decree which would be declaratory not only of her rights but of the rights of the defendants as against plaintiff and also *inter se*. This difficulty appears to have been recognized, and as a result of it, Mr. Kirkpatrick eventually asked the Court to allow plaintiff to "withdraw her suit on the basis of the terms of the compromise," and as we read the order of the District Judge, this is what the Court intended to do. The suit was dismissed, but dismissed with express reference to the agreement between the parties.

In these circumstances and having regard to the fact that the petition was actually brought on the record and that the District Judge wrote several orders relating to the case upon the back of the petition, we are of opinion that the case falls within the purview of the principle laid down by their Lordships of the Privy Council in *Pranal Anni v. Lakshmi Anni* (1) [see also *Khair-ul-nisa v. Bahadur Ali* (2)]. But even if it cannot be held that the Court in dismissing the suit on the basis of the compromise, impliedly incorporated the terms of the petition into its decree, we are still of opinion that the petition formed part of the pleadings of the parties in the case and being incorporated as such into the judicial record did

(1) 22 M. 508 (P. C.); 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147.

(2) 27 P. R. 1906; 11 P. L. R. 1906.

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not need registration in order to make it admissible in evidence for the purposes of the present case. In support of this view we would refer to the dicta of their Lordships of the Privy Council in *Bindesri Naik v. Ganga Saran Sahu* (3), and to *Sellappa Koundan v. Gurumoorti* (4); *Jaxardan Missir v. Maharani Janki Koer* (5); *Raghutans Mani Singh v. Mahabir Singh* (6); *Gobinda Chandra Pal v. Dwarka Nath Pal* (7) and *Wazir Ali v. Asa Ram* (8).

We accordingly hold that the petition was admissible in evidence, and accepting this appeal, we remand the case under Order XLI, rule 23, Civil Procedure Code, to the Court of the Senior Subordinate Judge, Delhi, for decision on the merits and with reference to the foregoing remarks.

Appeal accepted.

(3) 20 A. 171 (P. C.); 25 L. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273.

(4) 28 Ind. Cas. 790; 27 M. L. J. 396.

(5) 22 Ind. Cas. 687.

(6) 28 A. 78; A. W. N. (1905) 195; 2 A. L. J. 564.

(7) 35 C. 837; 7 C. L. J. 492; 12 C. W. N. 849.

(8) 95 P. R. 1894.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1082 TO 1092,
1862 TO 1868 AND 2052 OF 1913.

October 22, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Phillips.

A. L. A. R. ARUNACHELUM CHETTY,

BY HIS AUTHORISED AGENT,

SUBRAMANIA AIYAR—PLAINTIFF—

APPELLANT IN ALL

versus

SYAD AHAMED AMBALAM AND OTHERS

—DEPENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 13 (3)—Landlord and tenant—Extra charge for vanpayir claimed—Long-continued course of payment—Contract to pay—Presumption.

It cannot be laid down as a general rule that in all cases where there has been a long-continued course of payment of an extra charge for vanpayir, a contract to pay it must be presumed. [p. 540, cols. 1 & 2.]

Venkata Perumal Raju v. Ramudu, 27 Ind. Cas. 688; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129, explained.

Arumugam Chetty v. Raja Jagaveera Rama Venkateswara Ettappa, 15 M. L. J. 292; 28 M. 444, considered.

Arumugam Chetty v. Raja Jagaveera Rama Venkateswara Ettappa, 8 Ind. Cas. 330; 9 M. L. T. 76; 35

M. 134 and *Devi Bhuknoji Kasidoss Subbaraya v. Allamadugu Narayana Reddi*, 28 Ind. Cas. 492; (1915) M. W. N. 209, followed.

Second appeals presented respectively against the decrees of the District Court of Ramnad, in Appeal Suits Nos. 37, 58, 62, 82, 88, 105, 112, 116, 306, 309 and 311 of 1912, 628, 632, 647, 655, 660, 653 and 667 of 1911 and 130 of 1913, preferred, respectively, against the decrees of the Court of the Sub-Collector of Ramnad, in Summary Suits Nos. 797, 2832, 2836, 2856, 2862, 2881, 2888, 2892, 1422, 1425 and 1427 of 1911, and the decrees of the Court of the Special Deputy Collector of Ramnad, in Summary Suits Nos. 406, 410, 432, 443, 448, 453 and 459 of 1911, and the decree of the Court of the Sub-Collector of Ramnad, in Summary Suit No. 2906 of 1911.

FACTS of the case appear fully from the judgment.

Mr. S. Sundaraja Iyengar, for the Appellant:—The extra charge for vanpayir has been paid for very many years prior to the enforcement of the Estates Land Act. A contract to pay the rate claimed must, therefore, be inferred from the long-continued course of conduct. *Venkata Perumal Raju v. Ramudu* (1).

Messrs. A. Krishnaswami Iyer and T. Arumainatham Pillai, for the Respondents:—The charge is clearly illegal. *Vide* section 13 (3) of the Madras Estates Land Act, I of 1908. The case relied upon for the decision in *Venkata Perumal Raju v. Ramudu* (1), viz., *Arumugam Chetty v. Raja Jagaveera Rama Venkateswara Ettappa* (2), does not really support it. See also *Arumugam Chetty v. Raja Jagaveera Rama Venkateswara Ettappa* (3) and *Devi Bhuknoji Kasidoss Subbaraya v. Allamadugu Narayana Reddi* (4). The appellant must not be allowed to raise a new point in second appeal, as that would necessitate evidence being gone into.

JUDGMENT.—The first point argued before us, relates to the landlord's claim to an extra charge for "vanpayir," (i. e.,

(1) 27 Ind. Cas. 688; 23 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129.

(2) 15 M. L. J. 292; 28 M. 444.

(3) 8 Ind. Cas. 330; 35 M. L. J. 9 M. L. T. 76.

(4) 25 Ind. Cas. 492; (1915) M. W. N. 209.

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garden crops raised on dry lands by means of wells dug at the tenants' expense. Both the lower Courts have held that this charge is illegal.

There is no dispute that the wells in question were dug at the tenants' expense; nor, on the other hand, that in spite of this fact, the extra charge has been levied for many years—the Sub-Collector says, "from time immemorial," which we must take to mean 'ever since the wells were dug, and their water used for raising the garden crops.' But there does not appear to be any finding as to the length of time during which payment has been made in any particular case.

The respondents rely on section 13 (3) of the Madras Estates Land Act to support the decision of the lower Courts. The appellant contends that the charge is made in pursuance of a contract prior to the introduction of the Act: and that, as held in *Venkata Perumal Raju v. Ramudu* (1), such a contract is enforceable in spite of the section.

This theory of a contract validating the charge, has been set up for the first time in the hearing of these second appeals. In both the lower Courts, and even in the memorandum of second appeals, it was sought to support the charge on the basis, not of contract, but of custom: and the respondents' Vakil, in our opinion reasonably, objects to the appellant being allowed to alter his case at this stage. The admission of the contention, now raised, would necessitate the remand of the suits for findings on fresh issues and evidence; and such a course seems to us not justifiable. The appellant's Vakil has endeavoured to convince us that the required contract must be inferred from the long-continued course of payment, for which proposition he refers us to the judgments in the case above quoted. It is no doubt true that in that case Napier, J., presumed not only an agreement to pay the higher rates, but also consideration for the agreement from 60 years' payment, (i.e.,) a complete and enforceable contract. Sadasiva Aiyar, J., agreed that the same presumption could be drawn: though in his view of the case, that did not affect the result. Neither learned Judge, as far as we can gather, seems to have intended to lay down a general

proposition that such a presumption must always be drawn and would be irrebuttable; and it is only if this were the case that we could deny the respondents an opportunity of adducing evidence to contest it. Apart from this, if we may say so with all respect, we doubt whether the decision in *Arumugam Chetty v. Raja Jagaveera Rama Venkateswara Ettappa* (2), on which the learned Judges rely, affords any support whatever for the presumption of consideration for the agreement from long-continued payment. On the contrary, as it seems to us, Subramania Aiyar, J., is at pains to emphasize the contrary, (i.e.,) "that though payment for a number of years at the rate of 8 *fanams*, may imply an agreement to pay in future at that rate, yet that will not imply a contract between the parties, for the obvious reason that there was no consideration to support such an agreement so as to make it a binding one."

And the same view was taken at a subsequent stage of the same litigation by a Bench to which one of us was a party [*Arumugam Chetty v. Raja Jagaveera Rama Venkateswara Ettappa* (3)]. The existence of an agreement was allowed to be inferred from long payment: but independent proof of consideration for the agreement was insisted on as necessary. We may also refer to a later, case *Devi Bhuknoji Kasidoss Subbaraya v. Allamalingu Narayana Reddi* (4), for the same distinctions.

We must decline to allow a contract for the payment of the higher rates to be set up at this stage; and we confirm the finding of the lower Courts as to the illegality of the *vanpayir* charge.

The other points in dispute may be more briefly dealt with. We agree with the lower Courts in holding that the disallowance of the claim for extra rent for a second dry crop is a necessary corollary of the decision that the rent for the dry land can be claimed independently of whether a crop was raised or not, and we see no reason to differ from their interpretation of the word '*palanthur*' in relation to the charge leviable on palmyra trees.

There remains only the question raised on issue No. 17 of the rent claimed on land No. 337 in Summary Suit No. 2881 (Second Appeal No. 1087 of 1913). It is classed as "Mandaikollai or Veetadikollai" and the

CHANDAN MAL v. *Musammât Wasindi Bai*.

District Judge, differing from the Sub-Collector, has held that rent claimed as due on it, cannot be recoverable by a suit under section 77 of the Madras Estates Land Act. In our opinion, he is right in his conclusion. Of course if it were shown that the "Kollai" had been carved by the tenant out of *ryoti* land, without the landlord's consent, the latter would be entitled to recover rent due on it under the Act. But that is not the case here.

We dismiss the second appeals with costs.
Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1731 of 1912.
May 19, 1915.

Present:—Mr Justice Rattigan and
Mr Justice Leslie Jones.

CHANDAN MAL—PLAINTIFF—APPELLANT
versus

MUSAMMAT WASINDI BAI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family Widow of predeceased son holding a share of ancestral property as maintenance, whether can alienate.

Where in a suit for a declaration that an alienation by a widow shall not affect plaintiff's reversionary rights after the widow's death, it appeared that on the death of the last male owner, the mutation in respect of his estate took place in favour of (1) the plaintiff, (2) the father of the defendants Nos. 2 to 4, and (3) defendant No. 1, the widow of the predeceased son of the last male owner, who alienated her share in favour of the defendants Nos. 2 to 4.

Held, that the plaintiff could not have been separate in estate from his father and as the parties were Aroras and admittedly governed by Hindu Law, the widow received a third share obviously for the purpose of maintenance and had no right to alienate that share to the prejudice of the plaintiff.

Second appeal from the decree of the Divisional Judge, Multan, dated the 19th July 1912.

Mr. *Badr-ud-Din*, for the Appellant.

Mr. *Baidri Nath*, for the Respondents.

JUDGMENT.—The family tree of the parties and the facts of the case are set forth in the judgment of the Additional District Judge and need not be repeated. The plaintiff Chandan Mal sues for declaration to the effect that an alienation by *Musammât Wasindi Bai*, effected by a regis-

tered deed dated the 7th April 1910, in favour of defendants Nos. 2, 3 and 4, the sons of Chandu Mal, shall not affect his reversionary rights on the death of the widow. The suit has been dismissed by both the lower Courts on the ground that *Musammât Wasindi Bai* was holding the property on a life-interest, but that the alienation was for necessary purposes inasmuch as the estate held by her, was not sufficient for her maintenance. The plaintiff has preferred a second appeal to this Court and in our opinion his appeal must succeed.

On the death of Wiru Mal in 1886, mutation in respect of his estate took place in favour of (1) Chandan Mal, plaintiff, (2) Chandu Mal, father of defendants, and (3) *Musammât Wasindi Bai*, widow of Sewa Mal, a son of Wiru Mal who had predeceased his father. It is obvious from this that Chandan Mal could not have been separate in estate from his father Wiru Mal and as the parties are Aroras and admittedly governed by Hindu Law, *Musammât Wasindi Bai* who received a third share of the property, obviously for the purpose of maintenance, would have no right to alienate that share to the prejudice of Chandan Mal, plaintiff. The first Court has found that plaintiff separated from Wiru Mal some years before the latter's death, but this finding is more or less conjectural and based on very slight evidence. The Divisional Judge merely states that Chandan Mal lived separately from his father and both the Courts appear to have overlooked the importance of the question whether plaintiff was joint with or separate from his father in 1886, when the latter died. As we have remarked above, the division of the estate on that occasion proves conclusively that plaintiff could not have been separate in estate from the other members of his family.

We accordingly accept the appeal and grant plaintiff the decree prayed for. Defendants must pay costs throughout.

Appeal accepted.

SILU PEDA YELLIGADU v. SURYA RAO BAHADUR ZAMINDAR GARU.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 60
OF 1914.

September 27, 1915.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Spencer.SILU PEDA YELLIGADU—PETITIONER—
APPELLANT

versus

Sree RAJA RAVU VENKATA KUMARA
MAHIPATI SURYA RAO BAHADUR
ZAMINDAR GARU AND ANOTHER—
RESPONDENTS.*Civil Procedure Code (Act V of 1908), O. XII, r. 16*
—Execution—Injunction, decree for, in respect of
easement—Transfer of dominant tenement—No appli-
cation by transferee—Decree-holder, right of, to execute
decree—Executing Court, competency of, to consider
incapacity of decree-holder to enjoy easement owing to
transfer of dominant tenement.

An injunction granted by a decree in respect of an easement does not cease to be executable by the decree-holder merely because, subsequent to the decree, he has transferred the dominant tenement to a third party. A decree-holder is *prima facie* entitled to execute the decree and it is no answer to his application for execution that he has transferred the decree to a third party, so long as the transferee has neither appeared nor applied for permission to execute the decree. [p. 542, col. 2.]

It is not competent to the executing Court to take into consideration the fact that by a transfer of the dominant tenement the decree-holder is not entitled to enjoy the easement right granted by a decree. [p. 542, col. 2.]

Ram Sahai v. Gaya, 7 A. 107; A. W. N. (1884) 224; *Jagat Tarini Dasi v. Rakhal Chandra Tewary*, 3 Ind. Cas. 324; 14 C. W. N. 752; 10 C. L. J. 398; *Jasoda Deye v. Kirtibash Das*, 18 C. 639; and *Hansraj Pal v. Mukhraj Kunwar*, 30 A. 28; A. W. N. (1907) 280; 4 A. L. J. 759, followed.

Appeal against the order of the Court of the Subordinate Judge of Cocanada, in Appeal Suit No. 91 of 1913, preferred against that of the District Munsif of Peddapore, in Execution Petition No. 975 of 1912, in Original Suit No. 269 of 1904, (Appeal Suit No. 47 of 1912 on the file of the Court of the Temporary Subordinate Judge of Rajahmundry).

FACTS of the case appear sufficiently from the judgment.

Mr. P. Narayanamurthy, for the Appellant:—The order of the lower Court is contrary to law. *Prima facie*, a decree-holder is the person entitled to execute the decree. The transferee has not come forward and applied for permission to execute the decree. The decree-holder is the only person on the record and there is nothing in law

to prevent him from proceeding with the execution. The executing Court has no jurisdiction to consider as to the competency of the decree-holder to enjoy the easement. *Vide Ram Sahai v. Gaya* (1); *Jagat Tarini Dasi v. Rakhal Chandra Tewary* (2); *Jasoda Deye v. Kirtibash Das* (3) and *Hansraj Pal v. Mukhraj Kunwar* (4).

Messrs. S. Srinivasa Iyengar and D. Appa Rao, for the Respondents, argued *contra*.

JUDGMENT.—This is an appeal against the order of the lower Appellate Court setting aside a portion of the order of the Court of the first instance. The lower Appellate Court disallowed execution of the decree so far as injunction against the judgment-debtor was concerned, on the ground that the property to which the right of easement was attached had been subsequently transferred by the decree-holder to a third person. The transferee has not appeared and is not on the record of the case nor has he applied for permission to execute the decree. So far as the record goes, the judgment-creditor is the decree-holder and is, therefore, *prima facie* entitled to execute the decree. It may be that the land having been sold, the decree-holder is not entitled to enjoyment of the easement, but that is a question which it is not competent for a Court executing the decree to deal with in the circumstances of this case. It was bound to allow execution at the instance of the decree-holder as there was no other person who had the right to execute the decree.

The ruling reported as *Ram Sahai v. Gaya* (1) is very much to the point. There the decree-holder had sold the property which gave rise to a right of pre-emption, and the contention was raised that the property having been sold, the decree could not be executed at the instance of the decree-holder. That contention was disallowed on the ground that the executing Court was bound to recognise the decree-holder on record. There are a number of other decisions which follow the principle laid down there. [See *Jagat Tarini Dasi*

(1) 7 A. 107; A. W. N. (1884) 224.

(2) 3 Ind. Cas. 324; 10 C. L. J. 398; 14 C. W. N. 752.

(3) 18 C. 639.

(4) 30 A. 28; A. W. N. (1907) 280; 4 A. L. J. 759.

NARASAMMA HEGADTHI v. BILLA KESU PUJARI.

v. *Rakhal Jhandra Tewary* (2), *Jasoda Deye v. Kirtibash Das* (3), *Hansraj Pal v. Mukhraji Kunwar* (4).] The appeal should be allowed. The lower Appellate Court's order is, therefore, set aside and the District Munsif's order restored. The respondent must pay the costs of the appellant in this and the lower Appellate Court.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 710 TO 713
OF 1910.

April 2, 1913.

Present:—Justice Sir Ralph Benson, Kt., and
Mr. Justice Sundara Aiyar.

NARASAMMA HEGADTHI—PLAINTIFF—
APPELLANT

versus

BILLA KESU PUJARI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 8, 21—Statement of executant considerable time after execution, weight of—Construction of documents—Subsequent conduct, effect of—Ancient document—Gift to wife absolutely—Unambiguous deed—Draft deed prepared long before execution, admissibility of.

A statement made by a person as to the circumstances under which he executed a document a considerable time after the execution, cannot be admitted to prove the facts stated by him. [p. 544, col. 1.]

Except in the case of ancient documents the construction of a document whose terms are clear cannot be controlled by the subsequent conduct of the parties. [p. 544, col. 2.]

Where a person delivered his property absolutely to his wife and said that she was to enjoy the property from generation to generation:

Held, that the document created an absolute interest in favour of the wife. [p. 544, col. 2.]

A draft deed prepared long before a similar unambiguous deed is executed, is inadmissible to construe the latter deed.

Second appeals from the decrees of the Court of the Temporary Subordinate Judge of South Canara, in Appeal Suits Nos. 109, 107, 108 and 106 of 1908, presented against that of the Court of the District Munsif of Udipi, in Original Suits Nos. 448, 456, 457 and 449 of 1906.

Mr. B. Sitarama Rao, for the Appellant.

Messrs. K. Ramanatha Shenai, K. Naraina Rao and K. Yegnanarayana Adiga, for the Respondents.

JUDGMENT.—The principal question in this case relates to the construction of the document Exhibit A in the case. It was executed by one Mainda Hegade in favour of his wife, Ummakke, in 1864. It purported to be a deed of sale. But both the Courts have found that it was in reality a deed of gift, and that finding is binding upon us. In fact the finding has not been impeached by either party in this Court. In 1903 Ummakke executed a deed of gift (Exhibit B) of the properties comprised in Exhibit A in favour of the plaintiff. This suit by the plaintiff is to recover the property leased to defendants Nos. 1 and 2 on *chalgani* lease by Ummakke. The contention of the tenants, defendants Nos. 1 and 2, is that they surrendered possession to the 3rd defendant, a son of Ummakke, and that the rent sued for was also paid to him. The plaintiff's answer to this contention is that the property in question belongs to herself alone under Exhibit B, and that she is entitled to recover it from defendants Nos. 1 and 2 with the arrears of rent, and that any payment made to the 3rd defendant could not be set up in answer to her claim. The other children of Ummakke including the 3rd defendant were made parties to this suit, and they pleaded that the deed of gift, Exhibit B, was obtained by the plaintiff from Ummakke by undue influence and that in any event, the deed was invalid because under the deed Exhibit A, the right to the property vested not in Ummakke alone, but in herself and in her children subject to the incidents of *Alyasantana* Law. The District Munsif found that the defendants had failed to prove that Exhibit B was brought about by any undue influence; but he was of opinion that Ummakke was not the sole owner of the property under Exhibit A. The Appellate Court agreed with the Court of first instance with regard to the construction of Exhibit A, and held further that undue influence was exerted on Ummakke to make her execute Exhibit B. In second appeal it is contended that there is absolutely no legal evidence in support of the Appellate Court's finding on the question of undue influence, and that with respect to the construction of Exhibit A, both Courts are wrong. We may first deal with the question

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of undue influence inasmuch as, if we are able to confirm the finding on that point, it would be unnecessary to go into the construction of Exhibit A. We feel constrained to uphold the contention of the appellant that there is no legal evidence to support the finding. The evidence referred to by the Appellate Court consists of the statements of the plaintiff's 2nd witness and of the 2nd defendant. Both of them speak to statements made by Ummakke, that she did not know the nature of the contents of Exhibit B when she executed it. No pressure is spoken to by either of them. All that is stated is that Ummakke said that she was asked to execute the document and that she did so. This fact, assuming the evidence to be relevant, is no evidence of undue influence at all. There was nothing wrong in the plaintiff asking her mother to make a gift of the property to herself alone, and, if the mother was willing to do so, there would be nothing improper in her taking it. We are, however, of opinion that the evidence of the 3rd defendant and of the plaintiff's 2nd witness, of statements made to them by Ummakke is not in the circumstances of this case admissible at all to prove the facts alleged to have been stated by Ummakke. Her statement was admittedly made after her return from the house of the plaintiff's husband, where she had gone on a visit. According to the evidence of the witnesses mentioned above, she stayed two or three months in that house. Ummakke's statements did not accompany any conduct on her part, nor were they made at the time when the document Exhibit B was executed. Evidence regarding the statements made by her would not come within the purview of either section 8 or section 21 of the Evidence Act. A statement made by a person as to the circumstances under which he executes a document a considerable time after the execution, cannot be admitted to prove the facts stated by him. If we reject the statements, as we hold we are bound to do, there is absolutely no evidence in support of the plea of undue influence. We must, therefore, set aside the finding of the lower Appellate Court on that question.

It is then necessary to decide what right Ummakke obtained under Exhibit A. The

terms of the document seem to us to be quite unambiguous. Mainda Hegade delivers the property absolutely to his wife and says that she is to enjoy the property from generation to generation. These are words appropriate for the creation of an absolute interest, and they are not consistent with any limitation of the right of the donee. It may be, as urged by the learned Vakil for the respondent, that the donor wished by the gift to benefit not only his wife but also his children. But the question is, what is the correct interpretation to be placed upon the words of the document. On that matter, we have no doubt that it creates an absolute interest in favour of the wife. The donor may have hoped that his wife would transmit his estate to all his children and was content to rely on her doing so, but whatever his idea may have been, the document is perfectly clear and we cannot hold that it confers on Ummakke any other than an absolute estate. The case is not similar to *Kunhacha Umma v. Katti Mammi Hajee* (1) where the gift was to a woman and her children. The lower Appellate Court refers in support of its construction to two documents, Exhibits XIV and XV, which came into existence two years before the date of Exhibit A. They were apparently prepared by Mainda Hegade for the purpose of being executed. These documents are of no use in construing Exhibit A, which is in our opinion unambiguous. It may be that the donor changed his mind. He certainly did so as to the language in which he should express his wishes. But whether he had any different intentions at the time of Exhibit A from those he had at the time when Exhibits XIV and XV were prepared, or not, the construction of Exhibit A cannot be controlled by anything to be found in Exhibits XIV and XV. For the same reason we must also hold that the subsequent documents which were put in to show the conduct of Ummakke as to what she thought was the correct construction of Exhibit A, are also useless. It is settled law that except in the case of ancient documents, the construction of a document whose terms are clear cannot be controlled by the subsequent conduct of

(1) 16 M. 201; 2 M. L. J. 226.

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the parties. In reality those subsequent documents do not afford much help in the construction of Exhibit A. In 1882 it appears that Ummakke sued a tenant for rent in conjunction with one of her sons. This was 18 years after Exhibit A was executed; but it appears also that in 1892 she instituted another suit against a tenant by herself. The only other document relied on as evidence of her conduct is a petition by her son, Chandayya, for *pattah* for a land adjoining one of the items included in Exhibit A. The petition stated that *Muli* No. 18 included in Exhibit A was in the possession of the applicant Chandayya; but the Revenue Authorities in their order recognised the possession only of Ummakke and granted a *cowl* in favour of Chandayya on the ground that Ummakke consented to it. These detached documents, even if admissible, would afford no safe guide in the construction of Exhibit A, especially when we find that Ummakke did not always act in conjunction with her sons in matters connected with the administration of the property. Mr. Naraina Row has tried to support the judgment of the lower Appellate Court on two grounds, neither of which was raised till now. The *first* ground is that there was a secret trust at the time of the execution of Exhibit A in favour of the children of Ummakke. No such trust was pleaded by the defendants. The question whether there was a secret trust or not is one of fact. We cannot allow it to be raised in second appeal. The District Munsif, no doubt, says that "whatever the outward form which the transaction eventually took, the real nature of the transaction is disclosed by Exhibits XV and XIV and Ummakke took the property burdened with the trust in favour of herself and her children contained in Exhibits XV and XIV." We do not think that the District Munsif in this passage is really speaking of any secret trust accepted by Ummakke. The documents are apparently referred to by him as throwing light on the intention both of the donor and of Ummakke. There is absolutely no evidence that Exhibits XIV and XV were brought to the knowledge of Ummakke and that she consented to accept the property on any trust.

The *second* contention is that, whatever the original character of the gift under Exhibit A may be, Ummakke threw the properties comprised in it into the common stock by incorporating it with other properties belonging to the family. Here again no issue was raised to try the question; and the question being one of fact, we must decline to allow it to be raised here. It would have to be shown that the property was continuously enjoyed by Ummakke and her children together. The documents referred to by the lower Courts do not bear out any such theory of continuous enjoyment by the whole family. We must disallow this contention also. The result is that the decrees of the lower Courts must be reversed, and the plaintiff must be given a decree for the possession of the property.

Decree reversed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 7 OF 1913.

March 30, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Tyabji.

RAHMAN BI AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

FATIMA BIBI AND OTHERS—DEPENDANTS
—RESPONDENTS.

*Muhammadian Law—Gift—Transfer of possession—
Donor continuing to receive rents—Presumption.*

A deed of gift evidences merely a declaration of intention and nothing more. In order to make the gift complete and operative, the donor must deliver possession of the subject of gift to the donee and must divest himself of all power over it. [p. 548, col. 2.]

Where, therefore, after the execution of a deed of gift, no act of ownership was exercised over the subject of gift either by the donee or any person on his behalf, but the donor reserved to his own use the rents and profits of the property:

Held, that the gift was not intended to operate as a transfer to the donee and could not be given effect to. [p. 548, cols. 1 & 2.]

Appeal from the decree of the Hon'ble Mr. Justice Wallis, dated the 19th November 1912, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and made in Civil Suit No. 50 of 1911,

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JUDGMENT of Sir Arnold White, Kt., C. J., and Mr. Justice Tyabji referring back the case for findings on the questions of fact is printed in 23 Ind. Cas. 651.

FINDINGS.—Their Lordships the Chief Justice and Mr. Justice Tyabji in dealing with Original Side Appeal No. 7 of 1913 have called for findings on the following points:—

1. Whether possession of the subject of the gifts in question was in any way purported to be actually transferred by the donor to the donee?

2. If so, in what way possession was purported to be transferred? and

3. Whether, after the alleged gifts, acts of ownership were exercised over the subject of gift by the donor or the donee or by some person acting on behalf of the donee.

Evidence has been let in on both sides. The subject of the gift is two houses, 76, Angappa Naick Street, and 107, Thambu Chetty Street. I shall first deal with 107, Thambu Chetty Street. So far as this house is concerned, it appears from Exhibit H, dated 14th November 1904, that the donor was carrying on business in the house and sold the stock in trade to Mahomed Mohidin by a sale-deed, dated 14th November 1904. *Prima facie*, therefore, he was in possession before that date and was carrying on business in that house and there is no satisfactory evidence to show that prior to Exhibit H, anybody else was in possession. At the date of the gift which was 5th October 1904, the donor, therefore, must be taken to be in the possession of the house. Subsequent to that date, he took a rental agreement, Exhibit E, from Mahomed Mohidin, dated 3rd December 1904. That rental agreement was taken in donor's name without reference to his having been the guardian of his minor sons. I have no reason to suppose that the rental agreement is not genuine. Subsequent to this rental agreement and on the 15th June 1906, the donor Chinnavappu got a rental agreement, Exhibit I, wherein he is described as the guardian of his minor sons who were the donees and, so far as Exhibit I is concerned, there can be little doubt that Chinnavappu treated the donees as the owners of the house and himself as the guardian. The clear inference to be drawn from Exhibit I is that his object was to confirm the

gift and to transfer possession to the donees. It is argued by Mr. Venkata Subba Row that Shah-ul-Ameer, one of the donees, was a major at the time, because he described himself as about 22 years old in his statement, Exhibit O, made by him before the Registrar in 1907. Having regard to the age as given in the deed of gift and the fact that there was no motive why the father should in Exhibit I have described Shah-ul-Ameer as a minor, when in fact he was a major, I do not think I can accept the statement in Exhibit O, probably made for his own purpose, and hold that at the date of Exhibit I, the donee was a major and consequently Exhibit I was inoperative. At any rate, Exhibit I clearly shows that the donor wanted to transfer possession to the donees and did everything that was possible for him to do to give effect to that transfer. Certain rent receipts are produced by the plaintiff's Vakil to show that the receipts for No. 107 for rent were granted by the donor not as guardian but in his own name. These receipts are not in the affidavit of documents and were produced for the first time in the enquiry before me. It is doubtful whether these documents could be admitted at this stage; but, as my attention has been called to the fact that both Justices Bakewell and Wallis held that no document need be disclosed in the list which parties are not bound to disclose in the affidavit of documents, I admitted them. I, however, think that it would be unsafe to act upon these receipts and base any conclusion thereon which would be opposed to the plain tenor of Exhibit I. So far as No. 107 is concerned, the position is that there was no mutation of names either in the Collector's certificate or in the Municipal Assessment Registers, but that the donor recognised the deed of gift and transferred possession of the property to the donees so far as it lay in his power to do so.

As regards No. 76, Angappa Naick Street, the position is different. In this case, there is admittedly no mutation of names either in the Collector's books or in the assessment registers, and so far as it appears from the record, there is nothing to show that the possession was delivered to the donees or the donor did anything in his power to indicate that he divested himself of possession or recognised the donees as the owners. An attempt has been made to show that just as in the case of

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No. 107, a rental agreement was taken from one Chinnathambi wherein the donor was described as the guardian of the donees. The evidence as to this is that of Shah-ul-Ameer, Chinnathambi, and Jalaluddin who were examined by the defendants. I must say at once that I do not believe their evidence. I find that there was no rental agreement executed in respect of No. 76 as alleged. In the first place it seems to me that, if, as in the case of No. 107, a rental agreement was executed, describing the father as the guardian, it would certainly have been registered as Exhibit I was. Chinnathambi wants to make out that he was in possession of No. 76 from four months before the date of gift to 11 months subsequently, i.e., from June 1904 to September 1905 and that while in possession he executed this deed of gift. He admits that he was during that period living in house No. 247, Thambu Chetty Street, belonging to the donor. But says that, as he had two wives, one of his wives was occupying No. 76. There is no documentary evidence to show that she ever occupied No. 76, but, on the contrary, such documents as there are, distinctly point to Ummer Sahib and Alli Sahib having been in possession of this property till 1906 and Sikkandar Rowther having come into possession subsequently. Ratnavelu Chetty, who was examined by the plaintiff, deposed that Chinnathambi never occupied No. 76, but that Alli and Ummer were in possession of the property. I find it difficult to believe that Chinnathambi was occupying two houses instead of only one and his explanation for leasing No. 76 is, in my opinion, worthless. I find that so far as No. 76 is concerned there is no evidence of any act having been done by the donor which will indicate any transfer of possession on his part of the property. It has been argued by the plaintiffs' Vakil that possession ought to have been given immediately after the gift and possession given by Exhibit I is not sufficient. These are, however, matters for the Appellate Court to consider and all that I have to submit is findings on the points required.

As regards No. 76, my finding is that possession of the subject of the gift was not actually transferred by the donor to the donee and that, after the gift and until the death of the donor, no act of ownership was exer-

cised over the subject of gift either by the donee or by any person on behalf of the donee but that the donor continued to receive rents from the property.

As regards No. 107, my finding is that possession of the house was delivered to the donee by Exhibit I and that subsequently the donor's position was only that of a guardian.

This appeal coming on for final hearing on the 22nd and 23rd March 1915 after the return of the above findings by the Honourable Mr. Justice Kumaraswami Sastri sitting in the original side upon the issues referred by the Court (Sir Charles Arnold White, C. J., and Tyabji, J.) for trial, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

AYLING, J.—I have no hesitation in accepting the findings of the learned Judge on the issues referred to him.

As regards the house assigned by Exhibit B, No. 107 in Thambu Chetty Street, it is found that at any rate after the date of Exhibit I, possession was held by Chinnavapu Sahib (the donor) only as the guardian of the donee and it may be inferred that his possession between the date of gift and that date was in the same capacity. I should, therefore, hold that the gift is valid.

The case of the other house, No. 76 in Angappa Naick Street, transferred by Exhibit A is different. The learned Judge finds "that possession of the subject of the gift was not actually transferred by the donor to the donee and that, after the gift and until the death of the donor, no act of ownership was exercised over the subject of gift either by the donee or by any person on behalf of the donee but that the donor continued to receive rents from the property."

There is in fact nothing apart from the recital in Exhibit A (the deed of gift itself) to indicate or suggest any transfer of possession or change of ownership. To this must be added the fact that the income of the property is by Exhibit A secured to the donor for his life; and that the donor omitted to take the simple and common place step of securing mutation of names

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in the registers of the Collector's Office or Municipality.

I express no opinion as to the question of whether in a case like this a declaration of gift can itself be sufficient or whether something over and above it must always be required, and I do not understand my learned brother to have intended to decide this point in his judgment delivered at the first hearing of this appeal. But I think the facts in this case justify the inference that the gift of this house was not intended to be effective: and should not be given effect to.

It is argued that the two gift-deeds were executed on the same day and are identically worded while the inference from the failure to secure mutation of names is the same in each. But in the one case there is something to rebut this inference: in the other there is not. And the fact that the donor went to the entirely unnecessary trouble and expense of executing and registering separate sale-deeds for the two houses, certainly suggests a possibility of different intentions regarding them.

I would, therefore, hold the gift by Exhibit A to be invalid.

TYABJI J.—I have arrived at the same conclusion. I agree with Kumaraswami Sastri, J.'s appreciation of the evidence and in his findings of fact. The result is that as regards one of the gifts (Exhibit B) we find the father dealing with the property after the declaration of gift on the basis that the son was its owner. This conduct of the father indicating that the son was the owner of the property, strongly supports the conclusion that there was "on the part of the father.....a real and bona fide intention to make a gift," *Ameer-oonnissa Khatoon v. Abeldounnisa Khatoon* (1), and that he had completely transferred the ownership of the property to the donee. I come to the conclusion, therefore, that the gift under Exhibit B was valid and complete.

With reference to the other gift, Exhibit A, all we have is a bare declaration of gift by the father. In the circumstances of the case (including the fact that the father reserved to his own use the rents and profits of the property during his life-time) no aid can be had from the application of the (1) 2 I. A. 87 at p. 104; 15 B.L.R. 67; 23 W. R. 208.

profits of the gift, though ordinarily, as Sir Barnes Peacock pointed out in the case already cited at page 98, "the mode in which the father dealt with the profits would be important as regards the *bona fides* and completeness of the gift as throwing light upon the intention." There are circumstances on the other hand showing that there was no intention to make a complete transfer by way of gift. These circumstances are, in my opinion, sufficient to turn the scale in a case where the father reserves the rents and profits to his own use and where, therefore, their application cannot be referred to for discovering where the ownership lies. For there is no mutation of names in the Collector's books or in the Municipal records, no tenants are asked to attorn to the donee, or informed that in future the donee is their landlord nor public acknowledgment of the ownership of the donee. In such a case it would be quite unsafe to hold that there was any intention to transfer the property because a declaration of gift was made and the donor was the father and guardian of the minor donee. For the reasons I have already given, it seems to me that the presumption of law that the gift is completed on the declaration cannot be made the basis for holding that the gift must be necessarily considered in every case to be proved to have been intended to be made and to be completed, when all that is proved is that there was a declaration of gift by the father or grandfather in favour of his minor son or grandson. The surrounding circumstances may show, as they do here, that the alleged gift was not intended to operate as a transfer to the donee.

BY THE COURT:—In the result there will be a declaration that the gift under Exhibit A was invalid, but that the gift under Exhibit B was valid and complete, and the properties referred to in Exhibit A formed part of the estate of the deceased Mahomed Ibrahim alias Chinnavapu, but that the properties referred to in Exhibit B, did not so form part.

The suit does not expressly purport to be one for administration and has not been tried as such, but we find ourselves unable to accede to the plaintiff's request to ignore the contentions raised in the written state-

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ment of the defendants which are to the effect that the deceased Mahomed Ibrahim died possessed of other properties movable (and perhaps also immovable) which ought to be administered. We do not think that in the circumstances of this case we ought to pass a preliminary decree for the partition amongst the heirs of the deceased of the properties referred to in Exhibit A alone without any enquiry of the nature required in an administration suit. For we find that on the pleadings the most proper course would be to proceed on the basis of this suit being for the administration of the estate of the deceased.

We remand the suit to the original side, therefore, for trial of the other questions raised on the pleadings. The parties may be required, if necessary, to put in fresh statements so that the issues necessary to be raised and considered in a suit for the administration of the estate of Mahomed Ibrahim may be raised and decided.

The costs will be costs in the cause.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3644 OF 1910.

April 25, 1913.

Present:—Mr. Justice N. R. Chatterjee.

MADAN MOHAN CHAKRAVARTY AND
OTHERS—DEFENDANTS—APPELLANTS

versus

SASHI BHUSAN MUKHERJI AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Easement—Right of way—Several servient owners—Obstruction by one—Other servient owners, if necessary parties—Enjoyment by tenant, if enjoyment by owner—Permanent tenure-holder, if can acquire right against another under same landlord—"Adhin" in road cess, meaning of—Severance of tenement—Grant—Presumption.

Where a way passes over different parcels of land owned by different persons and the owner of one parcel obstructs the way on his own land and the owners of the remaining parcels do not raise any obstruction nor even deny the dominant owner's right, the latter are neither necessary parties nor

can be joined in a suit for a declaration of his right of way by the dominant owner against the servient owner who obstructs the way. [p. 550, col. 1.]

An enjoyment of easement by a tenant in possession of the dominant tenement under a claim of right in respect of the dominant heritage, may give the owner a prescriptive right. [p. 550, col. 1.]

The word "*adhin*" used in the road cess return means "appertaining to" and not "subordinate" to the *housla*. [p. 550, col. 2.]

Quere:—Whether a permanent tenure-holder can acquire a prescriptive right of way against another permanent tenure-holder under the same landlord? [p. 552, col. 1.]

The plaintiffs purchased the dominant tenement some 60 years before the suit after a partition between their ~~70~~ fathers and their co-sharers. A way was in existence from beyond that time. The path was intended to be permanently attached to and for the use of the would-be dominant tenement.

Held, that there was the presumption of an implied grant on severance of the two tenements. [p. 553, col. 1.]

Held, further, that assuming that the way came into existence only after the partition, the fact that the tenant in possession of one tenement had been using the path over the other for about 60 years, would lead to the inference that the user had its origin in a grant not as a matter of legal presumption, but a grant which may be found as an inference of fact. [p. 553, col. 1.]

On a severance of a property a grant of a right of way of necessity by the owner of one of the severed portions to the owner of the other can be presumed. [p. 553, col. 2.]

Second appeal against the decree of the Subordinate Judge, 3rd Court, Dacca, dated the 4th July 1910, affirming that of the Munsif, 3rd Court, Munshiganj, dated the 30th July 1909.

Baba Harendra Narain Mitter, for the Appellants.

Baba Dwarka Nath Chakravarty, Dr. Sarat Chandra Basak, Babus Ramani Mohan Chatterjee and Jogish Chandra Roy, for the Respondents.

JUDGMENT—This appeal arises out of a suit for declaration of a right of way, for restoration of the path to its former condition and for perpetual injunction. The Courts below have concurred in decreeing the suit, and the defendants have appealed to this Court.

The first contention raised on behalf of the appellants is that the suit ought to fail, as the owners of all the servient tenements over which the way is claimed, have not been made parties to the suit, and the case of *Madan Mohan Chattopadhyaya v. Akshoy Kumar Barui* (1) is relied on in support of the

(1) 5 Ind. Cas. 23; 14 C. W. N. 15.

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contention. It is not alleged that the owner of any land other than *bhadrar kola* over which the way passes, has obstructed the plaintiffs or ever has denied the plaintiffs' right. The owners of the land *bhadrar kola* alone have caused the obstruction, and all the owners of that land have been made parties to the suit. In the case cited above, all the servient owners were not made parties and the learned Judges observed that it was difficult to see how a decree based on an easement in that state of the record could be passed. But "all the servient owners", I think, mean all the servient owners who had raised objections to the plaintiffs' right of way and against whom there was a cause of action and do not refer to the owners of all the tenements over which the way passed. If a way passes over 50 different parcels of land owned by 50 different persons, and the owner of the fiftieth parcel obstructs the way on his own land and the owners of the remaining parcels do not raise any obstruction nor even deny plaintiff's right, I do not think the latter are necessary parties or can be joined in a suit against the person who obstructs the way. The plaintiffs in the present case complain of the obstruction at the site of the *bhadrar kola*, and all the owners of that tenement have been made parties. They no doubt pray for a declaration of their right of way which is described as passing over the lands of other persons but that is merely descriptive of the way, and they have no cause of action against the owners of the other tenements. One Siva Prasanna, the owner of a tenement over which the way passes, was made a party defendant and he pleaded that there was no cause of action against him. The obstruction being confined to *bhadrar kola* alone, there was no cause of action against the owners of the other tenements over which the way passes. I am accordingly of opinion that this contention has no force.

Secondly, it has been argued that the user by the plaintiffs' tenants cannot inure to the benefit of the plaintiffs. But the enjoyment by the tenant in possession of the dominant tenement under a claim of right in respect of the dominant heritage may give the owner a prescriptive right. The easement is acquired for the benefit of

the dominant tenement, and becomes appurtenant to it into whatsoever hands it passes. See Goddard on Easements, 7th Edition, page 223, Gale on Easements, 6th Edition, page 202. Section 12 of the Easements Act (V of 1882) lays down that an easement may be acquired on behalf of the owner of immoveable property by any person in possession of the same. Although the Act does not apply to Bengal, it shows that the principle is a well-recognised one. It was contended that the servient owner may allow successive tenants in temporary occupation (say for 2 or 5 years each) of the dominant tenement to use a way, but that such user cannot confer a right upon the landlord. But this question does not arise in the present case, as one of the tenants alone is found to have used the way for 25 years. The lower Appellate Court has found that the plaintiffs themselves have been in possession of the dominant tenement for 20 years and that before that their tenants were in possession of the same from 1258 (1851) and that it was clearly established by the evidence that the way had been in existence from beyond that time. The user by the plaintiffs themselves is sufficient, in so far as the suit is based upon section 26 of the Limitation Act.

The third contention is that the Court below has misconstrued the word "*adhin*" in the road cess return and that it ought to have held that the plaintiffs were subordinate tenure-holders under the defendants. I am of opinion, however, that the Courts below have rightly construed the word "*adhin*" as meaning "appertaining to" and not "subordinate" to the *howla*, and that they have arrived at a right conclusion in holding that they were not subordinate tenure-holders.

The fourth point taken is that as both the plaintiffs and the defendants hold tenures within the same *howla*, the plaintiffs are co-owners with the defendants and cannot acquire a right of easement against the defendants. They are not co-owners of the same piece of land and the lands held by them respectively are separate. It is found that the *howla* was partitioned among the co-sharers long ago and the dominant tenement fell to the share of the

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plaintiffs' predecessor-in-title, while the servient tenement fell to the share of the defendants on partition. The defendants do not admit that the plaintiffs have any right to the servient tenement. But although the parties hold separate tenures and the tenures are permanent, they hold under the same landlord and the question, therefore, arises, whether one permanent tenure-holder can acquire an easement by prescription against another permanent tenure-holder under the same landlord. The ordinary rule no doubt is that a prescriptive right cannot be acquired by one tenant against another tenant of the same landlord. In the case of *Kilgour v. Gaddes* (2), Collins, M. R., referring to section 2 of the English Prescription Act said: "It appears to me clear that under the section, the right cannot be acquired merely by a tenant as against a tenant, but must be acquired by the owner of fee in one of the tenements as against the owner of the fee in the other. Here the respective tenants of the so-called dominant and servient tenements hold under the same landlord; and, if the proposition be correct that a prescriptive right of way under section 2 of the Act must be acquired by the owner of the fee in one of the tenements as against the owner of the fee in the other, then in this case the defendant's contention would involve the result that the tenant of one of the tenements has acquired for his landlord a right of way over the landlord's own land; which is impossible and inconsistent with the essential notion of a right by prescription, namely, that the right is acquired by the owner of land over land belonging to another owner. I limit what I am saying to such an easement as a right of way, because questions with regard to the easement of light stand on a different footing, and depend on the provisions of section 3 of the Act. The present case depends on section 2, which deals with prescriptive rights of way and other similar easements," and it was also pointed out that the reason why a prescriptive right of way cannot be acquired by user by one tenant over land in occupation of another tenant of the same owner is that

the enjoyment of the easement in that case would not be as of right.

In that case the question arose between two termors. A permanent tenure-holder like a *mokuridar* in this country does not stand in the same position as a termor. As pointed out by Pontifex, J., in *Kasumunnissa v. Nilratan Bose* (3), in this country *putnis*, *surpeshgis*, leases and interests of that nature are very considerable interests in the land and cannot be looked upon as a mere lease for a term of years and are in fact substantial proprietary interests, and it was held by the Privy Council in *Sonet Koer v. Himmat Bahadoor* (4) that a *mokurari* tenure is an absolute interest which does not revert to the *zemindar* on failure of heir of the grantee, and that it goes to the Crown by escheat.

But it was held in the case of *Kally Das Ahiri v. Monmohini Dassee* (5) that though there may be some correspondence between a conveyance in fee simple and a *mokurari manrusi* lease, in its practical results the legal effect is not the same, and that an owner by granting a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest, and that the word "lease" implies an interest still remaining in the lessor. The observations of the learned Judge in that case were quoted with approval by the Privy Council in the case of *Abhiram Goswami v. Shyama Charan Nandi* (6). In the case of *Mani Chander Chakerbutty v. Baikanta Nath Biswas* (7), it was held that an *osat talukdar* cannot acquire an easement by prescription in respect of the water of a tank of his lessor. The learned Judges in that case observed that although tenants with permanent rights have very extensive rights, still a tenant is always a tenant and never an owner of the land and as he always derives his rights from the lessor, and as the latter cannot have the right of enjoyment of an easement as of right against himself, so neither can his tenant against him.

(3) 8 C. 79; 9 C. L. R. 173.

(4) 1 C. 391; 25 W. R. 239; 3 I. A. 92; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257.

(5) 1 C. W. N. 321; 24 C. 440.

(6) 4 Ind. Cas. 449; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 C. 1003.

(7) 9 C. W. N. 856; 29 C. 363.

(2) (1904) 1 K. B. 457; 73 L. J. K. B. 233; 52 Jy. R. 438; 90 L. T. 604; 20 T. L. R. 240.

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The tenement over which the right was claimed in that case was not in the possession of another permanent tenure-holder but appears to have been in the *khas* possession of the landlord himself.

Having regard, however, to the present state of the authorities, it seems very doubtful whether a tenant although he is a permanent tenure-holder, can acquire a prescriptive right of way against another permanent tenure-holder under the same landlord.

The question is one of importance and requires careful consideration; but it is not absolutely necessary to decide it in the present case.

Although the plaintiffs may not claim a prescriptive right because both they and the defendants are tenants under the same landlord, I think the Courts below are right in presuming an implied grant upon the facts proved in the case. The two tenements at one time belonged to the same persons, i.e., before the partition. The presumption in favour of the grant of an easement upon the severance of a heritage by its owner into two or more parts, arises primarily with reference only to continuous and apparent easements, and a way is evidently not a continuous nor always an apparent easement [see *Ram Narain Shaha v. Kamala Kanta Shah* (8)], and it is accordingly contended on behalf of the appellant that in the absence of an express grant, no right of way could be claimed.

The distinction between continuous and discontinuous easements has, however, recently been considerably modified, although the decisions in the recent cases, as observed in *Goddard on Easements*, 7th Edition, page 196, have "unfortunately not tended to simplify, define or render the rule of law clear as to implied grants and reservations of continuous and discontinuous easements on severance of property and the effect has tended rather to indecision than to settlement of the principles of law." In this state of the authorities, I do not think it will serve any useful purpose by discussing the English cases on the point. The result of the authorities is stated in *Goddard*

on Easements (7th Edition, at page 197) thus:—

"The net result is that the distinction which was made in *Pearson v. Spencer* (9), *Worthington v. Gim on* (10) and *Pollen v. Bastard* (11) between continuous and discontinuous easements, though not altogether abrogated, has been very much modified: for *Brown v. Alabaster* (12) and *Thomas v. Owen* (13) are decisions that if ways are made in a defined direction and between fixed bounds and are evidently intended to be permanently attached to one part of a property for the sole use thereof, no distinction can be made between a right of way which is a discontinuous easement and a continuous easement, though probably it would still be held that no grant could be implied on division of a property if the way were an ill-defined track, unmetalled and unpaved, over unenclosed ground of the vendor of the would-be dominant estate."

The fact that a path is metalled and paved would no doubt indicate permanence in the adaptation of the tenement, but I do not think the learned author means to say that it is absolutely necessary that the path should be paved and metalled even if it otherwise appeared that there was permanence in the adaptation.

The plaintiffs purchased the dominant tenement so far back as 1851, i.e., about 60 years ago, after partition between their vendors and their co-sharers. The lower Appellate Court has found that it was clearly established by evidence that the way had been in existence from beyond that time and in fact it has been found upon the evidence on both sides that the way has been in existence from time immemorial. The Court of first instance says, "moreover the right to use the path in question was practically a right inseparably attached to the *bari* by immemorial user

(9) (1861) 1 B. & S. 571; 7 Jur. (N. S.) 1195; 4 L. T. 763; 124 R. R. 656.

(10) (1860) 29 L. J. Q. B. 116; 2 El. & El. 618; 6 Jur. (N. S.) 1053; 119 R. R. 873.

(11) (1865) 1 Q. B. 156; 7 B. & S. 130; 35 L. J. Q. B. 92; 13 L. T. 441; 14 W. R. 198; 147 R. R. 374.

(12) (1887) 37 Ch. D. 490; 57 L. J. Ch. 235; 55 L. T. 267; 36 W. R. 155.

(13) (1887) 20 Q. B. D. 225; 57 L. J. Q. B. 195; 55 L. T. 162; 36 W. R. 440; 52 J. P. 51.

[(8) 26 C. 311 at p. 313.

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and cannot be detached from it, and so whoever becomes the owner of the *bari* must have a right to use the path for all purposes. The existence of this path from a very remote past, and its enjoyment down to the time of the obstruction complained of by the plaintiffs and the previous occupiers of the *bari*, lead me to refer this long enjoyment to a legal origin and to presume a grant or an agreement between the owners of the *howlas* creating this right."

The facts found, therefore, show that the path was evidently intended to be permanently attached to, and for the use of, the would-be dominant tenement now occupied by the plaintiffs. The learned Subordinate Judge finds that there could be no question as to the fixity of the path. So it was not an ill-defined track but a formed road. It may not be paved or metalled: very few private paths in villages are metalled or paved in this country, but the facts found show that there was a permanence in the adaptation of the tenement from which continuity could be inferred.

In these circumstances, I think the Courts below are right in presuming an implied grant on severance of the two tenements. But even if there was no formed road or a way of the nature stated in the passage in *Goddard on Easements* cited above during the unity of possession of the two tenements and the way as it is came into existence only after the partition, the fact that the tenant in possession of one tenement has been using the path over the other for about 60 years would lead to the inference that the user had its origin in a grant not as a matter of legal presumption, but a grant which may be found as an inference of fact. And I think it is open to a Court dealing with facts to draw such an inference of fact from an unbroken user for about 60 years. The Court of first instance expressly drew such an inference and the Court of Appeal below confirmed it. The user is found to have been as of right.

The Court of Appeal below has further found that the disputed way is one of absolute necessity and the only way for ingress and egress to and from the plaintiffs' dwelling houses. It is true every right of way of necessity is founded upon presumed grant, and unless a grant can be presumed, no

way of necessity can be claimed. But on a severance of a property, a grant by the owner of one of the severed portions to the owner of the other can be presumed, and has been presumed in this case.

It was pointed out, on behalf of the appellants, that according to the finding of the Court below, the path cuts the *kola* diagonally from north-west to south-east, whereas the Commissioner's map shows a different direction of the path, and that this shows that there was no definite pathway. But the apparent discrepancy is explained by the fact that the plan attached to the plaint is a rough sketch and what is shown as an oblong figure in the plan is shown in the Commissioner's map in a different shape. The question does not appear to have been raised in the Courts below and I do not think that there is any force in this objection.

I am accordingly of opinion that the plaintiffs have established their right of way, and that the decree of the Court below is correct. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

N. B.—There was a Letters Patent Appeal against this decree which was dismissed by Jenkins, C. J., and D. Chatterjee, J. on the 2nd of June 1915—Ed

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1177 OF 1914.

November 12, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

MUKHA AND ANOTHER—PLAINTIFFS—

APPELLANTS

versus

QABZA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Hindu Law—Succession—Grandfather's daughter's daughters' son—Bandhu—Mitakshara.

A grandfather's daughter's daughter's son is a *bandhu ex parte paterna*. [p. 554, col. 1.]

Second appeal from the decision of the Additional District Judge of Saharanpur, dated the 6th June 1914.

Messrs. C. C. Dillon and Damodar Das, for the Appellants.

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Mr. Nehal Chand, for the Respondents.

JUDGMENT.—This appeal arises out of a suit which was brought to realise the amount of a mortgage, dated the 7th of February 1910. The mortgage was made by one Musammat Thakuri, the widow of Pat Ram. The defendants to the suit were Qabza, Dalla, Rasalu and Musammat Parsanni. Musammat Parsanni and Rasalu were *pro forma* defendants, vendors of the defendants Qabza and Dalla. The defence was that there was no legal necessity. The plaintiffs replied that there was legal necessity and that even if there was no legal necessity, the defendants claiming under Rasalu had no *locus standi* to contest the legality of the mortgage, in that Rasalu had no right of inheritance to the estate of Pat Ram, the husband of Musammat Thakuri. The Court below has decreed the suit in part. It has held that there was legal necessity to the extent of Rs. 498-8-0, principal and interest. Two appeals have been preferred. The plaintiffs have appealed in regard to so much of their suit as was dismissed, whilst the defendant Qabza contends that legal necessity for no part of the mortgage-money was proved.

We shall first deal with the question of necessity. The evidence consisted of the proof that there had been a previous debt incurred by Musammat Thakuri, but there is no evidence to show that there was any necessity for the incurring of this previous debt. In our opinion under these circumstances legal necessity was not proved.

The second question, namely, whether the defendants had any *locus standi* to contest the validity of the mortgage, depends upon whether or not Rasalu was a reversioner or otherwise entitled to succeed to the property. Rasalu according to the findings of the Court below was the daughter's daughter's son of the grandfather of Pat Ram. According to Sarbadhikary's Tagore Law Lectures for 1882, page 701, a grandfather's daughter's daughter's son is a *bandhu ex parte paterna*, and we think that he is a *bandhu*. Under these circumstances, the defendant Qabza is entitled to contest the validity of the mortgage.

It was contended that Qabza who claimed under Rasalu could not contest the validity of the mortgage on one other ground, namely,

that Rasalu took a sale-deed from Musammat Thakuri of a portion of the estate of Pat Ram and, therefore, was estopped from denying that she was not entitled to all Pat Ram's estate. We do not agree with this contention. The property purchased by Rasalu from Musammat Thakuri was not the same as is now in dispute. Under these circumstances, it seems to us that the appeal fails and must be dismissed. We accordingly dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2462 OF 1910.

August 10, 1915.

Present:—Sir Lawrence Jenkins, Kt.,
Chief Justice, Mr. N. R. Chatterjea
and Mr. Justice Mullick.

ABDUL RAHMAN CHOWDHURI—
PLAINTIFF—APPELLANT

versus

AHMADAR RAHMAN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 161—*Putni* tenure, unregistered purchaser of, right of—Incumbrance.

Per Jenkins, C. J., and N. R. Chatterjea, J., (Mullick J., dissenting).—An interest of an unregistered purchaser of a portion of a *putni* tenure is not an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. [p. 558, col 1; p. 561, col. 2.]

Appeal from a decision of the District Judge, Chittagong, dated the 29th April 1910, confirming that of the Additional Munsif, Fatikchhari, dated the 27th May 1909.

The appeal came up for hearing at the first instance before N. R. Chatterjea and Mullick, JJ., who passed the following

JUDGMENT.

N. R. CHATTERJEA, J.—The plaintiff-appellant purchased a *putni taluk* at a sale held in execution of a decree for arrears of rent, and sued to recover possession of the lands in suit which were included in the *taluk*, from the defendants who were in possession thereof by purchase from the former *putnidar*. The Courts below dismissed the suit on the

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ground that the purchases made by the defendants of portions of the *putni* were "incumbrances" within the meaning of section 161, Bengal Tenancy Act, which had not been annulled according to the provisions of section 167 of that Act. The plaintiff has appealed to this Court.

Before dealing with the above question, I will notice a point raised on behalf of the respondents, *viz.*, that the landlord was bound to recognise the transfers of portions of a permanent tenure, and the transferees not having been made parties to the rent suit, the sale held in execution of the decree for rent passed only the interest of the person who was a party to the decree. But the tenure in the present case is a *putni* tenure, and under the Putni Regulation, transfers of fractional portions of a *putni taluk* are not binding upon the *zemindar*, although the transferee acquires a valid title to the portion purchased. This is clear from sections 5 and 6 of the Regulation, and if any authority were needed, I may refer to the decision of the Judicial Committee in *Watson & Co. v. Collector of Zillah Rajshahye* (1). The cases relied upon on behalf of the respondent do not support his contention. In *Sourendra Mohan Tazore v. Surnomoyi* (2), it was held that although the transferee of a fractional share of a *putni* cannot enforce registration of his name on payment of the necessary fee and tender of the requisite security, yet the transfer is not altogether void, and he is liable for rent severally and jointly with the registered tenant, if the landlord chooses to recognise him as one of the joint holders of the *putni* and he is also liable for the entire rent of the *putni* estate. The other case, *Aosub Ali Pramanik v. Biseshuri* (3), also is to the same effect. These cases are no authorities for the proposition that the transfer of a share in *putni*, without the express consent of the *zemindar* is binding upon him. They only lay down that the transferee is liable jointly with the registered *putnidar* if the landlord chooses to recognise him as one of the joint holders of the *putni*. In the present case, the *zemindar* did not recognise

the transferees and he was not bound to do so. This contention must, therefore, be overruled.

The *zemindar* sued the registered *putnidar* for rent, and in execution of the decree for rent brought the tenure to sale, and the plaintiff purchased it with power to annul all incumbrances. The defendants were unregistered transferees of the *putni*, and the question is whether their interests were incumbrances within the meaning of section 161 of the Bengal Tenancy Act.

Now the defendants being transferees of portions of the *putni*, their position was that of co-sharers of the former *putnidar* though not recognised by the landlord. The sale held in execution of the decree for arrears of rent against the recorded *putnidar* passed the tenure itself, and not merely the right, title and interest of the recorded *putnidar*. The recorded *putnidar* represented the ownership of the *putni*, and so far as the *putni* interest itself was concerned, the sale passed the interest of the transferees of the portions of the *putni* as much as it did that of the recorded *putnidar*.

Section 161 of the Bengal Tenancy Act lays down that for the purposes of Chapter XIV of that Act, the term "incumbrance" used with reference to a tenancy "means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding, or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section (section 160)." Now the right or interest created by the sale of a portion of the tenure itself is not a right or interest created by the tenant on the tenure, nor, do I think, is it a right or interest "in limitation of his own interest therein." The words "his own interest therein" in the case of a tenure mean the interest of a tenure-holder; and the right or interest created must be in limitation of such interest, and not a transfer of the tenure holder's interest itself. By the sale of a portion of the tenure, the interest of the tenant in the tenure itself to the extent of the portion sold is transferred, and not an interest created in limitation of his own interest in the tenure. It is said that when a tenant transfers a part of his tenure, he does so in limitation of his interest, mean-

(1) 12 W.R. (P.C.) 43; 13 M. L. A. 160; 3 B.L.R. (P.C.) 49; 2 Suth. P. C. J. 289; 2 Sar. P. C. J. 500; 29 E. R. 511.

(2) 8 O. W. N. 38; 26 O. 103.

(3) 8 O. L. J. 554.

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ing thereby his entire interest, in it. But the words "in limitation of his own interest therein" would seem to indicate that it is not limitation in respect of the quantity or extent of interest which is contemplated and which could have been sufficiently expressed by saying "his interest therein," but has reference to limitation in respect of the particular interest held by the tenant.

The purchaser of a portion of the tenure professes to purchase and does purchase the ownership of the tenure itself to the extent of the portion purchased, and becomes a co-sharer of the original tenant. He is as much bound by the decree for rent as his vendor. He can maintain a suit for his share of the surplus proceeds of the sale held in execution of a decree for rent against the recorded tenant [see *Matangini Choudhuran v. Sreenath Dass* (1)]. It is true a mortgagee can also do so, but a mortgagee can do so only as an incumbrancer and to the extent of his lien, whereas the purchaser of a portion of the tenure has right as a tenure-holder to the surplus sale-proceeds representing the portion purchased by him, because the sale is of the tenure including the portion purchased by him.

I think, therefore, that the words "in limitation of his own interest therein" do not refer to a sale of the tenure-holder's interest. As pointed out in *Tamizuddin Khan v. Khoda Nawaz Khan* (5), the right created by a sale of a portion of the tenure itself is to that extent not in 'limitation,' but in "extinction," of the rights of the tenure-holder. If the sale of a portion of a tenure is an incumbrance, the sale of the whole tenure would also be an incumbrance, and the purchaser at a sale for arrears of rent would get nothing unless he takes steps within a year from the date of the sale to annul the interest of the private purchaser under section 167, Bengal Tenancy Act. I do not think such a result was contemplated by the section.

I may in this connection refer to certain observations of Mookerjee, J., in *Bhawani Kuer v. Mathura Prasad* (6), where one of the questions to be considered was, whether

the interest of a person who has acquired by purchase the rights of the owner constitutes an "incumbrance" within the meaning of section 54 of Act XI of 1859. The learned Judge observed: "It was not disputed, and in my opinion, it could not be reasonably disputed, that if a person acquires the interest of the original owner of the estate before the default is made, his interest cannot be said to be an incumbrance and passes by the sale to the purchaser, because what is sold is in essence his share in the estate," and again—"a purchaser of the interest of the proprietor, after default and before the revenue sale, is quite as much bound by the revenue sale as the proprietor himself, because in substance, he occupies the position of the proprietor." The observations were no doubt made in connection with the provisions of section 54 of the Revenue Sale Law, which does not contain a definition of the word "incumbrance" and I have referred to them only to show that the purchaser of the interest of the proprietor stands in the same position as the proprietor himself in relation to the sale.

We were referred to several cases, but none of them holds that a purchase of the tenure-holder's interest is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. In the case of *Chandra Sakai v. Kali Prasanno Chuckerbutty* (7), it was held by Norris and Gordon, JJ., that an exchange of land is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. Gordon, J., in delivering the judgment of the Court observed—"It seems to us that the exchange by which this land was acquired by the defendants was in limitation, if not in fact in destruction, of the original tenant's right in the holding."

The case of an exchange may perhaps be distinguished from that of a sale, although the two stand on the same footing generally so far as the rights of the parties are concerned. A person who takes the land of a tenure by exchange, does not take it as a part of the tenure nor as a tenant. The tenant does not create an interest in the tenure itself as in the case of a sale, and in that view, it may possibly be said

(4) 7 C. W. N. 552.

(5) 5 Ind. Cas. 116; 11 C. L. J. 16; 14 C. W. N. 229.

(6) 7 C. L. J. 1 at pp. 20, 21.

(7) 23 C. 254.

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that he creates an interest in "limitation" of his own interest in the tenure.

But if there is no distinction between an "exchange" and a "sale" so far as the present question is concerned, the view that an "exchange" is in "limitation" of the tenant's interest is opposed to that taken in *Tamizuddin v. Khoda Nawaz Khan* (5), and if an exchange is in "destruction" of the tenant's right it cannot be an "incumbrance" within the meaning of section 161 of the Bengal Tenancy Act. I have doubts about the correctness of the decision in the case of *Chandra Sakai v. Kali Prasanna Chuckerbutty* (7) referred to above, and in any case, I think, it ought not to be extended further. In *Jogeshwar Mazumdar v. Abed Mahomed* (8), there is an observation that a "lease just as much as a sale, gift or mortgage must come within the word 'incumbrance.'" In that case the learned Judges had only to deal with the question whether a "lease" is an "incumbrance" within the meaning of section 11, clause (3) of the Putni Regulation. It is true that under that Regulation, sales and gifts as well as mortgages and leases are treated as "incumbrances." But the word "incumbrance" appears to have been used in that Regulation in a different sense, as it includes a sale of the entire *putni* itself. Besides, the purchaser, under section 15 of that Regulation, is entitled on applying to the Civil Court to obtain possession against the assignees of the defaulting *putnidar* at the time of delivery of possession.

The mode of enforcement of rights of the purchaser of a *putni taluq* as against assignees of the defaulting *putnidar* under the Putni Regulation is different from that of a purchaser under the Bengal Tenancy Act, and the question we have to consider in the present case is, whether the interest of the purchaser of a portion of a tenure is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act, which if not set aside under section 167 of the Act stands good against the purchaser.

The other cases referred to in argument are *Tamizuddin Khan v. Khoda Nawaz Khan* (5) and *Asgar Ali v. Gourri Mohan Roy* (9). Both the cases dealt with the meaning of (8) 3 C. W. N. 13.

(9) 21 Ind. Cas. 58; 18 C. W. N. 101; 18 C. L. J. 57.

the word "incumbrance" in section 86 of the Bengal Tenancy Act. In the first, it was held that the sale of a portion of a non-transferable occupancy holding is not an incumbrance within the meaning of section 86, sub-sections (6) and (7), of the Bengal Tenancy Act and the case of *Jogeshwar Mazumdar v. Abed Mahomed* (8) was distinguished. In the second, which was decided by Mookerjee, J., and one of the members of the present Bench, it was held that the surrender by the tenant of his holding to his landlord in that case after he had transferred a portion of his holding was collusive, and that so long as the tenancy of the original tenant subsisted, the landlord was not entitled to eject the transferee. Another question was raised in the case, *viz.*, whether the purchaser of a portion of a holding is not protected under sub-section 6 of section 86 of the Bengal Tenancy Act, but in the view that was taken of the rights of the parties with reference to the first question, the Court held that it was not necessary to decide whether the case of *Tamizuddin Khan v. Khoda Nawaz Khan* (5), upon which reliance was placed on behalf of the respondent, furnished a correct exposition of the law. The Court, however, observed that at least four points required consideration with reference to the decision in *Tamizuddin Khan v. Khoda Nawaz Khan* (5). The last two points referred to by the Court have no bearing upon the construction of section 161 of the Bengal Tenancy Act. With regard to the first two points, it was observed—"In the first place, the learned Judges adopted for the purposes of the interpretation of section 85, which finds a place in Chapter IX of the Bengal Tenancy Act, the definition of the term 'incumbrance' given for the purposes of Chapter XIV alone. In the second place, the decision of this Court in the case of *Chandra Sakai v. Kali Prasanna Chuckerbutty* (7) shows that an exchange is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act, and in relation to the question raised before us, there does not appear to be any real distinction between an exchange and a sale. Now, the Court in that case expressly said that it was not necessary to determine whether the case of *Tamizuddin Khan v. Khoda Nawaz Khan* (5) was correctly decided, and reserved its

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opinion upon the question involved in the said case. But the observation on the first point indicates, if anything, that in the view of the Court, the term "incumbrance" as used in section 161 is not the same as in section 86, and the observation on the second point, viz., that "there does not appear to be any real distinction between an exchange and a sale" was made in relation to the question before the Court, i.e., in connection with section 86 of the Bengal Tenancy Act. The Court in that case had nothing to do with the construction of the term "incumbrance" in section 161 of the Bengal Tenancy Act, and these cases under section 86, therefore, do not apply to the present case.

It is pointed out that adverse possession for the statutory period has been held to be an "incumbrance." In the case of adverse possession, however, although the tenant by allowing the adverse possessor to acquire a right may be said to create an interest in limitation of his interest in the tenure, no right is created in favour of such a person as a tenant as in the case of a sale, and the latter does not hold the portion in respect of which he acquires a statutory title, as a tenant or as part of the tenure. The purchaser of a portion of the tenure, on the other hand, acquires a right to a portion of the tenure itself, and holds such portion as a tenant and as a part of the tenure, and his position, therefore, differs materially from that of a person who has acquired a statutory title against the tenant.

I am of opinion that the interest of an unregistered purchaser of a portion of a *putni* tenure is not an incumbrance within the meaning of section 161 of the Bengal Tenancy Act, and that the purchaser at a sale held in execution of a rent-decree against the recorded *putnidar* is not required to annul such an interest under the provisions of section 167 of the Bengal Tenancy Act.

In my opinion, therefore, the decrees of the lower Courts should be set aside and the suit decreed.

MULLICK, J.—The defendant is the purchaser of a share in a *putni taluk* from the registered tenant and the question is, whether his interest is an incumbrance on the tenure within the meaning of section 161, Bengal Tenancy Act. If the interest is not an incumbrance, then the auction-purchaser who is

the *zemindar* is entitled to take possession without annulling the defendant's interest. In the present case, admittedly the procedure for annulment of incumbrances has not been taken within the statutory period of one year from the date of the sale or from the date on which the purchaser had notice of the incumbrance, and the decree-holder's suit for *khas* possession must fail unless he can show that the interest in question is not an incumbrance.

Now an incumbrance as defined in section 161 being any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein and not being a protected interest as defined in the last foregoing section, it seems to me clear that the interest of a purchaser of a share of a tenure from one of the registered tenants must fall within this definition, and if the meaning of the Statute is plain, it is not our province to speculate as to the intentions of its framers. A tenant by selling a portion of his tenure creates a right or interest on his tenure as well as an interest in limitation of his own interest in the tenure. The extinction of his interest in that portion of the tenure which is transferred, does not affect the matter. The sole question is whether the definition applies.

This would appear to have been the view taken by this Court in *Chundra Sakai v. Kali Prasanno* (7). In that case, the plaintiff was the auction-purchaser of a *rai-yati* holding at a rent-sale brought about by the *putnidar* and sued to eject the defendants from three plots of land in the holding, which the defendants claimed to have obtained from the recorded tenant in exchange for some other lands outside the holding. It was held that the interest of the defendants was an incumbrance within the meaning of section 161. The learned Judges observed in that case that the defendants had an incumbrance upon the holding and the exchange by which the land was acquired by the defendants was in limitation, if not in destruction, of the original tenant's right in the holding.

Although other Statutes do not always furnish a safe guide, yet in the present case it would be useful to examine the previous law upon the subject of annulment of incumbrances in respect of tenancies. The first Statute which gave the auction-purchaser of a

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tenure sold for arrears of rent, the power to avoid incumbrances was Regulation VIII of 1819. The term "incumbrance" is not defined in that Regulation, but it is clear from the text that it covers transfers by sale, mortgage or gift. A complete extinction of the tenant's interest is, therefore, under the Regulation not inconsistent with the creation of an incumbrance. But Regulation VIII of 1819 only applied to a limited class of saleable tenures and although section 105, Act X of 1859, rendered all other saleable tenures also liable to sale for arrears of rent, there was no procedure for bringing the latter to sale free of incumbrances. This difficulty was removed by Act VIII (B. C.) of 1865. In that Act also, there is no definition of the term "incumbrance" but the reported cases show that a sale by the registered tenant of a portion of his tenancy had the effect of creating an incumbrance, the transferee being regarded as the holder of a rent-free tenure: *Shib Doss Banerjee v. Bamun Doss Mookerjee* (10) following *Sreenath Chuckerbutty v. Sreemunto Lushkur* (11). Finally Act VIII of 1885, while leaving Regulation VIII of 1819 untouched, repealed Act X of 1859 and provided a procedure for bringing all saleable tenures to sale for arrears of rent. It reproduced in effect the provisions of Act, VIII (B. C.) of 1865 in regard to incumbrances and added a definition of the term "incumbrance."

Therefore, upon the analogy of the rulings under Act VIII (B. C.) of 1865, and in the absence of anything in the present Act which compels us to adopt a contrary interpretation, I think it would be reasonable to hold that a purchaser from a registered tenant is in the position of a rent-free sub-tenant and is still an incumbrancer within the meaning of section 161 of the present Act.

In *Jogeshwar Mazumdar v. Abed Mahomed* (8), the point for consideration before the Court was whether a tenancy granted by a *putnidar* was an incumbrance within the meaning of the Putni Regulation, but in giving judgment Rampini, J., observed that a lease just as much as a sale, gift or mortgage must come within the meaning of the word "incumbrance." It is true, the correctness of that decision was doubted by Caspersz and Doss, JJ., in *Tamizuddin Khan v. Khoda*

Nawaz Khan (5), where they held that the sale of a portion of a non-transferable holding was not an incumbrance within the meaning of section 86, Bengal Tenancy Act. But with regard to this case, it is to be observed in the first place, that sections 85 and 86 of the Bengal Tenancy Act (Act VIII of 1885) contain no definition of the term "incumbrance" and in the second place, that the Court was to some extent at least influenced by the consideration that the transfer having taken place without the consent of the superior landlord the transferor had not created any valid incumbrance.

On the other hand, in so far as the decision was authority for the proposition that a sale of a portion of a non-transferable occupancy holding was not an incumbrance, it was expressly dissented from in *Asgar Ali v. Gouri Mohan Roy* (9) by a Division Bench of this Court of which I was a member. In that case we relied *inter alia* on *Chundra Sakai v. Kali Prosonno* (7) and were of opinion that if an exchange created an incumbrance within the meaning of section 161, Bengal Tenancy Act, there was no reason why a similar result should not follow from a sale, and applying this line of reasoning to section 86 also, we held that an interest in a portion of a non-transferable occupancy holding acquired by purchase, was an incumbrance.

My learned brother has in the present case based his decision to some extent upon certain decisions relating to the Revenue Sales Act (Act XI of 1859). For the purposes of section 54 of that Act, it has been held that the interest of a purchaser from the defaulting proprietor before default, is not an incumbrance: *Bhawani Koer v. Mathura Prosad* (6) and *Annoda Prosad Ghose v. Rajendra Kumar Ghose* (12). It has also been held that a person acquiring by adverse possession the interest of the defaulter before default is not an incumbrancer. These decisions, however, were founded upon a consideration of the policy of the Revenue Sales Act and it was felt that in the absence of any definition of the term "incumbrance" it would not be right to apply the term to the interest of a purchaser from the defaulter; for in that case, the auction-purchaser would get nothing at all, a state of affairs which would completely defeat the object of the framers which was the security

(10) 15 W. R. 360; 8 B. L. R. 257.

(11) 10 W. R. 467; 8 B. L. R. 240 note.

(12) 6 C. W. N. 375; 20 C. 223.

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of the revenue. No such considerations of policy arise in reference to sales held under Act VIII of 1865 and still less to those under Act VIII of 1885, which gives by definition a specific meaning to the term. Indeed on general principles, I cannot see how an interest acquired by purchase can be distinguished from one acquired by exchange or adverse possession.

It appears to be settled that for the purposes whether of the Putni Regulation or Act VIII of 1865, or of the Assam Land Revenue Regulation, a person who acquires by adverse possession some part of the right of the registered tenant, is an incumbrancer. I see no reason for doubting that he would also be an incumbrancer within the meaning of section 161 of Act VIII of 1885, notwithstanding the fact that the acquisition of his interest means the complete destruction of the tenant's interest in the portion so acquired.

On principle, therefore, the complete extinction of the tenant's interest in a part of the tenancy does not seem to be inconsistent with the terms of section 161.

But in the case before us, there is a further ground for holding the interest of the transferee to be an incumbrance. That ground is that the purchaser having acquired a fractional share and not being entitled to claim registration under the Putni Regulation, the extinction of the purchaser's interest *qua* the landlord is not complete. There has, therefore, been no complete extinction of the tenant's interest.

The result is that I summarise the grounds upon which I base my judgment as follows:—

1. The definition in section 161, Bengal Tenancy Act, covers the sale of a portion.
2. The reported decisions seem to support the view I have taken, with the exception of the cases under Act XI of 1859 which do not apply and *Tamizuddin Khan v. Khoda Nawaz Khan* (5) which has been dis-sented from.
3. No question of policy stands in the way.

I would, therefore, dismiss the appeal with costs.

As we differ in opinion on a point of law, *viz.*, whether the interest of an unregis-

tered purchaser of a portion of a *putni* tenure is an "incumbrance" within the meaning of section 161 of the Bengal Tenancy Act, the case is laid before the Chief Justice, so that the point may be referred to one or more Judges under section 98 of the Civil Procedure Code.

The case came up for final disposal before Sir Lawrence Jenkins, C. J.

Babus *Prabodh Kumar Das* and *Khitish Chandra Chakerverty*, for the Appellant.

Babus *Dhirendra Lal Kastgir* and *Biraj Mohun Mojumdar*, for the Respondents.

JENKINS, C. J.—The point of law referred under section 98 of the Code of Civil Procedure is whether the interest of an unregistered purchaser of a portion of a *putni* tenure is an "incumbrance" within the meaning of section 161 of the Bengal Tenancy Act. In its practical aspect, the question is whether a purchaser of a tenure under a rent-decree must annul the interest of an unregistered purchaser in order to get a clean title, and whether on his failure so to do, the title of the unregistered purchaser prevails against him. It is not suggested that it was a defect in the rent-decree that the unregistered and unknown purchaser was not a party to the suit; the registered tenant represented the ownership of the whole tenure and as the sale was not of the defendant's interest but of the whole tenure, that tenure passed to the purchaser on the sale in execution of the rent-decree. The only limitation on the purchaser's acquisition was that he took subject to the interests (if any) defined in Chapter XIV of the Bengal Tenancy Act as "protected interests," but with power to annul the interests defined in that chapter as "incumbrances." There were no protected interests, but it is contended that the interest of the unregistered purchaser is an "incumbrance," and that as the necessary steps to annul it were not taken, it still subsists. In support of this view reliance is placed on the meaning ascribed to the terms "incumbrance" by section 161.

The section runs as follows:—"For the purposes of this Chapter (a) the term 'incumbrance', used with reference to a tenancy, means any lien, sub-tenancy,

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easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section."

The language used, it is maintained, extends the meaning of the term incumbrance beyond its ordinary signification so as to include any disposition of the tenancy, even an absolute assignment on sale of the entirety, and it is conceded that all that can be urged in favour of an assignment of a part must equally extend to an assignment of the whole; the two stand or fall together.

It is difficult to understand why the inferior interests of a lien, sub-tenancy and easement alone should have been mentioned, if the intention was that the superior interest involved in an assignment was to be included in the general words. It runs counter to the first principles of construction. An incumbrance would not ordinarily mean or include an absolute assignment, nor would it be a right or interest created on the tenure. Can it be said to be in limitation of the tenant's interest? I think not; these words appear to me to refer not to the area but to the quality of the tenant's interest. This view preserves the essential characteristics of a lien, sub-tenancy or easement, for the idea inherent in these leading words is that of a graft on a subject-matter which is not destroyed but still continues, though in a modified form. The more general words that follow are at least as susceptible of a meaning which would give effect to that idea as the wider but less appropriate one for which the respondents contend.

It is urged, however, that there are decisions which compel me to hold an absolute sale as an incumbrance and special stress is laid on the case of *Chundra Sakai v. Kali Prosonno Chuckerbutty* (7) where it was held that an exchange of land is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act.

The Court there was dealing with an exchange followed by a long possession, and the subject-matter was a holding, not tenure. The *ratio decidendi* is to be

found in these words: "The exchange by which this land was acquired by the defendant was in limitation, if not in fact in destruction, of the original tenant's right in the holding." A distinction was thus recognised between limitation and destruction and presumably it was considered an exchange was a limitation, for section 161 does not extend to that which is in destruction of the tenant's right. Whether this be a true view of the effect of an exchange, may have to be reconsidered in the future, it does not arise now. I am concerned only with an absolute sale and that, in my opinion, is not in limitation but in destruction of the interest to which it relates. On the question referred, therefore, I hold that the interest of an unregistered purchaser of a portion of a *putni* tenure is not an incumbrance within the meaning of section 161 of the Bengal Tenancy Act.

Therefore, according to the opinion of the majority of the Judges who have heard the appeal, the decree of the lower Appellate Court is reversed and a decree for possession passed in the plaintiff's favour.

The case must go back to the Court of first instance for a decree as to mesne profits in accordance with Order XX, rule 12. The respondent will pay the appellant's costs of this appeal and reference.

Decree reversed; Case sent back.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3190 of 1913.

May 3, 1915.

Present:—Mr. Justice Fletcher and
Mr. Justice Roe.

MAHENDRA NATH MAITY—DEFENDANT
No. 1—APPELLANT

versus

GIRISH CHANDRA MAITY AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Dayabhaga—Ajautuka stridhan—Succession—Heir, preferential—Brother or husband.

MAHARAM ALI v. AYESA KHATUN.

At the marriage of a Hindu woman governed by the Dayabliaga school of Hindu Law there was a promise by her brother to give some quantity of land as dowry. The property was, however, given to the woman seven years after the marriage. On the death of the woman her brother sued her husband for the property as the rightful heir of the same:

Held, that the property was the woman's *ajautuka stridhan* and that her brother was the preferential heir to her husband. [p. 562, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge of Midnapur, dated the 30th June 1913, affirming that of the Munsif, Midnapur, dated the 4th April 1912.

Babus *Jotish Chandra Hazra* and *Satkowri-pati Ray*, for the Appellant.

Babus *Shih Chandra Palit* and *Kshirode Narain Bhuiyan*, for the Respondents.

JUDGMENT.—This is an appeal from a decision of the learned Subordinate Judge of Midnapur, dated the 26th June 1913, affirming the decision of the Munsif. The suit involves the question as to the right of succession to seven *bighas* of land, which formerly belonged to a Hindu woman who is now dead. The contest is between her husband and her brother. That the property was the *stridhan* property of the deceased woman, there can be no doubt. The question is what was the nature of the *stridhan* that was acquired by this woman. The learned Judge of the Court of Appeal below has found that the property was given to the woman seven years after her marriage and that it was a property not given on the occasion of her marriage. The case for the husband, who is the appellant before us, is that there was a promise to give the property at the time of the marriage and that the gift must be taken as a ratification of the promise. That, of course, is not correct. The promise was one that was not capable of being specifically performed. Any seven *bighas* of land could have been given and there cannot be the slightest doubt that we must take the gift as from the date when it was made to the woman. On the date that the property was given to the woman, there cannot be any doubt that it was an *ajautuka stridhan* property. There cannot also be the slightest doubt, on the decisions of this Court, that the brother is the preferential heir to the husband. It may be, as has been argued by the learned *Vakil* for the appellant, that Sreekrishna

in his Commentaries says that the husband ought to succeed in preference to the brother when the marriage is accompanied by certain religious ceremonies. That that view has not been accepted in this Court is sufficiently shown by the decision of Mr. Justice Mookerjee in the case of *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (1). There Mr. Justice Mookerjee agreeing with Mr. Justice Rampini accepted the opinion of Jimutavahana in preference to that expressed by Sreekrishna. We are bound by that acceptance of the opinion of Jimutavahana and we must adhere to the view that the form of marriage does not alter the nature of the *stridhan* property. There cannot be any doubt that this property was the *ajautuka stridhan* property of the dead woman and the decisions of this Court are clear with reference to the brother being the preferential heir to the husband. That being so, we agree in the decisions of the learned Subordinate Judge and dismiss the appeal with costs.

Appeal dismissed.

(1) 10 C. W. N. 510; 3 C. L. J. 15; 33 C. 36.

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CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 992 OF 1914.
July 15, 1915.

Present:—Mr. Justice Woodroffe and
Mr. Justice Newbould.

MAHARAM ALI—DEFENDANT—
APPELLANT
versus

AYESA KHATUN—PLAINTIFF—
RESPONDENT.

Muhammadian Law—Divorce—Kabinnamah executed by husband authorizing wife to divorce on ground of second marriage, validity of.

A Muhammadian husband executed a *kabinnamah* in favour of his wife authorizing her to divorce herself from the husband in the event of his marrying a second wife. He, however, married a second wife and imputed unchastity to his first wife and refused to maintain her. Thereupon a document of *taluknamah* was executed by the wife in accordance with the provisions to that effect in her *kabinnamah*.

Held, that the contract was not void and the effect of the second marriage was to give the wife a power to divorce her husband. [p. 563, cols. 1 & 2.]

MAHMUR ALI v. AYESA KHATUN.

Appeal against a decree of the Subordinate Judge, Tipperah, dated the 15th January 1914, affirming that of the Munsif, Comillah, dated the 28th February 1913.

Babu Sasadhar Roy, for the Appellant.

Babu Upendra Kant Roy, for the Respondent.

JUDGMENT.—This is a suit to recover maintenance against a Muhammadan husband. The claim is in respect of the period of *iddat* after divorce. A document of *talaknamah* was executed by the wife in accordance with the provisions to that effect in her *kabinnamah*. Both the Courts have come to a conclusion that the wife is entitled to maintenance and that the divorce which she purported to effect, was a good and valid one. On appeal, it has been contended that there is no cause of action either in fact or in law. The facts are that the wife claimed under the terms of the *kabinnamah* to divorce herself from the husband under the powers which had been given her in the event of his marrying a second wife, and further she alleges that she has the right to divorce herself because he has imputed unchastity to her and refused to maintain her. These are findings of fact with which we cannot interfere in second appeal. It must be taken that such facts do exist. But it is said that in law, it was not possible for the parties to enter into the terms which they did. We are referred to the provisions of section 26 of the Indian Contract Act, upon which it is argued that the agreement not to marry a second wife was void. As I pointed out in the course of the argument, we are not concerned, in the circumstances of the case, with the question whether or not the defendant could be restrained from marrying a second wife. The question before us is this, if he does marry a second wife, what is the effect under the terms of the *kabinnamah*? The effect of the second marriage is to give the wife a power to divorce her husband. That the husband can delegate to her, power to divorce on certain conditions, is not contested before us and as regards the condition against re-marriage which is assailed, we have been referred to the decisions in *Badrannissa Bibi v. Mafiattala* (1), which was before, and

(1) 7 B. L. R. 442; 16 W. R. 555.

Ayatunnissa Beebee v. Karam Ali (2), which was after, the Contract Act. An expression of opinion in Mr. Ameer Ali's work on Muhammadan Law was also referred to.

Under these circumstances, we are not prepared to say that the parties could not enter into the contract into which they did enter. Lastly, it is contended that the divorce was bad, because it was not communicated to the defendant by the plaintiff. In the first place, it is by no means clear that in a case of this kind where *talaknamah* is registered, anything more than this is necessary. The case of *Sarabai v. Rabiabai* (3) has been cited before us. It is not reasonable to suppose that a registered document of this kind could have been executed in a mofussil village without the defendant knowing that it had been done. But apart from this, it is sufficient to dispose of this part of the case on the ground that the question was not raised in either of the two lower Courts. Had it been raised, the question whether or not there was a sufficient communication or whether the defendant had otherwise knowledge of the divorce pronounced by his wife, could have been entered into. The point not having been raised in the lower Courts cannot, in our opinion, be urged here now.

The result, therefore, is that we affirm the decision of the Court below and dismiss this appeal with costs.

Appeal dismissed.

(2) 1 Ind. Cas. 513; 12 C. W. N. 907; 36 C. 23.

(3) 30 B. 537; 8 Bom. L. R. 35.

RAM NATH TEWARI v. Musammât GENDA.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 732
OF 1915.

November 4, 1915.

Present:—Sir Henry Richards, Kt.,
Chief Justice.

RAM NATH TEWARI—JUDGMENT-DEBTOR
—APPELLANT
versus

Musammât GENDA—DECREE-HOLDER—
RESPONDENT.

*Execution—Decree—Suit conditionally decreed on
payment of certain amount within certain time—Pay-
ment not made—Defendant's execution for costs—
Procedure.*

A decree was passed in the following terms:—

"It will be established and declared that the sale-deed executed by defendants Nos. 2 and 3 in favour of defendant No. 1, is not binding upon the plaintiff; possession will be delivered to the plaintiff by dispossession of defendant No. 1 on condition of paying into Court Rs. 66 within one month; in case of default, the plaintiff's suit will stand dismissed." A schedule of costs was given on the assumption that the money would be paid in time. The money was not paid within time.

Held, that under the decree as it stood, the defendant was not entitled to execution for costs.

Execution second appeal from the decision of the District Judge of Benares, dated the 8th February 1915.

Mr. Damodar Das, for the Appellant.

Mr. B. E. O'Connor, for the Respondent.

JUDGMENT.—This appeal arises under the following circumstances. The judgment-debtor brought a suit claiming a declaration that a sale-deed made by his mother and a brother's widow was not binding upon him, on the ground that it was an alienation made by Hindu widows without legal necessity. The Court held that there was legal necessity to the extent of Rs. 66 and it accordingly decreed the plaintiff's suit, but subject to the condition that he should within one month pay into Court the sum of Rs. 66. The plaintiff failed to pay the money into Court within the month. He did, however, pay in on a subsequent date and the Court accepted the money. Thereupon, the defendant Musammât Genda made an application for execution of the decree, contending that inasmuch as the plaintiff had failed to comply with the condition, the plaintiff's suit stood dismissed with costs. The application was to recover the costs that would be payable to the defendant in the ordinary course upon the plaintiff's

suit being dismissed "with costs". The plaintiff raised objections. These objections have been disallowed by both the Courts below. The plaintiff has appealed. The decree was drawn up in the following form: "It will be established and declared that the sale-deed executed by defendants Nos. 2 and 3 in favour of defendant No. 1, is not binding upon the plaintiff; possession will be delivered to the plaintiff by dispossession of defendant No. 1 on condition of paying into Court Rs. 66 within one month; in case of default the plaintiff's suit will stand dismissed." A schedule of costs follows. The schedule shows what the costs of each side would be if the condition had been duly fulfilled. In other words, the schedule is based on the assumption that the money would be paid in within the time specified. It will thus be seen that there was no award of costs to the defendant in the event of the condition not being fulfilled. The decree simply says the suit shall "stand dismissed." It is somewhat unfortunate from the plaintiff's point of view that he should lose the benefit of the decree in his favour simply by reason of his failure to pay the money into Court within the time specified. The defendant, however, is entitled by law to the benefit caused by the default of the plaintiff. On the other hand, the Court executing a decree can only execute the decree as it stands. If the decree was not in conformity with the judgment, it was the duty of the person interested in the decree to have it brought into conformity. In my opinion, the decision of the Court below was not correct and ought to be reversed. I hold that the defendant is not entitled to execution for costs. The other point in the case is connected with the effect of the omission of the plaintiff to pay the Rs. 66 into Court within the time specified. I think this is not an objection which, properly speaking, arose on the defendant's application to execute the decree for costs. If the plaintiff contends that he has still a decree in his favour notwithstanding that he did not pay the money in within the time, he should make an application for the execution of the decree and then the Court will decide the point. If again, the plaintiff considers that he is still entitled to get an extension of time for payment of the money into Court and that the Court has power to grant him such exten-

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sion, he should make an application for such extension of time and the question can be decided. I wish to say that I am not deciding either of these two last mentioned questions. I allow the appeal, set aside the decree of both the Courts below and remand the case to the Court of first instance through the lower Appellate Court with directions to dispose of the same, having regard to what I have said above. I make no order as to the costs of the appeal.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 136 OF 1910.

March 17, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Tyabji.

BANGARU MUTHU VENKATAPPA
NAYANIVARU, ZEMINDAR OF
BANGARI POLIEM—DEFENDANT NO. 1—
APPELLANT

versus

GOLLA CHINNABBA NAIDU

—PLAINTIFF AND OTHERS—DEFENDANTS—
RESPONDENTS.

Grant—Dasabandham rights, grant of, by zemindar to ladies of house—Mortgagee of such rights, rights of—Transferee of zemindari, liability of—"Son to grandson", interpretation of—Custom of such grant, validity of.

A zemindar made a grant for the benefit of the ladies of his family of the *dasabandham* dues recoverable by him from certain villages and himself undertook to collect the same and pay them on to the ladies. The grantees mortgaged these rights to another person:

Held, that the mortgagees could enforce his rights under the mortgage against the subsequent purchaser of the zemindar's right with notice of the obligation. [p. 569, col. 1; p. 573, col. 1.]

Per Tyabji, J.—The words "son to grandson" used in a grant of this description are merely words of limitation and not of purchase. [p. 569, col. 2.]

A custom providing for grant by a zemindar for the maintenance of the ladies of his family of the *dasabandham* dues recoverable by him from certain villages and prescribing a particular course of devolution and management of such property, is neither uncertain nor opposed to public policy, and is valid. [p. 570, cols. 1 & 2.]

Kunhambi v. Kalanathar, 24 Ind. Cas. 528; 27 M. L. J. 156; 16 M. L. T. 17, followed.

Appeal against the decree of the District Court of North Arcot, dated the 20th December 1909, in Original Suit No. 35 of 1908.

Mr. K. Raja Aiyar, for the Appellant.

Messrs. T. Rangachariar and T. Ramachandra Rao, for the Respondents.

This appeal coming on for hearing on the 5th February 1914, the Court (Miller and Tyabji, JJ.) made the following

ORDER.—We do not think, we can decide this appeal without a finding on the 1st issue as to the title of Gangamamba. The District Judge of North Arcot will be asked to return a finding in six weeks. Seven days will be allowed for filing objections. Evidence may be taken.

In compliance with the above order of this Court, the District Judge of North Arcot submitted the following

FINDING.—I am required by the High Court to submit a finding upon the 1st issue in this suit, the issue being whether Gangamamba Garu was entitled to half share in the collections as alleged in paragraph 3 of the plaint. The said allegation is that Gangamamba Garu owns and enjoys one-half out of the assessment, *jodi*, *russums*, etc., leviable upon all wet lands and dry lands cultivated with wet crops and *inam* lands in the village of Dalavayipattada.

2. It is explained in this connection that within the Karvetinagar *zemindari*, there is a separate estate, known as the *mahal* estate, set apart for the maintenance of the ladies of the palace, and that it is managed by the seniormost Dowager or *Rani* for the time being. This separate estate has existed from time immemorial. The Manager of the estate is known as the *mahal khavand*. In 1866 the then *zemindar*, Verkata Perumal Razu, executed the document, Exhibit A, to his mother Vijaya Lakshmamba Garu, who was then the *mahal khavand*. This document recites that the irrigation works of certain villages were out of repair and in consideration of Vijaya Lakshmamba Garu having them repaired and paying a certain sum as value of existing works out of her own private funds, she should have the *dasabandham* right of collecting half wet rents. The document finishes with recitals that this right should be enjoyed by her and her transferees, hereditarily from son to grandson and so on, with powers of gift, mortgage and sale so long as the sun and moon last. The plaint village of Dalavayipattada is included in the document.

3. It appears that after the death of Vijaya Lakshmamba Garu, Konamamba Garu,

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the senior wife of the grantor, Venkata-perumal Raju, took possession of the *mahal* estate, and after her, the estate came to the possession of Gangamamba Garu, the junior wife of the grantor, who, however, had meanwhile died. The ladies of the *mahal* were incurring debts and living beyond their means, and so Konamamba Garu as *mahal* *khavani* on October 16th, 1888, executed the usufructuary mortgage-deed, Exhibit E, for the *dasabandham* right in various villages, including the plaint village, to the then *zemindar*. The *zemindar* was required to pay Rs. 61,265 to Chandrappa Naidu Garu and Papa Naidu Garu, to pay the *mahal* expenses, and other creditors, and repay himself out of the *dasabandham* income giving back the property when he had entirely repaid himself. The *zemindar*, however, did not pay off Chandrappa Naidu and Papa Naidu, but merely hypothecated to them the rights which he had obtained under Exhibit E. The latter sued and obtained a decree which is now pending execution.

4. In 1894, the *zemindar* said he could not pay off the debts and the *mahal* might take back the property, but he executed no deed of release of the usufructuary mortgage. Gangamamba Garu was then the *mahal* *khavani*, and it is said she has been in possession ever since. In 1899, the Court of Wards took possession of the Karvetinagar estate and remained in possession until 1905, but they did not interfere with Gangamamba Garu's right to *dasabandham*. The owner of the *ayan* right has always collected the whole rent and paid over the *dasabandham* share to the *dasabandhamdars*.

5. In consequence of a personal decree against the *zemindar*, the village of Dallavayipattada was brought to sale on October 22nd, 1895, and was purchased by the *zemindar* of Bangari Polliem, *vide* Exhibit B, the sale certificate. This certificate gave all the *tinvas*, *miras*, *jodi* allowances and other rights appertaining to the defendant *zemindar*. The plaintiff is a double transferee of the *dasabandham* right from Gangamamba Garu.

6. Upon the hearing of this remand, two further witnesses (Nos. 5 and 6) were examined for the plaintiff and four documents, Exhibits KK, LL, MM and NN, were exhibited. For the 1st defendant, Exhibits XVII and XVIII were filed. The parties

also rely upon evidence already on record. P. W. No. 5 was a *gumastah* under the *Zemindar* of Karvetinagar for 35 years, and he made the copy, Exhibit KK1, of the letter sent by the *zemindar* in 1894, saying that he, the *zemindar*, could not pay off the debts, and the *mahal* could take back the usufructuary mortgage which had been given to him. The original of this letter has been filed in some previous suit and been lost. It is objected that this letter is inadmissible as evidence for want of registration. The objection is good in so far as the document might be used to prove in itself the extinguishment of the mortgage right, but it is admitted in evidence to explain how the *dasabandham* right came back to Gangamamba Garu in 1894. This witness says further that the *zemindar* was meeting the *mahal* expenses during the continuance of the usufructuary mortgage, *i. e.*, from 1888 to 1894, but not before or after. P. W. No. 6 says he has been a *gumastah* to the *mahal* estate for 15 years. The original letter of 1894 (Exhibit KK1) was filed in Original Suit No. 269 of 1900 in the Tirupati District Munsif's Court, but was not reclaimed and was destroyed. The *gumastah* speaks to the custom of the estate, that it is managed by the senior *rani* for the time being. He also produced the *mahal* *chitta*, Exhibit LL, from 1902 to 1904, showing receipts of *dasabandham* amounts from Dalavayipattada for *Faslis* 1308, 1309 and 1310, and he says the *mahal* was in possession from the year *Jaya* (1894—1895). Exhibit MM is a letter of 1900 from the Manager to the Court of Wards stating that the Court had not taken the management of the *mahal* villages.

7. I think it is clear from the evidence now produced and from that already on record that there is, and has been from time immemorial, a *mahal* estate for the benefit of the ladies of the *mahal*, and that it is managed by the senior *rani* for the time being, *vide* also Exhibits O and O1 where the *zemindar* in 1888 set out the *mahal* theory. The first objection taken for the 1st defendant is that Gangamamba Garu was not a proper heir under Hindu Law to succeed to property left by Vijaya Lakshmamba, her mother-in-law. This would, no doubt, be a valid objection were the estate the absolute property of Vijaya Lakshmamba, but as the estate

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was the joint property of the members of the *mahal*, and Vijaya Lakshmamba was merely the manager or *khavand* for the time being, and as Gangamamba Garu inherited merely as manager or *khavand* on behalf of the *mahal*, the objection will not hold.

S. The next objection is that the grant Exhibit A specified that the property should descend to son and grandson, and, therefore, the son and grandson of Vijaya Lakshmamba (i. e., the *zemindars*) are the legal heirs. In the first place, Exhibit A is an outright conveyance, and any limitation and conditions in it are void. In the second place, it is said for the plaintiff that the expression "son to grandson" is mere figurative language implying absolute transfer (*vide* latter part of paragraph 2 *supra*), and this I consider is the correct interpretation to put upon it. The argument is that the *zemindar* was rightfully entitled to the *dasabandham* right, which, therefore, came to the auction-purchaser under Exhibit B.

9. The plaintiff relies upon certain documents, as mentioned above, to prove that Gangamamba Garu was in possession of the *dasabandham* right after 1894 and that the *Zemindar* of Bangari Polliem acknowledged her right. I do not think it necessary to specify the Exhibits (H, H1, K, L, L3 to L9, F, etc.,) and the evidence further, as they clearly prove the point. The 1st defendant in reply pleads that he only recently came to know of the transactions between the *mahal* and the *zemindar*, the usufructuary mortgage and the invalid relinquishment, and he cannot, therefore, be bound by any admission which he previously made. I consider that this is a contention which must be allowed.

10. The important question in the issue is whether the relinquishment by the *zemindar* in 1894 can have any legal force. The letter, Exhibit KK1, is undoubtedly a non-testamentary instrument which purports to extinguish an interest of the value upwards of one hundred rupees in immoveable property, and it, therefore, requires registration under section 17 of the Registration Act. It is contended for the plaintiff that it is open to a mortgagee at any time to remit the debt and say he does not require the security, and that it would not be necessary in such a case to execute a registered relinquishment-deed. In the present case,

however, the matter is further complicated by the fact that the mortgagee did not pay the debt in consideration of the mortgage, but further mortgaged his mortgage right to the creditors. The creditors brought a suit, Original Suit No. 39 of 1900, in the Sub-Court and obtained a decree (Exhibit XVII) for the amount due to them upon the security of the mortgage right to the *zemindar* (Exhibit E), and this decree is still awaiting execution. It does not appear from the decree that the relinquishment of 1894 was admitted or even pleaded in that suit. I entirely fail to see how the *zemindar* could give up his mortgage right by a mere letter when he had mortgaged it to others. It is, therefore, argued that on the day of the Court sale in 1895, the *zemindar* had a right to be in possession of the *dasabandham* right as a usufructuary mortgagee, and that this right passed to the *Zemindar* of Bangari Polliem under Exhibit B.

11. The Court sale of 1895 was in execution of the decree in Original Suit No. 378 of 1880 in the High Court. The attachment of the *zemindar's* interest in certain villages, including Dalavayipattada, was made on August 3rd, 1885, and it was in pursuance of this attachment that the sale of 1895 was held. It is argued for the 1st defendant that the relinquishment of 1894 was invalid during the continuance of the attachment of 1885, but on the other hand, the *zemindar* did not acquire his usufructuary mortgage right under Exhibit E until 1883. The usufructuary mortgage right is entirely separate and distinct and certainly cannot be regarded as a mere accretion to the rights which were attached in 1885. If there was no attachment of the usufructuary mortgage right, there could be no valid sale of it, and it cannot be regarded as included in the Court sale of 1895 for which Exhibit B is the certificate.

12. My finding under the 1st issue must be that Gangamamba Garu was entitled, as manageress of the *mahal* properties for the time being, to a half share in collections, but that her rights were subject to a usufructuary mortgage (Exhibit E) to the *zemindar*, who had in 1894 waived his right to possession and given back possession to Gangamamba Garu.

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The new evidence and printed papers are returned herewith.

This appeal coming on for final hearing, after return of the finding on the 15th, 16th, 22nd and 23rd February 1915, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

AYLING, J.—The subject-matter of the present litigation is the *dasabandham* rights in the village of Dalavayipattada in the Karvetinagar *Zemindari* originally granted by the *zemindar* in 1866 by Exhibit A. They are claimed by the plaintiff (1st respondent) in virtue of an assignment of a usufructuary mortgage (Exhibit C) executed in 1905 by Gangamamba, and the first question is whether this lady was possessed of the *dasabandham* rights at that time.

According to the plaintiff, the grant by Exhibit A, the genuineness of which is not disputed, was really in favour of the "mahal estate." It is explained that this estate constitutes a sort of endowment for the benefit of the ladies of the *zemindar's* family, and is managed by the senior married lady for the time being. This estate is of a somewhat unusual nature, and the appellant's Vakil has commented on the meagreness of the direct evidence adduced to prove its existence. On the other hand, the documentary evidence (in particular Exhibits E, F series, M, O and OO) shows the clearest admissions on the part of the appellant (the 1st defendant) and his predecessors-in-title, not only that such an estate existed, but that the plaintiff *dasabandham* rights formed part of its assets, and that Gangamamba was entitled to enjoyment of the said rights. I consider that the decision of the District Judge on all these points in favour of the plaintiff was justified. I am unable to accept the appellant's contention that an estate of this kind in any way offends against the doctrine of perpetuities.

As regards Exhibit E, I am of opinion that apart from all questions of the admissibility in evidence of Exhibit KK (1), there is evidence to show that in 1894 the *zemindar* Bomma Raju relinquished his usufructuary mortgage rights under that document (Exhibit E) and gave

back possession thereof (in so far as *dasabandham* rights could be the subject of possession) to Gangamamba. It cannot be held that these *dasabandham* rights formed part of the property purchased by the 1st defendant's brother under Exhibit B. It being thus found that the plaintiff as assignee from Gangamamba was entitled to receive the plaintiff *dasabandham* dues, it only remains to decide whether the District Judge was right in giving a decree for their recovery from the 1st defendant.

Whether or no, the holder of the *dasabandham* rights would be legally entitled to recover his dues direct from the individual *ryots* of this village is open to doubt, although such a procedure would seem to be contemplated by Exhibit A and for some periods may have been actually resorted to. The difficulties attendant on it are, however, obvious: and it is quite clear that the 1st defendant's brother and predecessor who had succeeded to the rights and liabilities of the grantor of Exhibit A, undertook to collect the whole revenue of the village and to pay to Gangamamba the amounts due to her on account of *dasabandham* dues—vide Exhibit F, dated 5th April 1903, in which he specifically requests her to refrain from making collections on her own account, and undertakes to pay her the amount due to her for *dasabandham*. It is likewise clear that the 1st defendant on succeeding his brother accepted the same liability and that up to the beginning of 1907, there was no modification in the system. Shortly before that, the 1st defendant as proprietor of the village had granted a lease of the same for 10 years to the defendants Nos. 2 and 3. (Vide Exhibit D.) It would appear from Exhibits M and M1, that in March 1907 the 1st defendant directed the plaintiff, as mortgagee under Gangamamba, to receive the *dasabandham* dues from the lessees (defendants Nos. 2 and 3). What steps were taken by the 1st defendant to direct the defendants Nos. 2 and 3 to pay the same to the plaintiff, does not appear: but it is clear that they made no such payments, and in fact, have throughout denied their liability to do so.

They rely on Exhibit D as defining their liability under the lease: and admittedly this document only provides for

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the payment of a fixed annual rent of Rs. 900. The 2nd defendant claims that he and the 3rd defendant are entitled under the lease to appropriate the whole rent of the village (or so much of it as they can collect) less this amount. Whatever the rights under this lease (Exhibit D) may be, must form the subject of a separate litigation: the primary liability of the 1st defendant remains and was, in my opinion, rightly enforced by the decree of the District Court.

I would dismiss the appeal with costs. (Two sets.)

TYABJI, J.—This appeal arises out of a suit in which the plaintiff claims to be paid by the defendants, a half share of a certain cess (referred to as the *dasabandham* cess) recoverable from the *ryots* of Dalavayipattada village. The right to recover the other half share of the *dasabandham* cess is not in question before us, and I shall throughout speak of the cess as referring to the half of it which is the subject of this suit. The plaintiff has obtained a decree against the 1st defendant who now contends that, if the plaintiff has any right at all,—which is denied—it is against the 2nd and 3rd defendants.

The defendants' position appears from the following facts. On the death of Rajah Venkataperumal, the grantor of the *sanad*, (Exhibit A), his son Bomma Razu succeeded him and all his property was seized and sold in 1895 in execution of a decree in Original Suit No. 378 of 1880. In the auction-sale in execution of that decree, the 1st defendant's elder brother and predecessor-in-title purchased Bomma Razu's interest in the *dasabandham* cess in question in addition to the other rights of Bomma Razu in the same property. The sale certificate, Exhibit B, is dated the 19th February 1896. The 2nd and 3rd defendants are lessees under the 1st defendant. The lease is Exhibit D dated the 21st September 1906. It is for a term of 10 years relating back to the 1st July 1905. (See paragraphs 1, 2 and 18 of Exhibit D.)

The question from the point of view of the defence, therefore, is whether Bomma Razu had any interest in the *dasabandham* rights, claimed by the plaintiff. The plaintiff's

and the defendants' claims are, it is evident, exclusive of each other. They cannot both have title to the same rights and to some extent, the defendants' case is based on a denial of the title of the plaintiff. The defendants, however, raise some further contentions which will have to be dealt with separately.

The plaintiff's alleged right is traced ultimately to a *sanad* of 1866, Exhibit A, under which Raja Venkataperumal, the then *Zemindar* of Karvetinagar, granted to his mother, Vijaya Lakshmamba Garu, the right to levy and enjoy a moiety of the *dasabandham* cess by her and those authorized by her, and by her transferees "hereditarily from son to grandson, and so on with powers of gift, mortgage and sale so long as the sun and moon last." The next step in the plaintiff's title is the alleged devolution of this right from the grantee Vijaya Lakshmamba Garu upon Konamamba Garu, the senior wife, and from her upon Gangamamba Garu, the junior wife, of the grantor, namely, the *zemindar*. The first question that has to be considered, therefore, is whether this alleged devolution can be held to have taken place and can be recognized in law; and in this question two points are involved: (1) whether the terms of the grant being such as they are, any person other than "the son, grandson and so on" can be considered to have succeeded to the rights granted under Exhibit A; and (2) assuming that a devolution other than that to which the grant refers, can prevail, then, whether the particular mode of devolution relied upon by the plaintiff, can be upheld.

Both these points are somewhat closely connected with each other; for the son of the grantee is the grantor himself, and it appears that the son and the grandson of the grantor have been dealing with Vijaya Lakshmamba, Konamamba and Gangamamba in such a manner that it is impossible to hold that there were any rights left in favour of the grantor in what was purported to be granted away. Moreover, the words cited from Exhibit A, appear to have been used clearly as words of limitation and not of purchase. They indicate that the grantee was to take the fullest and most absolute estate in the rights granted.

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It is desirable at the outset to refer to the fact that the *dasabandham* cess has been purported to be granted and usufructually mortgaged exactly as though it were actual land; and in the arguments before us, the same assumption was made throughout.

The rule of devolution under which the plaintiff claims, depends upon the existence of a custom. The question of fact involved in the proof of the custom [*Cf. Kunhambi v. Kalanathar* (1)] was considered by the learned District Judge in the finding which he has submitted to this Court on the first issue. He came to the conclusion that there was a custom prevalent in the *Zemindari* of Karvetinagar laying down a particular rule of inheritance with regard to property held by the ladies of the *zemindar's* family and derived from the *zemindar* in the first instance for the purpose of maintenance. The alleged custom is that the property, unless it has been alienated during the life-time of the ladies entitled thereto, devolves upon the other ladies of the *zemindar's* family who would for the time being be entitled to be maintained out of the *zemindari* funds.

The appellant attacks this finding on what may be analysed as three distinct grounds. It is *first* argued that the custom is too uncertain to be given effect to; *secondly*, that it is opposed to public policy, because it ties up property indefinitely; and *finally*, that it has not been satisfactorily proved to have been prevalent and to have been acted upon for a sufficiently long period with a consciousness that it has the force of law.

There is nothing uncertain about the custom as alleged. Certainly, it is not more difficult of ascertainment than the claims for maintenance of the members of the *zemindar's* family.

The argument that it is opposed to public policy must also fail, because the custom does not restrict the devolution of property, but at the most earmarks property for a particular purpose leaving each holder of it for the time being a wider power of disposition than in the case of property assigned in lieu of maintenance. The cus-

tom appears to be reasonable when considered in the light of the fact that the ladies of the *zemindar's* family must have some provision made for their maintenance and that this provision in order to be adequate must be of a stable nature and commensurate with the dignity of the ladies. The custom is well calculated to bring about these results.

With reference to the evidence of its prevalence in the Karvetinagar *Zemindari*, I am not prepared to say that the learned Judge was wrong in the finding at which he has arrived, especially in view of the documents and of the admissions of the parties most nearly concerned and of clear indications that it was recognised as binding by persons who would have been most interested in questioning its binding force. The persons that would have the best information upon it, would be the members of the Karvetinagar *Zemindar's* family, and not the present plaintiff and defendants. The conduct of the *zemindars* in the past and of members of their family, bear strong testimony to the existence of the custom.

The only alternative to the recognition of the custom suggested by the appellant is that on the death of Vijaya Lakshammamba Garu her son Venkataperumal, the grantor himself, and on his death, his son Bomma Razu who next succeeded to the *zemindari*, inherited this right. This alternative cannot be entertained in view of the events that have taken place and of the conduct of Bomma Razu. For Bomma Razu took a mortgage of the same right on the 16th of October 1883 (Exhibit E), five years after Vijaya Lakshammamba's death. It was argued for the respondents that Bomma Razu as the mortgagee of this right, was estopped from denying his mortgagor's title; and Coote on Mortgages, Volume II, page 1434, *Pearce v. Morris* (2), *Kinniard v. Trollope* (3) and *Debendra Nath Sen v. Mirza Abdul Samed Seroji* (4) were relied upon for this proposition. In view of the events that have taken place and of the present title of the parties, it is difficult to apply the rule of estoppel; but it is unnecessary to

(2) (1869) 5 Ch. App. 227; 39 L. J. Ch. 342; 22 L. T. 190; 19 W. R. 196.

(3) (1888) 39 Ch. D. 636; 57 L. J. Ch. 935; 39 L. T. 433; 37 W. R. 234.

(4) 1 Ind. Cas. 264; 10 C. L. J. 150 at p. 163.

(1) 24 Ind. Cas. 528; 16 M. L. T. 17; 27 M. L. J. 156.

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consider whether it is applicable. In any case, Bomma Razu would not have taken a mortgage of the *dasabandham* rights if he had conceived himself to be entitled to rights of full ownership in it; and the conduct of Bomma Razu is, therefore, strong evidence in favour of the existence of the custom. He was deeply interested in denying the existence and questioning the effect of the custom, he would have had intimate knowledge of facts enabling him to determine whether the custom was prevalent, yet he acted to the detriment of his own interests in a manner which can only be explained on the basis of the existence of the custom and a consciousness of its having binding force. Exhibits O, OI, OO, E, LL, K, H, H1 need not be referred to in detail; they all support the same conclusion.

Assuming, however, that the custom relied upon by the plaintiff cannot prevail, after the death of Vijaya Lakshmamba Garu in 1883, her son Venkataperumal and on his death, his son Bomma Razu became entitled to the property, and their rights to take possession of the property have never been asserted and became barred long prior to the suit.

I, therefore, proceed on the basis that Gangamamba Garu was entitled to execute Exhibit C which purports to be a usufructuary mortgage of the *dasabandham* cess, and that the plaintiff who is the assignee of that mortgage, would be entitled to come to this Court in his right as mortgagee, subject to the defences with which I shall now deal.

In 1888, Konamamba Garu who, in accordance with the decision at which I have arrived that the custom relied upon by the plaintiff has been proved, must be taken to have been entitled to deal with the property now in question, executed what purports to be a usufructuary mortgage of it to her son Bomma Razu, Exhibit E. If that mortgage was subsisting at the date of the execution purchase on which the 1st defendant relies, then the plaintiff's right must be taken to be subject to that mortgage, and the plaintiff's suit must consequently fail. It must, therefore, be considered whether the mortgage under Exhibit E was subsisting. With reference to this, the plaintiff contends (1) that the mortgage

was released by Exhibit KK (1), (2) that the mortgage right was lost by adverse possession, (3) that the alleged mortgage was nugatory inasmuch as no consideration passed for it, and (4) that the alleged mortgagee is estopped from setting it up as against the plaintiff.

These four contentions are based on different aspects of the same events or pieces of evidence. It may be stated at once that it is not possible to say that on the merits either the plaintiff or the defendants have established any case. On the other hand, the documents and the transactions in question indicate a gross mismanagement of the estate by the *zemindar* and a complete apathy as to the rights and legal positions of both the *zemindar* and the ladies of the family and unbusiness-like methods of dealing with valuable rights. Taking the whole of the events and documents together, it seems to me, however, for the reasons which I will state, that the plaintiff's contentions must prevail.

Exhibit E purports to be a usufructuary mortgage. Its object was to provide for the payment of the debts incurred for *mahal* expenses by Vijaya Lakshmamba Garu; and this was sought to be done by transferring the management of the 32 villages referred to in Exhibit E to Bomma Razu. On the true construction of Exhibit E, it appears that there was in fact no mortgage in favour of Bomma Razu and no consideration received from Bomma Razu, and the real effect of Exhibit E seems to be to entitle Bomma Razu to take charge of the property and to liquidate the debts which were due from the ladies out of the income of the properties referred to in Exhibit E, and after the debts had been liquidated, to hand back the properties to the ladies. This being the original nature and object of the transaction, it is unnecessary for the plaintiff to rely upon Exhibit KK (1) as in the nature of a re-assignment of the mortgage. It is enough for his purpose to refer to the fact that under the document, Bomma Razu would have been entitled to collect the rents and profits of the 32 villages and to pay off the creditors of Konamamba Garu thereout and if he had done so, he would have had a charge on the villages for the sums so paid out. He does

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not get any other right under the document. The arguments, therefore,

(a) that if there were any failure of consideration for Exhibit E, the only result of it would be that the mortgagor would be entitled to claim payment of the mortgage money and

(b) that in any case, the usufructuary mortgagee gets an immediate right to take possession of the property mortgaged and that this right cannot be affected by failure to pay the mortgage money.

These arguments have no application to the facts of the present case where what is dealt with, is the right to collect the moiety of a cess, and considerations which may be applicable to tangible property, cannot be applied.

It is clear also that Bomma Razu relinquished the right to take possession of the villages and that such a relinquishment does not require to be made by a registered document. [See *Thiruvengadachariar v. Ranganatha Aiyangar* (5).]

It was argued, moreover, that the auction-sale on which the 1st defendant relies for his title to the property, was based on an attachment of the 3rd August 1885, dated three years prior to the alleged mortgage under Exhibit E, that at that time, even according to the 1st defendant's case, Bomma Razu had no rights over the *dasabandham* cess now in question, and that it could not entitle the auction-purchaser to acquire rights which had not been attached for the reason that they had not come into being at the time. On the other hand, the 1st defendant relies upon section 70 of the Transfer of Property Act and the decisions in *Ramasami Naik v. Ramasami Chetti* (6), *Muniappa Naik v. Subramania Ayyan* (7), *Raja Thakur Barmha v. Jiban Ram Marwari* (8), *Umes Chunder Sircar v. Zakur Fatima* (9), *Ajudhia Prasad v. Man Singh* (10) and *Surja Narain Mandal v. Nanda Lal Sinha* (11). It is clear that there

is no such accession to the mortgaged property as is referred to in the Transfer of Property Act. It is, however, unnecessary in view of what I have already said to decide whether the comprehensive terms of Exhibit B, the sale certificate, were sufficient to transfer all the rights that Bomma Razu had in the property at the time of the execution sale and whether the absence of any express attachment of those rights, did not affect the purchase under Exhibit B.

In my opinion, therefore, the 1st defendant cannot rely upon the existence of any mortgage rights in favour of Bomma Razu at the time of the Court purchase on which the 1st defendant relies.

The 1st defendant's next contention is that the right of the plaintiff to recover the *dasabandham* cess must be asserted, if at all, against either the *ryots* themselves or as against the 2nd and 3rd defendants. This contention falls under the following heads: first, that the 1st defendant was under no liability to collect the *dasabandham* cess on behalf of the plaintiff; secondly, that as a matter of fact, the 1st defendant did not collect the cess; thirdly, that the right of the plaintiff is as against the *ryots*, not against himself; and fourthly, that if there was ever any liability on himself to collect the cess, that liability has been transferred to the 2nd and 3rd defendants by virtue of the lease Exhibit D.

All these contentions, again, are based on different aspects of the same pieces of evidence, and it need only be said that owing to his conduct throughout as indicated by the evidence and especially by Exhibits F, F2, M, M1, and S, the 1st defendant cannot be heard to say that he is not liable to pay over the *dasabandham* cess from time to time—the translation of Exhibit F says “therefore, it is made known to you that the amount due to you will be duly paid to you now and then” meaning thereby “from time to time as the amounts are collected.” The disclaimer of any liability to pay, contained in Exhibit GG dated the 20th February 1908, cannot affect the rights which had already become vested. It is unnecessary to decide in the present case whether the liability to pay to the plaintiff the *dasabandham* cess rest

(5) 13 M. L. J. 500.

(6) 30 M. 255; 17 M. L. J. 201; 2 M. L. T. 167.

(7) 18 M. 437; 5 M. L. J. 60.

(8) 21 Ind. Cas. 936; (1914) M. W. N. 118; 18 C. W. N. 313; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161; 6 M. L. J. 89; 16 Bom. L. R. 156; 41 C. 590.

(9) 18 C. 164; 17 I. A. 201.

(10) 25 A. 46; A. W. N. (1902) 176.

(11) 38 C. 1212.

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ultimately as between the defendants themselves, either upon the 1st defendant or or upon the 2nd and 3rd defendants. In my opinion, the right to receive the *dasabandham* cess has become vested in the plaintiff and by virtue of Exhibits F, F2, M, M1 and S the liability to pay the cess to the plaintiff, rests in the first instance upon the 1st defendant. Whether the 1st defendant assigned to the 2nd and 3rd defendants the right to collect the cess, or whether it is still vested in himself, or whether the 2nd and 3rd defendants are bound to pay the cess to the 1st defendant in addition to the payments they have already made, or whether they have discharged all the liability that rested upon them under Exhibit D and whether Exhibit D may entitle them to recover from the *ryots* the *dasabandham* cess to which we have held the plaintiff to be ultimately entitled—all these are questions which need not be considered in the present proceedings.

Finally, the question arises whether the Courts can recognise the existence of such a right as the plaintiff would be entitled to claim on the findings that we have given. We have had occasion recently in *Avula Chara-mudi v. Marriboyina Raghavulu* (12) to consider the incidence of section 27 (b) of the Specific Relief Act and section 40 of the Transfer of Property Act, and for the reasons mentioned in that judgment, I am of opinion that the English Law relating to covenants running with the land, is not applicable in India. I am of opinion that the obligation to collect and pay the *dasabandham* cess was annexed to the ownership of the Dalavayipattada village and as the 1st defendant is the transferee of the village with notice of the obligation, it may be enforced as against him. No reasons have been pointed out why the obligation which is capable of being specifically enforced, should not be so enforced. On the other hand, the principles which underlie section 39 of the Transfer of Property Act favour the enforcement of the obligation.

I am, therefore, of opinion that the decree under appeal is right and that the appeal must be dismissed with costs (two sets of costs).

Appeal dismissed.

(12) 28 Ind. Cas. 871; 28 M. L. J. 471; 19 M. L. T. 76; (1915) M. W. N. 596.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1119 OF 1914.

February 26, 1915.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Mullick.

PROMOTHA NATH CHAKRAVARTI—
DEFENDANT—PETITIONER

versus

MOHINI MOHAN SEN—PLAINTIFF—

OPPOSITE PARTY.

Provincial Insolvency Act (III of 1907), s. 34—Attachment before judgment, cash deposited as security for withdrawing—Defendant declared insolvent—Plaintiff, if acquires any right in security deposit—Receiver in insolvency, right of, to get the money.

Where the properties of the defendant, which were attached before judgment, are released on his payment of a cash security and the defendant is subsequently declared insolvent under Act III of 1907, the plaintiff acquires no lien or charge upon the money deposited as security for getting the attachment before judgment withdrawn and the Receiver in insolvency of the defendant's property is entitled to have the money paid to him. [p. 574, col. 1.]

Such money not having been realized in execution of a decree prior to the adjudication order, section 34 of Act III of 1907 does not apply. [p. 574, col. 2.]

Civil Rule against an order of the Munsif, Maldah, dated the 27th July 1914.

Babus Gobinda Chandra Dey Ray and Abani Nath Bhattacharjee, for the Petitioner.

Babus Mohini Mohan Chuckerbutty and Nishitha Nath Ghatak, for the Opposite Party.

JUDGMENT.—The opposite party in this rule instituted a suit for recovery of money on a *hatchitta* against one Doyachand in the Court of the Munsif of Maldah. He applied for attachment before judgment of certain moveable properties of the defendant. The Court directed an attachment, but ordered that the properties were to be released from attachment on the defendant's paying Rs. 500 as cash security. The defendant paid Rs 500 to the peon who went to attach the properties, which were accordingly released and the money was deposited in Court by the peon.

Subsequently, another creditor of the said Doyachand applied to the District Judge of Marshidabad to have him adjudged an insolvent under the provisions of the Provincial Insolvency Act and the petitioner was appointed *interim* Receiver of his estate. The petitioner thereupon applied to

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the Munsif of Maldah for payment of the said sum of Rs. 500 to him and for stopping payment of the amount to any rival claimant. The Munsif on the 11th April 1911 stopped payment of the amount until further orders of the Court.

Doyachand was adjudged an insolvent on the 25th May 1911 by the District Judge of Murshidabad, and the petitioner was appointed Receiver of his estate under section 18 of the Provincial Insolvency Act. The petitioner then applied for payment to him of the said sum of Rs. 500. The opposite party obtained a decree in his suit in the Maldah Court on the 20th July 1914, and he objected to the application of the petitioner.

The learned Munsif held that as the money was realised before the order of adjudication was made, the Receiver had no priority over the opposite party and accordingly ordered the amount to be paid over to the latter. The petitioner thereupon obtained this Rule for setting aside the said order.

We are of opinion that this Rule must be made absolute. The opposite party acquired no lien or charge upon the money deposited as security for getting the attachment before judgment withdrawn. It is contended, however, on behalf of the opposite party that the money was paid to his credit and was in fact a part payment of the debt for the recovery of which he had instituted the suit, provided it was decided in his favour, and that the money having been realised before the order of adjudication was made, the Receiver had no right to the same. This argument is founded upon the fact that in the *chalan* by which the sum of Rs. 500 was deposited in Court by the peon, it was stated that it was deposited to the credit of the opposite party. But the order of the Court was that the attachment on the goods was to be removed on the defendant's paying Rs. 500 as cash security. The peon thereupon could not by any statement of his, convert the security to a payment to the credit of the opposite party, specially at a time when the suit was not decided. It is next contended that the Receiver having been added as a party to the suit was precluded from setting up any right as Receiver to the money. But the decree was only for money, and did not create any charge upon the money deposited and although the Receiver was a party to the suit, there

was no decision as to the respective rights of the Receiver and the opposite party to the money which was in deposit in Court as security, nor could there be any such decision.

The money not having been realised in execution of a decree prior to the adjudication order, section 34 of Act III of 1907 does not apply.

We are of opinion that the order of the Munsif directing the money to be paid over to the opposite party, is erroneous. The order is accordingly set aside, and the opposite party is directed to refund the money to the petitioner.

The petitioner will get his costs, one gold mohur.

Order set aside.

MADRAS HIGH COURT.

CIVIL APPEALS Nos. 98, 107 AND 158
OF 1913.

September 6, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Seshagiri Aiyar.

KARUTURI GOPALAN, BEING MINOR, BY
HIS MATERNAL GRANDFATHER'S
YOUNGER BROTHER

ABBURI VENKATARAYUDU—
DEFENDANT No. 1—APPELLANT IN A. S. No. 98
OF 1913

KARTURI CHIRALAMMA—DEFENDANT
No. 2—APPELLANT IN A. S. No. 107
OF 1913

KARUTURI VENKATA RAGHAVULU—
PLAINTIFF—APPELLANT IN A. S. No. 158
OF 1913

versus

KARUTURI VENKATA RAGHAVULU
AND ANOTHER—PLAINTIFF & DEFENDANT No. 2
—RESPONDENTS IN A. S. No. 98 OF 1913 AND
A. S. No. 107 OF 1913.

KARUTURI GOPALAN—DEFENDANT No. 1
—RESPONDENT IN A. S. No. 158 OF 1913.

*Hindu Law—Adoption—Sudras—Subsequently born
aurasa son—Adopted son, share of—Minor, liability
of, for money not accounted for by guardian—Partition
—Marriage expenses of unmarried members, provision
for—Principle—Guardians, transactions entered into by
when binding.*

Under the Hindu Law, even among Sudras, an adopted son is entitled to one-fourth of the share of a subsequently born aurasa son, i. e., one-fifth of the estate. [p. 577, col. 2.]

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Raja v. Subbaraya, 7 M. 253, dissented from.

Raghunand Dass v. Sadhu Churn Doss, 4 C. 425; C. L. R. 534, *Giriapa v. Ningapa*, 17 B. 100, distinguished from.

Ayyaru Muppanar v. Niladatchi Ammal, 1 M. H. C. R. 45; *Bachoo Harkisandas v. Nigindas Bhagwandas*, 23 Ind. Cas. 912; 16 Bom. L. R. 263; *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmanamma*, 21 A. 460; 22 M. 398; 26 I. A. 113; 1 Bom. L. R. 226; 3 C. W. N. 427; 9 M. L. J. 67; 7 Sar. P. C. J. 330; *Pattu Lal v. Parbati Kunwar*, 29 Ind. Cas. 617; 19 C. W. N. 841; 13 A. L. J. 721; 17 Bom. L. R. 549; 18 M. L. T. 61; 29 M. L. J. 63; 22 C. L. J. 190; 37 A. 359; 2 L. W. 881; 42 I. A. 155, followed.

A minor is not liable for moneys not accounted for by his guardian. [p. 577, col. 2.]

Sonu Vishram v. Dhondu Vishram, 28 B. 335; 6 Bom. L. R. 122, followed.

In partition decrees, a provision should be made for the marriage expenses of unmarried members of the family who are of the same degree of relationship as those who have been married at the expense of the family. [p. 577, col. 2.]

Jairam v. Nathu, 8 Bom. L. R. 632; 31 B. 54; *Seivasa Iyengar v. Thiruvengadathaiyangar*, 23 Ind. Cas. 264, (1913) M. W. N. 1031; (1914) M. W. N. 282; 15 M. L. T. 307; 25 M. L. J. 644; 38 M. 556, followed.

A transaction by which a guardian gives up the rights of the minors in the family property is binding only when it is a bona fide settlement of disputes. [p. 578, col. 2.]

Appeals against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry, in Original Suit No. 111 of 1911.

FACTS of the case appear from the judgment.

Mr. V. Ramadoss, for the Appellant:—1. The ruling in *Raja v. Subbaraya* (1) is opposed to all principles of Hindu Law.

2. It was based on Dattaka Chandrika, which is in conflict with the Mitakshara.

3. Texts of Baudhayana, Vashishta and Katyayana agree with the Mitakshara. The Privy Council prefer the authority of the *Smritis* to other books. *Ayyaru Muppanar v. Niladatchi Ammal* (2), *Bachoo Harkisandas v. Nigindas Bhagwandas* (3), *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmanamma* (4), *Pattu Lal v. Parbati Kunwar* (5), *Sonu Vishram v. Dhondu Vishram* (6),

(1) 7 M. 253.

(2) 1 M. H. C. R. 45.

(3) 23 Ind. Cas. 912; 16 Bom. L. R. 263.

(4) 21 A. 460; 26 I. A. 113; 22 M. 398; 1 Bom. L. R. 226; 3 C. W. N. 427; 9 M. L. J. 67; 7 Sar. P. C. J. 330.

(5) 23 Ind. Cas. 617; 19 C. W. N. 841; 13 A. L. J. 721; 42 I. A. 155; 17 Bom. L. R. 549; 18 M. L. T. 61; 29 M. L. J. 63; 22 C. L. J. 190; 37 A. 359; 2 L. W. 881.

(6) 28 B. 330; 6 Bom. L. R. 122.

Jairam v. Nathu (7).

4. It is usual to provide in partition decrees for marriages of unmarried persons. *Srinivasa Iyengar v. Thiruvengadathaiyangar* (8).

Mr. P. Narayanamurthi, for the Respondents:—1. Dattaka Chandrika is the paramount authority in South India.

2. The ruling in *Raja v. Subbaraya* (1) made 30 years ago should not be disturbed.

3. Provision for marriage should be made only when they are actually celebrated. *Raja v. Subbaraya* (1), *Raghunand Dass v. Sadhu Churn Doss* (9) and *Giriapa v. Ningapa* (10).

JUDGMENT.

IN APPEAL SUIT NO. 98 OF 1913.

SESHAGIRI AIYAR, J.—One Venkanna adopted the plaintiff in 1898. The 1st defendant was subsequently born. Venkanna died in 1902. The 2nd defendant, the natural mother of the 1st defendant and the adoptive mother of the plaintiff, managed the estate during the minority of the two sons. The suit is for partition for a half share in the family properties. The main contention of the 1st defendant is that the plaintiff is only entitled to a fifth share. The Subordinate Judge, relying on an observation in *Raja v. Subbaraya* (1), held that the two sons were entitled to equal shares.

The question has been argued at great length before us. I am unable to agree with the Court below. The parties in this case are Sudras. In *Raja v. Subbaraya* (1), the dispute was between the natural son of a brother and the adopted son of another. It is settled law in Madras, notwithstanding *Raghunand Dass v. Sadhu Churn Doss* (9) and *Giriapa v. Ningapa* (10) to the contrary, that, by right of representation, the adopted son would take the share of his father in competition with the natural son of another member of the joint family. That was the only question that arose for decision in the

(7) 31 B. 54; 8 Bom. L. R. 632.

(8) 23 Ind. Cas. 264; 15 M. L. T. 307; (1913) M. W. N. 1034; (1914) M. W. N. 282; 25 M. L. J. 644; 38 M. 556.

(9) 4 C. 425; 3 C. L. R. 534.

(10) 17 B. 103.

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Madras case. At the end of the judgment, the learned Judges say: "If there be such a special rule as is suggested, it is not applicable at all events to *Sudras*, among whom the adopted son is declared entitled to take an equal share with a legitimate son who is born subsequently to the adoption." Apart from the text of Vridha Gautama commented on in the Dattaka Chandrika to which I shall presently refer, I have not been able to find any authority for this statement. On the other hand, *Ayyann Mappanar v. Niladatchi Ammal* (2) gave the adopted son only a fifth share in the family properties. Apparently, this decision was not brought to the notice of the learned Judges. In Bombay and Calcutta, subject to the special doctrine which denies the right of representation to the adopted son in a joint family, it has been held that the share of the adopted son among *Sudras* is only a fourth of that of the natural son. See *Raghubanund Doss v. Sadhu Churn Doss* (9), *Giriapu v. Ningapa* (10) and *Bachoo Harkisonda v. Nagindas Bhagwandas* (3).

On the authority of the *Rishis* and of the *Smrithi* writers, I feel no hesitation in holding that the adopted son is not entitled to share equally with the natural son. (1) The well-known text of Vasistha is in Chapter XV, *sloka* 9, "where a son has been adopted, if a legitimate son be (afterwards) born, the adopted son shares a fourth part." (2) Katyayana is quoted in the Dayabhaga and in Colebrooke's Digest, Vol. II, page 348, as saying: "A son of the body being born, the adopted sons of the same class take one-third of their portion." But in the Madanaparijatha and Viramitrodaya, the sage is quoted as allotting only a fourth part. (3) Baudhayana takes the same view as Vasistha: see Dattaka Mimamsa, section 5, *sloka* 42. (4) Manu in Chapter IX, *sloka* 163, says: "The *aurasa* son alone is the sole heir of his father's wealth; but as a matter of compassion, he may give maintenance to the rest." The Mitakshara interprets this passage as applying to the other class of sons "who are devoid of good qualities," and says that the general rule as to a fourth share, is not affected by Manu's text.

As against these *Smrithi* writers, we have the authority of Vridha Gautama, who

gives an equal share to the adopted son with the natural born son. It is not necessary to consider whether this text of the sage, is an interpolation as surmised by Messrs. Golap Chander Sircar and Ghose. Mr. Shyama Charan Sircar in his Vyavastha Chandrika inclines to the view that the text is obsolete. The preponderance of authority, therefore, is in favour of the view restricting the rights of the adopted son to a fourth share.

Coming next to the commentators, the majority of them enunciate the same rule. It is curious that Vijnaneswara does not even mention Vridha Gautama as an authority on this subject. This marked omission is significant. He refers to a number of *Smrithis* and propounds the rule, that the adopted son's share is a fourth of the *aurasa* son's (Mitakshara, Chapter I, section 11, placitum 24, *et seq.*). Jimuta Vahana, the author of Dayabhaga, in discussing the share of the adopted son in Chapter X, does not mention the authority of Vridha Gautama. The Madanaparijatha and the Viramitrodaya adopt the rule given in the Mitakshara. The Saraswati Vilasa after a full discussion, concurs in the same view. The author does not refer to Vridha Gautama. The first note of dissent is to be found in the Dattaka Chandrika, section 5, paragraphs 24 to 32. The author reconciles the text of Vridha Gautama with the others by restricting its application to *Sudras* alone. The text itself is general. But the commentator refers to the fact that among *Sudras*, illegitimate sons are given at least a third share in competition with legitimate sons, and argues that adopted sons should not be in a worse position. It is permissible to point out that whatever may be the social status of an illegitimate son, the fact that he is of the same flesh and blood as the person whose property he seeks a share in, may account for the favourable position assigned to him. The same considerations do not always apply to an adopted son. The other reason given by the author with reference to Manu's text about a man having a hundred sons, does not commend itself to me. It is curious that the Dattaka Chandrika in interpreting Vridha Gautama's text, does not properly explain the "taha

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Jathe." The author of the Dattaka Mimamsa translates the words as 'possessing good qualities'. Shyama Churn Sircar in his Vyavastha Chandrika gives the same meaning. In Ghose's Hindu Law, the quotation of Vridha Gautama uses the words "Thatha Jathe." Whatever may have been the exact words, their literal meaning is "existing as above." The reference apparently is to the quality which a person to be adopted is expected to possess. Manu in Chapter IX, sloka 169, describes an adopted son thus:—"He is considered as a son made or adopted, whom a man takes as his own son, the boy being equal in class, endowed with filial virtues, acquainted with the merit of performing obsequies to his adopter, and with the sin of omitting them." That is the reason why such an erudite scholar as Nanda Pandita translates Vridha Gautama's text in the way I have mentioned. I am of opinion that Gautama's rule is an exception to the general law. It would be impossible to administer such a rule by Courts, as the determination whether a man possesses good qualities would lead to endless conflict of views. The author of Dattaka Mimamsa, after examining Vridha Gautama's text carefully, inclines to the view taken by Vijnaneswara and the other commentators. Thus we see that with the exception of the Dattaka Chandrika, all the commentators agree in not giving an equal share to the adopted son. Mr. Narayanamurthi contended that as the Dattaka Chandrika is a special treatise on adoption its conclusions are entitled to greater weight than those of the other commentators; he quoted *Collector of Madura v. Mootoo Ramalinga Sathupathy* (11) for this position. In the first place, the question that has to be decided does not relate to the qualifications of the adopted son or to the ceremonies relating to the adoption. It is a question of inheritance. It is well settled that in matters relating to inheritance the Mitakshara is paramount in Madras. Moreover, as pointed out by Mr. Ramadoss, the authority of the Dattaka Chandrika is not to outweigh the sayings of the *Rishis*. See *Sri Balusa Gurulingaswami v. Sri Balusa Rama Lakshmanma* (4) and *Puttu Lal v.*

(11) 12 M. I. A. 397 at p. 436; 10 W. R. 17 (P. C.); 1 B. L. R. P. C. 1; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389.

Parbati Kunwar (5). Further, the Dattaka Mimamsa, another special authority on adoption, takes a different view. I am, therefore, clearly of opinion that the view taken by the Dattaka Chandrika is not binding on us and that the dictum in *Raja v. Subbaraya* (1) based on this authority should not be followed.

Writers on Hindu Law have almost unanimously accepted the view taken by the Mitakshara. Messrs. Golap Chandra Sarkar, Ghose and Siromani Battacharya are unhesitatingly for a fifth share. Messrs. West and Bolder are of the same opinion. Mr. Mayne expresses no definite opinion on the question. He says that in Ceylon, the adopted son shares equally with the *aurasa* son. On the other hand, the precedents quoted by Macnaughton in page 184 show that the practice is different in India. On all these grounds, I hold that the plaintiff is only entitled to a fifth share in the family properties.

Another point argued in the appeal relates to the direction in the decree that the 1st defendant's share should be held liable for moneys not accounted for by the 2nd defendant. This is clearly wrong. The 1st defendant may never benefit by the misconduct of his mother. See *Sonu Vishram v. Dhonda Vishram* (6).

The last point relates to the provision for marriage expenses. In *Srinivasa Iyengar v. Thiruvengadathaiyangar* (8), Spencer, J., agreeing with Sundara Aiyar, J., held that in partition decrees provision should be made for the marriage expenses of the unmarried members of the family. On the other hand, Sankaran Nair and Oldfield, JJ., in Appeal Suit No. 89 of 1913 have taken a different view. The practice in Madras seems to be in consonance with the view taken in *Srinivasa Iyengar v. Thiruvengadathaiyangar* (8). See Strange's Manual of Hindu Law, pages 190 and 191. Sir Thomas Strange in Chapter VIII refers to the opinion of Pandits to that effect. *Jairam v. Nathu* (7) supports the appellant. Such a provision should be made only for persons who are of the same degree of relationship as those who have been married at the expense of the family.

In reversal of the decree of the Subordinate Judge we direct that the plaintiff be

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allotted a fifth share in the properties found to belong to the family, that in passing the final decree a provision be made for the marriage expenses of the 1st defendant, and that that portion of the decree declaring the 1st defendant's share liable for malversation made by the 2nd defendant be omitted. Appellant is entitled to his costs from the 1st respondent in this appeal.

WALLIS, C. J.—I agree.

IN A. S. No. 107 OF 1913.

We think the 2nd defendant is entitled to maintenance at the rate of Rs. 10 per mensem charged on the estate, and to be paid by the plaintiff and the 1st defendant in proportion to their shares in the joint family property and payable on the 10th of every month. There will be no decree for arrears.

The decree is modified accordingly: otherwise the appeal is dismissed with costs.

IN A. S. No. 158 OF 1913.

The Subordinate Judge is wrong in disallowing item 18 in Schedule A. The reason that this item was sold away to the 18th defendant by the plaintiff is not sufficient to deprive him of his right to claim it as family property. The party whom the 1st defendant alleges as the owner of it was not before the Court. This item must be included in the properties decreed to the plaintiff.

As regards item 11 in Schedule A, item 6 in Schedule C and the E Schedule properties, we think the Subordinate Judge is right. The appeal must be dismissed in regard to them. With regard to the debt covered by Exhibit B, the matter stands thus. Exhibit B is a deed of simple mortgage taken by the plaintiff's father in respect of items 12 and 13 in 1892. At that time he was managing the properties of the 8th defendant's father. In 1895, the latter obtained from the plaintiff's father some of the properties entrusted to his management and gave Exhibit I A as receipt therefor. It is admitted that Exhibit B is not among the documents mentioned in that receipt. The case for the 8th defendant is that Exhibit B was subsequently handed over by the plaintiff's father to him. No receipt is produced evidencing the delivery. It seems unlikely that a receipt would not have been obtained if the document was really handed over. In 1905, the 2nd defendant purporting to act on behalf of the

plaintiff and the 1st defendant executed a deed of release by which she gave up the claims of the two minors in Exhibit B. We are not satisfied that this was a *bona fide* settlement of a disputed claim. The evidence of the 2nd defendant about the properties having been in the possession of the 8th defendant is palpably false, as the properties were subjected only to a simple mortgage. There is no specific evidence that the money due under the document came from the estate of the 8th defendant's father. All that is deposed to is that as the plaintiff's father had the estate in his possession, the money must have come from that estate. We do not think this evidence is sufficient to alter the *prima facie* character of the transaction. We are of opinion that the money advanced belonged to the father of the plaintiff and 1st defendant. They are entitled to their respective shares in the debt; items 12 and 13 of Schedule A are subject to this mortgage-debt.

We cannot uphold, for the reasons given in Appeal No. 98, the decree by which the 1st defendant's share in the property has been held liable for the moneys not accounted for by the 2nd defendant. We must ask the Subordinate Judge to appoint a Commissioner to take an account of (a) the moneys which came into the hands of the 2nd defendant as guardian of the two minors since the death of her husband in 1902; and (b) of the expenditure legitimately incurred by her in the management of the estate.

In passing a final decree, plaintiff and the 1st defendant should be given their respective shares in the balance that may be found due from the 2nd defendant. Plaintiff will have proportionate costs of this appeal from the 8th defendant in this and in the lower Court. The other parties will bear their own costs.

Appeals dismissed; Decrees notified.

DEB NATH DAS v. RAM SUNDAR BARMAN.

CALCUTTA HIGH COURT.

CIVIL RULE No. 366 OF 1915.

June 18, 1915.

Present:—Mr. Justice Woodroffe and
Mr. Justice Newbould.

DEB NATH DAS BAIRAGI AND OTHERS—

DEFENDANTS—PETITIONERS

versus

RAM SUNDAR BARMAN—PLAINTIFF—

OPPOSITE PARTY.

Specific Relief Act (I of 1877), s. 9—Adhjar, position of—Tenant or labourer—Suit for possession by adhjar, maintainability of—Civil Procedure Code (Act V of 1908), s. 115.

An *adhjar* is generally a tenant and as such his possession would be protected under section 9 of the Specific Relief Act.

Therefore, a decision in favour of an *adhjar* under section 9 of the Specific Relief Act is not liable to be revised under section 115 of the Civil Procedure Code, 1908, in the absence of proof that the *adhjar* is not a tenant but a labourer.

Civil Rule against the decision of the Munsif, Rangpur, dated the 8th January 1915.

Babu Atul Chandra Gupta, for the Petitioners.

Babu Jitendra Nath Roy, for the Opposite Party.

JUDGMENT.—This is an attempt to revise a decision passed under section 9 of the Specific Relief Act. The way it is sought to make this application one under section 115 is as follows:—It is said that the Judge has made a statement as to an alleged admission which is inaccurate. He says in the judgment that the defendants concede, however, that the plaintiff was in possession of the disputed land as a *bhag* tenant. It is said that that is not a fact and that no reference to tenancy is made in the pleadings. That appears to be so. But what was admitted was that the plaintiff was in possession as an *adhjar*. The question which is raised on that point is whether the *adhjar* is a tenant or a labourer. If he is a tenant, then his possession would be protected under section 9. If a labourer, it would be otherwise. In the first place, there is no affidavit before us that an *adhjar* in this part of the country means a "labourer" and not a "tenant." There is, on the contrary, a statement in the affidavit that the land was "let out" to the plaintiff as *adhjar*, which term is appropriate to the existence of a tenancy. The various books upon the subject which were referred to,

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show that very largely an *adhjar* is a tenant and the learned Judge who decided this case must be well aware of the meaning of the term in the district in which his Court is. Under those circumstances, a case has not been made out for revision under section 115 of the Code of Civil Procedure.

The Rule is, accordingly, discharged with costs. We assess the hearing fee at one gold mohur.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2566 OF 1912.

September 14, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Tyabji.MANAVIKRAMAN *alias* MANJERI

KARNAMULPAD—PLAINTIFF—

APPELLANT

versus

NILAMBUR THACHARAKAVIL

MANAVIKRAMAN *alias* THIRUMAL-
PAD—DEFENDANT'S LEGAL REPRESENTATIVE

—RESPONDENT.

Evidence Act (I of 1872), ss. 90, 114—Copy of document thirty years old—Handwriting of copyist—Presumption—Discretion—Appellate Court, interference by—Secondary evidence—Document lost—Proof, necessary—Pit dug by stranger in another's land—Elephant trapped—Ownership, question of.

In the case of a copy of a document 30 years old, section 90 of the Evidence Act empowers the Court to presume that the copy is in the handwriting of the person in whose handwriting it purports to be. Though a presumption as to stamping is not raised by section 90 of the Evidence Act, a lower Court can draw that presumption under section 114, and if it so does, an Appellate Court should not lightly interfere with it. [p. 580, col. 2.]

Where an original document is lost the party tendering secondary evidence of it need not show the exact mode and time of the loss but only that it was not lost by his own default or neglect. [p. 581, col. 1.]

Quære.—Whether a stranger who digs a pit in another's land, can claim an elephant which has fallen into it? [p. 580, col. 1.]

Makath Unni Moyi v. Malabar Kandapanni Nair, 4 M. 263 at p. 271; 4 Ind. Jur. 565; *Blades v. Higgs*, (1865) 11 H. L. Cas. 621 at pp. 632, 633; 11 E. R. 1474 at p. 1479; 20 C. B. (N. S.) 214; 34 L. J. C. P. 286; 11 Jur. (N. S.) 701; 12 L. T. 615; 13 W. R. 927; 145 R. R. 334, referred to.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 612 of 1909, preferred against that of the District Munsif of Manjeri, in Original Suit No. 44 of 1908.

MANAVIKRAMAN P. NILAMBUR THACHARAKAVIL.

This second appeal coming on for hearing on the 31st March and 1st April respectively of 1914, the Court (Tyabji and Spencer, JJ.) delivered the following

JUDGMENT.—This appeal arises out of a suit to recover an elephant. The elephant fell into a pit dug on a hill referred to in the plaint as Choriappara hill and by the defendants as (1) Thonimannu Thekke mala or (2) Ottathannippattu or (3), Perumpattur Thekke mala. Each party claims ownership of the land in which the pit was dug as well as to have dug the pit. The main issue, therefore, depends upon the questions whether (1) the land belonged to the plaintiff or (2) to the defendant and (3) whether the pit was dug by the one party or the other. The first Court held that the plaintiff had proved his title to the land as well as that the pit had been dug by him and granted a decree in his favour. The learned District Judge held that the plaintiff had not established his title to the land and on this finding alone dismissed the plaintiff's claim. It is admitted by the learned Pleader for the respondent that the Appellate Court's finding is insufficient to dispose of the case. It is argued, however, that the alternative claim based on the admission that the land may not be proved to have belonged to the plaintiff is not taken in the plaint and that such a basis for the claim is now not open to the plaintiff. We think the plaintiff's claim on this alternative basis was sufficiently raised in the plaint and will ask for findings accordingly. Difficult questions of law may arise if the pit is found to have been dug by one of the parties on land belonging to the other or to a stranger. See *Makath Unni Moyi v. Malabar Kandapuni Nair* (1), *Blades v. Higgs* (2). Pollock and Wright on Possession, page 148.

With reference to the title of the land it may be that neither side can conclusively show it. Failure on the part of the plaintiff to prove title would not, however, be such a fatal defect as to necessitate a dismissal of the plaintiff's suit. The learned District Judge has found that the plaintiff

has not established his title to the land. His finding is, however, vitiated in our opinion by the grounds on which he has excluded Exhibit D from evidence. He has rejected it on grounds mentioned in paragraph 2 of his judgment. With great respect to the learned Judge we are of opinion that he has misunderstood and misapplied the rules of law relating to secondary evidence. The District Munsif has approached the question from the right point of view in paragraphs 11 and 12 of his judgment. He considered first whether the original of which Exhibit D purports to be a copy, was in itself a valid document. On this point it was contended that the original was not stamped and that it could not be presumed to have been stamped. In this Court it was pointed out to us that section 89 of the Indian Evidence Act dealing with the presumption as to stamps does not apply to the present case—the document not being such as could be called for as required by section 89. It is then argued that section 90 does not apply as section 90 refers to originals. We see no difficulty in applying section 90 in so far as it is applicable to copies. In the case of a copy 30 years old section 90 empowers the Court to presume that the copy is in the handwriting of the person in whose handwriting it purports to be. But section 90 does not refer to stamps. We may, however, call the attention of the learned Judge to section 114 of the Indian Evidence Act and may also point out that when the Court of first instance has drawn a certain presumption which the law empowers it to draw and especially when the presumption has reference to such a point as the present, being preliminary to the admissibility of a document, a Court of Appeal ought not lightly to interfere with the exercise of the discretion vested in the Court of first instance. The learned Judge in considering the admissibility of Exhibit D will, therefore, first consider the question whether he ought to differ from the District Munsif on the question that the original of Exhibit D was duly stamped. After doing so, unless he holds that there are sufficient reasons to entitle him to differ from the District Munsif, he will have to consider whether the original was lost. In this

(1) 4 M. 268 at p. 271; 4 Ind. Jur. 565.

(2) (1865) 11 H. L. Cas. 621 at pp. 632, 633; 11 Eng. Rep. 1474 at p. 1479; 20 C. B. (N. S.) 214; 34 L. J. C. P. 226; 11 Jur. (N. S.) 701; 12 L. T. 615; 13 W. R. 927; 145 R. R. 334.

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connection it would be improper to expect that proof should be offered of the exact occasion when the document was lost. Documents would seldom be lost if parties could always account for the exact time and place when the document was lost by them. When events have occurred so long ago as in the case of Exhibit D, the Courts may well be expected to be satisfied with less clear evidence. In any case the question would not be so much whether the party has proved the exact mode and time of loss, but whether the party offering the secondary evidence is unable to produce the original for reasons not arising from his own default or neglect. See section 65 (c) of the Indian Evidence Act. Finally the District Judge will have to consider whether or not the copy is a genuine one. For this purpose the aid of section 90 may be called in to the extent we have referred to. Section 114 may also be applicable.

We will, therefore, ask the learned District Judge to record findings in the light of our observations on the following points:—

- (1) Whether Exhibit D was wrongly presumed to be genuine and admitted in evidence by the District Munsif?
- (2) If not, then whether the plaintiff has proved title to the land on which the pit in question was dug?
- (3) Whether the defendant has proved title to the said land?
- (4) Whether it was the plaintiff or the defendant who dug the pit and made the capture of the elephant?

The findings should be submitted within one month from the re-opening of the District Court after the recess and 10 days will be allowed for filing objections.

The District Judge returned findings to the effect that Exhibit D was wrongly presumed to be genuine, that neither the plaintiff nor the defendant had proved his title to the land in which the pit was dug, but that the pit was dug by the latter.

This second appeal coming on for final hearing this day after the return of the findings of the lower Appellate Court

upon the issues referred by this Court trial, the Court delivered the following

JUDGMENT.—We accept the findings and dismiss the plaintiff's suit with costs throughout.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL SUIT NO. 78
OF 1914.

February 4, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Woodroffe.

SUDAMDIH COAL COMPANY, LTD.—

PLAINTIFFS—APPELLANTS

versus

EMPIRE COAL COMPANY, LTD.—

DEFENDANTS—RESPONDENTS.

Jurisdiction—*Letters Patent*, 1865, cl. 12—*'Suits for land'*, meaning of—*Compensation for wrong to land*.

The expression "*suits for land*" extends to a suit for compensation for wrong to land, where the substantial question is the right to the land, and, therefore, clause 12 of the Letters Patent, which empowers the Calcutta High Court to try "*suits for land and other immoveable property*" applies to such a suit. [p. 582, col. 2.]

Appeal from the following judgment of Mr. Justice Fletcher in Suit No. 549 of 1914:—"This suit is down for the settlement of issues. The suit has been brought by the plaintiff Company to recover damages from the defendant Company. The allegations in the plaint are that the plaintiff Company and the defendant Company are the owners of adjoining collieries. The plaintiff Company alleges that it left a barrier of 25 feet along the eastern boundary of its property as a protection for its mine. They also allege that on some date between the 16th June 1913 and the 1st of July 1913 the defendant Company cut through their barrier and thereby caused a large influx of mud and water into the plaintiff Company's colliery, whereby the plaintiff Company suffered damage. The question, therefore, is, has this Court jurisdiction to try a suit of this nature? It seems to me that this Court has no jurisdiction. The case is a suit for land. I cannot distinguish the present case from the decision in

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(1). The material fact in this case will be whether the plaintiff Company can prove the ownership of the barrier of 25 feet of coal, which they allege they left along the eastern boundary of their own property. That is the basis of the cause of action, no case being set up in the plaint that the defendant Company had negligently worked their own property; that being so, the decision in this case will involve the trial of the title to this barrier of 25 feet which, it is alleged, had been left along the eastern boundary of the plaintiff's property. That is a suit for land not within the jurisdiction of this Court under clause 12 of the Letters Patent constituting this Court. That being so, this Court has no jurisdiction to try this case. The plaint discloses no cause of action which this Court is competent to try. This suit will, therefore, be dismissed with costs."

Mr. J. E. Bagram (with him Mr. Buckland), for the Appellants.

Si S. P. Sinha (with him Mr. A. K. Sinha), for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is an appeal from a judgment of Mr. Justice Fletcher who has dismissed the suit with costs. This was done on a preliminary hearing upon settlement of issues, and the only question involved is whether this is a *suit for land or other immoveable property* within the meaning of clause 12 of the Letters Patent. That clause was intended to define the original jurisdiction of the High Court as to suits, and it empowered the Courts "to receive, try and determine suits of every description, if, in the case of *suits for land or other immoveable property*, such land or property shall be situated.....within the local limits of the ordinary original jurisdiction of the High Court."

The matter in dispute here relates to a mining property outside the jurisdiction so defined. But on behalf of the plaintiff it is contended that having regard to the pleadings it cannot be said that it is a *suit for land or other immoveable property*. The question is, what was intended by that expression? It appears to me that it was

(1) 17 Ind. Cas. 500; 39 C. 739.

not a mere formal test that was proposed—a test to be determined by the precise form in which a suit might be framed; but that regard was to be had to the substance of the suit, and I cannot help thinking that the particular expression was used, because there was its equivalent in the Civil Procedure Code of 1859, section 6. Indeed, it is a matter of common knowledge that the Secretary of State's despatch forwarding the Letters Patent to this Court makes special reference to that circumstance. The course of decisions on the Charter shows that the description cannot be limited to suits for the recovery of land in its strict sense, and as to that there can be no dispute: and, running on parallel lines with that, we find the Code of Civil Procedure of 1859 developed in 1877, so as to embrace a number of topics which perhaps would not in strictness be regarded as *suits for land*, and it is instructive to observe what they are. They are suits for the recovery of immoveable property (with or without rent or profits), suits for the partition of immoveable property, suits for foreclosure, or redemption of a mortgage of immoveable property, suits for the determination of any other right to or interest in immoveable property, and suits for compensation for wrong to immoveable property. This appears to me to be in accordance with principles of general, if not universal, application, according to which *suits for land* in its strict sense must come before the Court where the land is situate. The system on which our procedure is based, the English procedure, regards a suit for damages for trespass to land in the same way, and it is interesting to notice that Chancellor Kent in his commentaries on American Law states that 'an injury to real property is local as to jurisdiction, and trespass on real property situated in one State cannot be sued for in another.' Therefore, it seems to me that we are not giving a construction that is opposed to the general trend of legal thought, if we hold that *suits for land* at any rate extend to a suit of this kind, which is a suit for compensation for wrong to land, when, as I hold to be the case here, the substantial question is the right to the land. In my opinion, the suit is one to which clause 12 of the Letters Patent applies in the sense I have indicated

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and, therefore, it was rightly dismissed. The appeal should, therefore, be dismissed with costs.

WOODROFFE, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 62 OF 1914.

September 14, 1915.

Present:—Mr. Justice Spencer and

Mr. Justice Phillips.

KALIANJI SINGJI BHAI, SOLE PARTNER OF

THE FIRM OF RAYSEE AMERCHUND

—COUNTER-PETITIONER—APPELLANT

versus

THE BANK OF MADRAS—PETITIONER—

RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 4, 12 (3), 51—Insolvency proceeding—Notice served upon agent, if effectual—Agent appearing—Waiver—Agent, act of insolvency by, if act of principal—Power of attorney—General authority—Agency, termination of—Rules framed under s. 51, Provincial Insolvency Act, r. 21, cl. (3).

A notice of proceedings in insolvency instituted by a creditor served on the agent of the debtor, is as effectual as if served on the debtor himself. [p. 585, col. 1.]

Although clause (3) of rule 21 of the rules framed under section 51 of the Provincial Insolvency Act, requires the notice to be served on the debtor himself by registered post, there is no express provision that it should be served only on the debtor. Where, therefore, an agent of the debtor gets notice of the proceedings and appears at the hearing he must be deemed to have waived any objection that he might have had to any supposed irregularities in giving the notice. [p. 585, col. 2.]

Minor, Ex parte, Pollitt, In re (1893) 1 Q. B. 455; 62 L. J. Q. B. 236; 4 R. 253; 48 L. T. 366; 41 W. R. 276; 10 Morrell 35, followed.

For the purposes of section 4 of the Provincial Insolvency Act, the act of an agent may be the act of the principal, and, therefore, where an agent departs from the place of business, it constitutes an act of insolvency on the part of the principal, though the English Law requires the act to be a personal act of the principal, i. e., the debtor himself. [p. 586, col. 1.]

Blain, Ex parte, Savers, In re (1879) 12 Ch. D. 522, 41 L. T. 46; 28 W. R. 734; Cooke v. Charles A. Fogelar Company, (1901) A. C. 102; 70 L. J. Q. B. 181; 84 L. T. 10; 17 T. L. R. 153; 8 Manson, 113 In the matter of Brijmohun Debay, 2 C. W. N. 366, followed.

Where the power-of-attorney, under which an agent acts, empowers him to do other acts besides carrying on the trade and dealing with his property, his agency does not terminate immediately on the presentation of a petition for the adjudication of his principal as insolvent. It subsists to stave-off bankruptcy orders against his principal. [p. 586, col. 1.]

Appeal against the order of the District Court of South Malabar, in Insolvency Petition No. 7 of 1912.

Mr. K. R. Subramania Sastri, for the Appellant.

Messrs. David and Brightwell and Morsely, for the Respondent.

This appeal coming on for hearing on the 13th, 16th and 17th November 1914 before Mr. Justice Oldfield and Mr. Justice Tyabji, the Court made the following

ORDER—The circumstances in which the learned District Judge held that notice had been duly served on the debtor under section 12 of the Provincial Insolvency Act are not clear. We must, therefore, call for a finding on the issues:—

1. What notices were served on the debtor directly or on his agent Visram?

2. What attempts to serve the former were made by registered letter or otherwise? and was rule 21 (3) of the rules framed under the Act complied with?

3. Was it found impossible to serve the debtor direct? If so, what were the circumstances in which a valid service was effected on Visram?

Fresh evidence may be adduced. The findings will be submitted within six weeks from the date of receipt of records. Seven days will be allowed for filing objections.

In compliance with the above order, the District Judge of South Malabar submitted the following

FINDING.

* * * * *

1. It is admitted that no notice was served on the debtor directly. But I find that a notice was issued on the 6th December 1912 by the Court addressed to Hirji Visram Sait, *mukhtiar* of Kallianji Singji Bhai, sole partner of the firm of Rayasi Amerchund of Nagaram Amsom, Desam, Calicut Taluq, the address given in the insolvency petition of the counter-petitioner for the service of notice and processes. The copy of that notice was affixed to the outer door of the dwelling house of Hirji Visram, because he stated that he was unwilling to sign and accept the notice and that his principal should be added as a party.

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2. It is proved by the evidence of Mr. Krishna Ayyar, Vakil engaged in the insolvency petition, that a registered letter (Exhibit H) was sent by petitioner's Vakil, Mr. Ramakrishna Ayyar, to the insolvent Kallianji Singji Bhai intimating to him the fact that a petition has been presented and accompanied by a copy of the petition. This was addressed to Cutch, Mandavi, and was returned by the postal authorities to the sender with the endorsement "Left, Particulars not known. Returned to the sender" for which the receipt being H2. I find that this was the only attempt made to serve the debtor.

With regard to the latter part of the second issue, I find that there was no compliance with rule 21 (4) of the rules framed under the Act, because as it appeared impossible to serve the debtor in person, the Court ordered on the 11th March 1913 that the notice given to the agent should be held to be sufficient with reference to rule 5 (2) of the rules under the Provincial Insolvency Act.

3. It appears from the fact that the notice sent to the debtor by post by the petitioner's Vakil was returned un-served and from the correspondence (Exhibits D, E, F and G) that the service on the debtor direct was impossible. It was not stated in the objection petition filed by Hirji Visram on the 11th March where the principal was. My finding on the first part of the third issue is consequently in the affirmative. With reference to the latter part of the 3rd issue, the *mukhtarnama* (Exhibit J) under which the agent acts gives him sufficient authority to represent the debtor and the *vakalath* executed by him for the petition was in pursuance of it. The service and the notice already referred to on the agent was service sufficient under Order III, rule 3, Civil Procedure Code, and Order V, rule 12, Civil Procedure Code, and with reference to rule 5 (2) of the Madras Insolvency Rules. I find, therefore, that in the circumstances stated valid service was effected on Visram.

This appeal against order coming on for final hearing after the return of the finding upon the issues referred by this Court on the 9th and 10th September 1915, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The appellant is the sole partner of the firm of Rayasi Amerchand carrying on a money-lending business at Calicut with a head office at Bombay. On December 3rd, 1912, the agent of the Bank of Madras, the respondent in the case, presented a petition to the District Judge to adjudicate the appellant insolvent and to appoint an *ad interim* Receiver. On December 6th a notice signed by the *sheristadar* of the District Court (by order) went to the local agent to inform him that a petition to declare the appellant insolvent was posted for January 21st and that he might appear and show cause against it. The agent, Visram Sait, refused to receive the notice on the ground that his master should be made a party, and it was served on him by affixture. On December 7th a notice of the hearing together with a copy of the petition was sent by the respondent's Pleader through registered post to the appellant at Mandavi in Cutch, where he was thought to be residing, but it was returned to the sender as the addressee had "Left, Particulars not known". At the hearing on January 21st notice was ordered by the Court to go to the principal debtor for March 11th, but admittedly no further attempt was made to serve a notice of the date of hearing on the debtor in person as it was found impossible to do so. On March 11th the notice given to the local agent was declared by the Court to be sufficient, and on the same date the said agent filed in Court a counter-petition on behalf of the appellant describing himself as his *mukhtiar*. The proceedings were fully contested and ended on December 19th, 1913, in an adjudication of the debtor under section 16 of the Provincial Insolvency Act as insolvent.

A number of objections have been raised to the sufficiency of the service of the notice on the agent and our attention has been called to the fact that the agent did from the first object to receiving notice for his principal.

These objections may be briefly answered by a reference to the provisions of the Provincial Insolvency Act and the rules framed under the authority of section 51. Section 12 (3) provides that in cases where the petition is by the creditors, notice of the date for hearing shall after admission of the petition be served on the debtor in the manner pro-

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vided for service of summons. Section 47 directs that Courts of Insolvency shall, subject to the provisions of this Act, follow the procedure followed in regard to original civil suits. Order V, rule 12, of the Civil Procedure Code declares that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. Rule 13 allows service to be made on any agent who at the time personally carries on business or work for a person who does not reside within the Court's jurisdiction, in any suit relating to business or work. Order III, rule 3 (i), makes service on a recognised agent as effectual as if it was on the party in person unless the Court directs otherwise. A recognised agent includes a person holding a power-of-attorney authorising him to make and do such appearances, applications and acts on behalf of such parties (Order III, rule 2). Exhibit J, the power-of-attorney held by Visram Sait from the appellant, authorizes him 'to defend all suits, appeals and actions' in the Courts of this Presidency to which the appellant may be a party and 'generally to act for him and to do all things and acts that may be necessary and that the attorney may think fit for the complete discharge of his business effectually, completely and to his benefit'; thus there can be no question that there was a valid service under the Civil Procedure Code on the appellant's agent, and that the Court declared it to be sufficient.

Turning to the rules framed by the High Court under section 51 of the Insolvency Act, we find that clause 3 of rule 21 provides that notice of the date of hearing of an insolvency petition shall, if the petition is by the debtor, be sent by the Court by registered post to all creditors and if the petition is by a creditor, shall be sent to the debtor, not less than 14 days before the date of hearing. Notice was not sent to the debtor in this case by the Court through registered post, although the Bank's Vakil attempted vainly, as already mentioned, to communicate a notice and a copy of the petition to the appellant in a registered letter. As we read the rules, however, the sending of a notice by registered post is chiefly intended to provide for the information to be given to creditors on a petition by a debtor and to

particularize the words 'such other manner as may be prescribed' in section 12, clause (2). We are not aware of any practice of sending notices of the hearing to debtors through the post in the first instance upon creditors' petitions. Notice to debtors is otherwise provided for by rule 5, clause (2), and by the rules under the Civil Procedure Code. If a debtor gets notice of the hearing served on his authorized agent like a summons, he cannot reasonably complain that he did not also receive a similar notice from the Court through the post, and his objection might be answered by a reference to section 99, Civil Procedure Code. Rule 5, clause 2, of these rules directs that a copy of an insolvency petition presented by a creditor shall be served together with the notice of the date for hearing 'on the debtor or upon the person upon whom the Court orders notice to be served.' It is not required that such an order should be in writing. In this case the notice was addressed to the agent and was signed by the District Court *Sheristadar* (by order). It was served under Order V, rule 17, Civil Procedure Code, more than 14 days before the hearing on January 21st. Presumably this was a good notice to the agent, and as the agent appeared and filed a counter-petition on March 11th in which he did not raise any objection to the manner or time of service, he must be deemed to have waived any objection that he might have had to any supposed irregularities in the giving of notice.

So much for the question of notice. More substantial objections have been raised to the capacity in law of an agent to represent a debtor in insolvency proceedings, and to the capacity of a debtor to be adjudicated insolvent upon an act of insolvency committed by his agent. It is argued that as orders of adjudication relate back to and take effect from the date of the presentation of the petition on which they are made [*vide* section 16, clause (6)], and as the agency of Visram Sait terminated under section 201 of the Contract Act by his principal being adjudicated an insolvent, therefore, the agency must be taken to have ceased on the presentation of the petition; and that by the appointment on December 3rd of a Receiver, in whom the property of the debtor vested, the business of the firm could no longer be carried on by the agent and

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ipso facto his power-of-attorney became void. But it is evident from a reading of the whole of this section from clauses 2 to 6 that they all deal with the property of the insolvent. This was made clear in the case of *Minor, Ex parte, Pollitt In re* (1), where in treating of the corresponding section of the English Bankruptcy Act, Lord Esher observed: "The result of the relation back is, that all the subsequent dealings with the debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed." The agent's power-of-attorney in this case empowered him to do other acts besides carrying on the trade and dealing with his property and one of those acts must be taken to be to stave off bankruptcy orders against the firm.

As regards the jurisdiction of the Courts to adjudicate persons insolvent upon acts of insolvency committed by their agents, there appears to be a difference in the law as it stands in England and in India.

In *Blain Ex parte, Sangers, In re* (2) it was held that an act of bankruptcy must be a personal act or default and could not be committed through an agent. This principle was followed in *Coke v. Charles A. Vogeler Company* (3), another case of a foreigner domiciled and resident abroad having business in England, but in both of these decisions it was conceded that if the law had been different the Courts would have had to take a different view.

In India it has been expressly enacted as an explanation to section 4 of the Provincial Insolvency Act that for the purposes of that section which deals with acts of insolvency committed by a debtor, the act of an agent may be the act of the principal. It was accordingly held in *In the matter of Brijmohun Dobay* (4) that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal.

In this case if the fact that the firm at Bombay of which appellant was partner had suspended payment, of which Mr. Lamb

states that the agent gave him notice, be taken as the act of insolvency giving rise to these proceedings, there is no need to consider the effect of the agent's act as agent, as the suspension of payment at Bombay was the act of the principal, but if the suspension of payment by the branch at Calicut and the inability of the agent there to meet his bills in Calicut, to which Mr. Deane has testified, be taken into account, then we have no hesitation in applying section 4 of the Act and in holding that the order of adjudication based on such an act of insolvency was a perfectly valid order. We agree in holding that an act of insolvency has been proved. We dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT, FIRST CIVIL APPEAL NO. 33 OF 1913.

November 11, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice and Mr. Justice Rafique.

BHARAT INDU AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

MUHAMMAD MAHBUB ALI KHAN

AND ANOTHER—DEFENDANTS—RESPONDENTS.
Banami purchase—Ownership—Source of money.

Where a property is alleged to have been purchased by one man in the name of another, the question of ownership must depend upon the answer to the question, with whose money was the property purchased. [p. 587, col. 2.]

Dharm Das Pandey v. Shama Soondri Dibiah, 3 M. L. A. 229; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 18 E. R. 484. *Bilas Kunwar v. Ranjit Singh*, 30 Ind. Cas. 299, 19 C. W. N. 1287; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 17 Bom. L. R. 1006; 37 A. 557; 13 A. L. J. 991, referred to.

First appeal from the decision of the Subordinate Judge of Faizilly, dated the 16th September 1912.

The Hon'ble Dr. Sunder Lal, for the Appellants.

Mr. B. E. O'Connor, for the Respondents.
JUDGMENT.

RICHARDS, C. J.—The suit out of which this appeal arises was the outcome of another suit which was brought as far back as the year 1896. This last-mentioned suit was a suit to realise the amount of a mortgage by sale of mortgaged property including the property now in dispute.

(1) (1893) 1 Q. B. 455; 62 L. J. Q. B. 236; 4 R. 253; 68 L. T. 366; 41 W. R. 276; 10 Morrell 35.

(2) (1879) 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334.

(3) (1901) A. C. 102; 70 L. J. Q. B. 181; 84 L. T. 10; 17 T. L. R. 153; 5 Manson, 113.

(4) 2 C. W. N. 300.

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On the 26th of March 1895 a decree was passed in favour of one Rai Bahadur Babu Durga Prasad for the sum of Rs. 85,665. The present plaintiffs are the sons of the said Babu Durga Prasad. In execution of the above-mentioned decree the property (the subject-matter of the present suit) was put up for sale and purchased in the names of *Musammât Bigga Begam* and a man named *Ahsan Ali*. The sale took place on the 20th of July 1898, and the sale certificate is dated the 12th of August 1899. On the 20th of December 1899 *Ahsan Ali* executed a deed in which he admitted that the entire purchase-money of the property mentioned in the plaint in the present suit, as also the purchase-money of an indigo factory which was sold at the same time, was altogether provided by the *Musammât* and that he "had not and never had" any interest in the property sold. *Musammât Bigga Begam* was the wife of one *Hakim Muhammad Wilayat Ali Khan*, the person against whom the mortgage-decree was passed. The said *Ahsan Ali* was a nephew of the said *Wilayat Ali Khan*. It may be noted here that in the deed to which I have just referred, *Ahsan Ali Khan* does not purport to relinquish any rights. The statement in the deed is that he "has not and never had any right or interest." The purchase-money of this property now in dispute was Rs. 10,075. The price of the indigo factory was Rs. 1,810. The mortgaged property having proved insufficient to satisfy the mortgage-decree a further decree was obtained under section 90 of the Transfer of property Act on the 1st of December 1906. The result of this last-mentioned decree was that the decree-holder was entitled to realise the balance still remaining due on foot of the decree from any other property which belonged to the judgment-debtor. Various applications were made for execution, with the result that a large additional sum was realised. Finally after the death of *Musammât Bigga Begam* the decree-holders attempted to attach the property now in dispute. In the first place, they alleged that the property had been inherited by *Wilayat Ali Khan* from his widow *Bigga Begam*. The application to sell this property

was refused. The result was the institution of the present suit. The plaintiffs' claim now is that the property was all along the property of *Wilayat Ali Khan*, in the alternative they contend that even if the property belonged to the *Musammât*, it was inherited by *Wilayat Ali Khan* and is, therefore, liable to satisfy the balance of the decree still remaining due. The defence is that the property was purchased by the *Musammât* with her own money and that prior to her death she disposed of the same by Will, that her heirs accepted the Will and that *Wilayat Ali Khan* never had any interest in the property from the date of its sale in 1898. I may here point out that even if the purchase in 1898 was really a purchase by *Wilayat Ali Khan* in the names of his wife and nephew, it ceased to be liable to the mortgage. The property can now only be sold by virtue of the personal decree under section 90.

The question for decision is whether the property belonged to *Wilayat Ali Khan* or his wife *Bigga Begam*. This question, it seems to me, must depend upon the answer to another question, namely, with whose money was the property purchased. See *Dhurm Das Panley v. Shama Soondri D. biah* (1) and the recent case of *Bilas Kunwar v. Desraj Ranjit Singh* (2). I may mention here that while there was nothing to prevent *Wilayat Ali Khan* making his wife a present of the property, there is no evidence that he did so and this is not the case for the defendants. Their case is that the money belonged to the lady. On the 18th of July 1895 *Hakim Muhammad Wilayat Ali Khan* mortgaged certain property to secure the sum of Rs. 6,000, the mortgage being in favour of *Gobardhan Das*. According to the registration endorsement Rs. 5,000 was paid in cash and a *rukka* for Rs. 800 was returned. The consideration appears to have been Rs. 5,045 and the discharge of the *rukka* for Rs. 800 principal and Rs. 155 interest. On the 19th of July 1898 *Hakim Muhammad Wilayat Ali Khan*

(1) 3 M. L. A. 29; 6 W. R. (P. C.) 43; 1 Suth. P. C. J. 47; 1 Sar. P. C. J. 271; 18 E. R. 481.
(2) 30 Ind. Cas. 26; 13 A. L. J. 991; 19 C. W. N. 1277; 29 M. L. J. 335; 2 L. W. 83; 18 M. L. T. 248; 17 Bom. L. R. 106; 37 A. 557.

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made another mortgage to secure Rs. 6,000. This was made in favour of Gauri Sahai, father of the mortgagee in the other mortgage. The plaintiffs contend that the raising of this sum of Rs. 11,000 odd in cash two days before the property in dispute was put up for sale is very significant and strong evidence that Wilayat Ali Khan was raising the money to buy in the property that was being sold on foot of the mortgage-decree. It seems to me that there is great force in this contention, unless the defendants can satisfactorily show that the money was raised for some other purpose. No books or documentary evidence are produced to show to what purpose this Rs. 11,000 odd was applied. But a witness of the name of Jaffer Khan is produced, who says that he used to have dealings with Wilayat Ali Khan who borrowed from him on one occasion Rs. 4,900 under a note of hand, that "God knows what difficulty he had to encounter in making Wilayat Ali Khan pay up the Rs. 4,900", that Wilayat Ali Khan about 14 years ago borrowed money from Gauri Sahai and his sons and paid him. In cross-examination he had to admit that the money which he advanced to Wilayat Ali Khan was not entered in his accounts. He admits that there are other entries relating to his business transactions with Wilayat Ali Khan in his account books. He says that this sum was not entered because the amount had been advanced from his house and not from his shop. I absolutely disbelieve this witness. It seems to me most improbable that Wilayat Ali Khan when he must have wanted money and when his property was being sold, would have paid off the debt of Jaffer Khan even if such debt existed. Jaffer Khan had not even a decree against him. I think, however, one has only to read the evidence of Jaffer Khan to come to the conclusion that there was no debt at all. In my opinion the purpose to which the money borrowed in 1898 by Wilayat Ali Khan was applied would appear from entries in his account books if they were produced.

The next point to consider is the probability of Bigga Begam being possessed of money to make the purchase. Ahsan Ali whose name was joined with herself in

the purchase says that the whole amount belonged to the lady, that she gave him Rs. 14,000 one day before the auction sale, that he went there to make the purchase on behalf of Bigga Begam. He states that before the purchase she and he were partners in a sugar factory and that the purchase was made in pursuance of an agreement between Bigga Begam and him that they should purchase the village share and share alike and that he would pay his share of the price in two or four years out of the income accruing from the sugar factory. In cross-examination he had to admit that he had no accounts of the profits and loss of the sugar factory. He made some vague statements that the *Musammal* had considerable means. He said that the father-in-law of Bigga Begam (that is, the father of Wilayat Ali Khan) used to allow her Rs. 200 or Rs. 250 per mensem and that after his death Wilayat Ali Khan made her a similar allowance. He admitted that the father of the lady had no *zamin-dari*, nor had the lady. He admitted that Wilayat Husain was the own brother of Bigga Begam and that the profit of his business (whatever it was) was not even assessable with income tax. His sons were cultivators and plied three or four *ekkas* on hire. It seems to me from a perusal of this witness' evidence that the father of Bigga Begam was a man of no property and that he was unable to give money to his son and still less to his daughter Bigga Begam. Furthermore, I think that if the lady really had property and was in a position to produce Rs. 14,000 in a lump sum the day before the auction sale, accounts would be forthcoming. The case for the plaintiffs may be summoned up as follows:

(1) The sale was admittedly fictitious to this extent that Ahsan Ali was joined in the purchase and he admitted by a deed that he never had any interest whatever therein;

(2) That the borrowing of the Rs. 12,000 two days before the sale unexplained proves that the money was the money of Wilayat Ali Khan;

(3) That not only is it not shown that the money belonged to the *Musammal*, but the evidence shows that she was a woman of no private means.

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The defendants, on the other hand, contend that the onus of showing that the money belonged to Wilayat Ali Khan lay on the plaintiffs and that they have not discharged the onus. It appears that after the death of the *Musammāt*, Wilayat Ali Khan and the other heirs accepted in writing an alleged Will made by the *Musammāt* in favour of Hakim Mahbub Ali Khan. Mr. O'Connor on behalf of the respondents strongly relied on this fact. He contends that Wilayat Ali Khan by accepting the Will admitted that the property belonged to his wife. I think the force of this argument entirely depends on the state of Wilayat Ali Khan's financial position at the time he made the so-called admission. If he was in financial difficulties, it might be much more to his interest to allow the property to come to his nephew than to claim it for himself. Furthermore, it appears that these admissions were made after the decree-holders had made a move to make this very property available for the satisfaction of the balance due on foot of the decree. An injunction had issued at the instance of the decree-holders restraining Wilayat Ali from dealing with the property.

Mr. O'Connor further relied on the fact that the decree-holders had never challenged the title of *Musammāt* Bigga Begam between the years 1898 and 1908. He contends that this fact shows that the decree-holders themselves considered that the property really was the property of the *Musammāt*, otherwise they would have attached it long ago. I am not much impressed with this argument. Up to the year 1906 when the decree under section 90 was obtained, only the mortgaged property could be made available for the satisfaction of the mortgage-decree and it was of no consequence whether the property belonged to the husband or wife. It was only when the mortgage security was exhausted that the decree under section 90 was or could be obtained. It is an admitted fact that after the decree under section 90 was obtained in the year 1906, the decree-holders succeeded in realising a very large sum out of property admittedly belonging to Wilayat Ali Khan other than the mortgaged property. It is,

therefore, not surprising that no move was made against this property until the year 1915 or 1909. The learned Subordinate Judge decided in favour of the defendants. He says in his judgment: "It was argued on behalf of the plaintiffs that Bigga Begam was not rich enough to pay for the property. But from the evidence of Muhammad Ahsan, Hamid Ali Khan and Ashraf Ali Khan, witnesses examined by the defendant, it appears that she was a rich lady. These witnesses have stated that she was in receipt of a sum of Rs. 200 a month from her father-in-law from the date of her marriage and from her husband from the date of his father's death. Muhammad Ahsan witness has stated that Bigga Begam and he were partners in a *khandsal* concern. The witnesses Gobardhan Das and Ramji Mal could not state if Bigga Begam had any money of her own. They did not know her father and brothers. Ramji Mal no doubt adds that he infers that her father must have been an ordinary man from the fact that her nephews ply *ekkas* now-a-days. But there is nothing extraordinary about a rich man's heirs to be placed in that position, but to judge of their predecessor from their present state of wealth is a far-fetched conclusion. Such being the evidence of the plaintiffs' witnesses, the testimony of the defendant's witnesses on this point must be believed." It seems to me that the learned Judge has not fully appreciated the force of the evidence. He disbelieves perhaps with some reason the evidence of Gobardhan Das and Ramji Mal that when Wilayat Ali Khan was executing the two mortgages for Rs. 6,000 each, he openly stated that the money was being raised for the very purpose of purchasing the property. It is suggested that if a secret purchase was being made for the debtor, he would not speak about it. It must be remembered, however, that at that time Wilayat Ali Khan had still a large amount of property, the amount of the decree had not swelled to the extent it subsequently did by the accumulation of interest and it may well have been then hoped that the decree would be discharged. But even if we discard the oral evidence, the fact still remains that Wilayat Ali

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Khan raised Rs. 11,000 odd at the very time the property was being sold and that no satisfactory account is given as to how this money was applied. On the contrary the account that is given cannot be believed. The learned Judge says "from the evidence of Muhammad Ahsan, Hamid Ali Khan and Ashraf Ali Khan it appears that the *Musummat* was a rich lady." I have already dealt with the evidence of Muhammad Ahsan. It is true that all these three witnesses make a vague statement that the lady was rich and that her father was a rich man but it is not shown that they had any personal knowledge of these matters, and it appears from the cross-examination of the witnesses that her father was not a rich man. There is not a particle of evidence that the lady got property from her father during his life-time or at his death. The witnesses say that she got an allowance of Rs. 200 a month from her father-in-law and afterwards from her husband, but this allowance would not make the lady a "rich" lady and it is not shown how these witnesses came to know that she received an allowance of Rs. 200 a month. If the lady was a rich lady it is certain that she would have had account books. It seems to me that the learned Judge has overlooked the significance of the admitted fact that Rs. 11,000 odd was raised on the very eve of the sale and that he has come to the conclusion that she was a rich woman on evidence not worthy of the name. I am quite satisfied on the evidence that the money which purchased the property belonged to Wilayat Ali Khan and not to his wife. If this view be correct, it is quite unnecessary to consider whether Wilayat Ali Khan could assent to the Will of his wife and so defeat his creditors. I think the Court below had a certain amount of sympathy, perhaps not unnatural, with the defendants on the ground that the decree-holders have realised a very large sum on foot of their decree. We are bound, however, to throw aside any feeling of this kind and to decide the case on the evidence before us. I would allow the appeal.

RAFIQUE, J. I concur.

By THE COURT.—The order of the Court is that the appeal prevails and is allowed. The decree of the lower Court is set aside and the claim of the plaintiffs-appellants is decreed, with costs of both the Courts

including fees in this Court on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 22) AND 274 OF 1913.

October 14, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL, REPRESENTED BY
THE COLLECTOR OF SOUTH CANARA—
PLAINTIFF—APPELLANT IN APPEAL No. 220
OF 1913 AND RESPONDENT IN APPEAL
No. 274 OF 1913.

versus

SUBRAYA KARANTHA—DEFENDANT—
RESPONDENT IN APPEAL No. 220 OF 1913
AND APPELLANT IN APPEAL No. 274 OF 1913

Escheat—Crown, suit by—Burden of proof as to failure of heirs—Evidence Act (1 of 1872), s. 13—Ejectment—Lease—Relationship—Gotra.

Per Wallis, C. J.—In a suit by the Government for ejectment of the defendant on the ground of escheat, it lies upon the Crown to prove at least *prima facie* that the deceased died without heirs, and it cannot rely upon the want of title of the party in possession. [p. 591, col. 2.]

Gudhari Lal Roy v. Bengal Government, 12 M. L. A. 448; 10 W. R. P. C. 31; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 153; 2 Sar. P. C. J. 382; 20 E. R. 408, followed.

The fact that in another contested suit a party has failed to prove the relationship of his line with the deceased is evidence against the existence of the right of that line as heirs of the deceased and is relevant under section 13 of the Evidence Act. [p. 593, col. 1.]

Natesi Gramani v. Venkatarama Reddi, 17 M. L. J. 518; 30 M. 510; 2 M. L. T. 45; *Mahamad Amin v. Hasan*, 3 B. 143; 9 Bom. L. R. 65, followed.

Where a lessee is in possession, the plaintiff to succeed in a suit in ejectment need not sue to set aside the lease. [p. 593, col. 2.]

Modhu Sudan Singh v. Rooke, 25 C. 1; 24 I. A. 164; 1 C. W. N. 433; *Harihar Ojha v. Dwarathi Misra*, 33 C. 257; 1 C. L. J. 408; 9 C. W. N. 636; *Bijoy Gopal Mukerji v. Krishna Mohini Debi*, 34 C. 329; 9 Bom. L. R. 602; 4 A. L. J. 329; 5 C. L. J. 334; 11 C. W. N. 424; 17 M. L. J. 154; 34 I. A. 87 (P. C.); 2 M. L. T. 133, followed.

Per Seshagiri Aiyar, J.—It is the common *gotra* that determines relationship between the parties, and not the use of a common family name. [p. 594, col. 2.]

When once the Crown establishes *prima facie* that the deceased died without heirs, the burden is shifted on to the party in possession to show that he is in the line of heirs. [p. 595, col. 2.]

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Gridhari Lall v. Bengal Government, 12 M. I. A. 448; 1 B. L. R. P. C. 44; 10 W. R. P. C. 31; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 E. R. 408; *Collector of Masulipatam v. Cavalry Venkata Narrainapah*, 8 M. I. A. 500; 2 W. R. P. C. 59; 1 Suth. P. C. J. 417; 1 Sar. P. C. J. 752; 19 E. R. 620; followed.

Appeals against the decree of the Court of the Subordinate Judge of South Canara, in Original Suit No. 61 of 1911.

FACTS appear from the judgment.

The Government Pleader, for the Government.—The Subordinate Judge has clearly gone off the issue; he says that the various instances in which the claim was set up show that the plaintiffs in those suits must have been the heirs. It is enough in this case for the Government to show, that there is some *prima facie* evidence that the deceased died without heirs. There were three suits brought against the widow when she alienated the properties in two of which they, the plaintiffs, were referred to regular suits, and in the third the right was negatived. As against the only possible heir, the right was entirely negatived.

(2). The judgment which negatived the right is relevant under section 13 of the Indian Evidence Act.

Mr. C. V. Ananthakrishna Aiyar, for the Respondent.—It is for the Government to prove *prima facie* that the deceased died without heirs. That is clearly laid down in the case of *Collector of Masulipatam v. Cavalry Venkata Narrainapah* (1).

JUDGMENT.

WALLIS, C. J.—This is a suit brought by the plaintiff to declare that the properties in South Canara of the late Zalle Subraya, who appears from Exhibit N to have died in that district in the year *Parthiva*, 1825—6, escheated to the Crown for want of heirs on the death of his widow Manjamma, who appears to have died at an advanced age in January 1906 at Benares. The suit was brought against the defendant in possession, and the latter in his written statement set up the existence, among other alleged heirs, of the junior widow and the senior widow's daughter and daughter's son of one Venkatapathaya, who are described as

residing at Shimoga in the Mysore State. The Subordinate Judge has rejected the case set up as to the other alleged heirs, but has held that the descendants of Venkatapathaya are in the line of heirs of the deceased. Before dealing with the facts of this somewhat extraordinary case, it will be well to refer to what their Lordships have laid down in *Gridhari Lall v. Bengal Government* (2), the leading Indian case, as to cases which lie on the Crown in claims to escheat. In the course of the argument in that case Kelly, C. B., observed that in England in a writ of Intrusion or Ejectment, the Crown must, to take lands by escheat, prove there was an entire failure of heirs, and so also of a Lord of the Manor with respect to copyholds on the death of a tenant without heirs, and cannot rely upon the want of title of the party in possession.

In that case the Calcutta High Court had rejected the claim of the appellant Gridhari Lall, who had been in possession and recognized by Government as heir, but had decided that the decree against him should not be made absolute until the claims of other alleged heirs had been investigated, and had remanded the case with a direction to the District Judge to call upon these and any other claimants to come in and prove their case. Their Lordships, whilst disposing of the appeal on the ground that Gridhari Lall was an heir, deemed it right to take exception to the procedure adopted by the High Court and to point out that, as against a defendant in possession, the Crown was in the position of an ordinary plaintiff in an ordinary suit in the nature of an ejectment. Their Lordships went on to lay down that it lay upon the Crown to prove at least *prima facie* that the deceased left no heirs, and that the defendant was entitled to set up any *jus tertii* that might exist. The course taken by the High Court, in their Lordships' opinion, would have had the effect of causing the other claimants who had intervened as objectors to litigate their title with Government, casting apparently the burden

(1) 8 M. I. A. 500; 2 W. R. P. C. 59; 1 Suth. P. C. J. 417; 1 Sar. P. C. J. 752; 19 E. R. 620.

(2) 12 M. I. A. 448; 1 B. L. R. P. C. 44; 10 W. R. P. C. 31; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 E. R. 408.

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of proof on them, and seemed to their Lordships to deprive the appellant of his right to defend his possession on the ground of an existing *jus tertii*. It had been objected for the Crown that it could not be called upon to prove a negative, and it was apparently with reference to that objection that their Lordships guarded themselves by saying that it lay upon the Crown to prove at least *prima facie* that the deceased died without heirs.

Coming now to the facts of the present case, the deceased Zalle Subraya died in the year 1826 leaving a widow Manjamma and apparently no other near relations. Manjamma died at Benares in January 1906, having survived her husband for 80 years and having about 50 years before her death alienated her husband's properties in South Canara and removed herself to Benares where she died. No pedigree or family tree showing the alleged relationship has been produced from proper custody, and the defendant is obliged to rely on the pedigrees or statements of relationship which are to be found in the pleadings in the litigation already mentioned. As the alleged common ancestor Venkappa is fourth in ascent from the deceased who died in 1826, direct oral evidence is not to be looked for. Nor again is there any oral evidence worth considering that either Subraya or his widow ever recognized the alleged relationship. On the other hand there are denials, no doubt, of an interested character by Manjamma in the litigation already referred to. In view of this litigation and of the conduct of Manjamma in alienating her properties and removing to Benares, it is not perhaps surprising that no communication should have passed between her and Venkatapathy's family after her removal to Benares, but the result is that there is no evidence of recognition any more than there is any direct evidence of relationship in support of the defendant's case. We are in effect left to rely on evidence of assertion of title as reversioners by Venkatapathy's line in certain suits filed between 1847 and 1872, in one of which the alleged relationship was found not to be proved. The Subordinate Judge lays much stress upon the improbability

that Venkatapathy's family would have persisted so long in their claims if they had been concocted, but I cannot attach much weight to this argument, and I do not think the evidence of assertion it such as would justify us in holding the alleged relationship proved in view of the fact that every assertion appears to have been met with a denial by Manjamma, and that in the only case where the issue was tried there was a finding against it.

Exhibit N is the judgment in Original Suit No. 280 of 1847 in the Court of the Sudder Amin of Honnavar, an unsuccessful suit brought against Manjamma and others by the widow of one Jalle Gundappa, who was alleged to be the undivided brother of the deceased. Paragraph 11 shows that Venkatapathy's grandfather Zalle Venkatapathy had presented a petition stating that he was the undivided *dayadi* of the deceased and that his claim should not be prejudiced by the suit. The petition was recorded with the observation that if his allegation was true he might bring a separate suit.

This judgment was pronounced on 8th March 1852, and it was only some years later that Venkatapathy's father Timmarasayya brought two suits, Original Suit No. 731 of 1862 and Original Suit No. 15 of 1864, in the Court of the Taluq Munsif of Kundapur. The plaintiff sued to recover the properties of the deceased as his undivided *dayadi* from the widow and her alienees, and in her written statement she denied that he was a member of her family and alleged that he had no right whatever in the property. In Exhibit M which is a translation of the judgment from the Canarese, the Munsif observed in paragraph 11: "the first question to be considered is whether the plaintiff and the first defendant are members of the same family, and whether either the plaintiff or his ancestors have either enjoyed the suit property or obtained the benefit thereof. In respect of this he has examined four witnesses in Kavelidurga Taluq (in Mysore, then under a Chief Commissioner) and four witnesses in this Court. Of these only two have given some particulars of the family, but they did not explain satisfactorily how they came to know them. From the evidence of the remaining witnesses nothing has been proved.

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It appears that the first defendant is a lonely woman without any relations whatever and having property, has been enjoying the same absolutely from the beginning of the year—(illegible). It appears from the general statement of the witnesses that the 1st defendant brought and had (*sic*) the plaintiff in her house and got writing and other work done by him, that thereafter, as ill-feeling arose between them, she turned out the plaintiff; that formerly he used to come in this manner from the *ghauts* occasionally from time to time staying for some days and go away. As these facts alone are not sufficient for establishing any rights—"Some word is missing after this, but it cannot affect the sense, and this judgment seems to me to contain a finding as between the plaintiff in that suit, Venkatapathiya's father, and the widow Manjamma, that the plaintiff had failed to prove his relationship with the deceased. The fact that Venkatapathiya's father failed in a contested suit to prove the relationship of his line with the deceased fifty years ago when such an issue was much more susceptible of proof than it is now is, in my opinion, evidence against the existence of the right of that line to claim as heir of the deceased within the meaning of section 13 of the Evidence Act. This seems to be in accordance with the ruling of this Court in *Natesa Gramani v. Venkatarama Reddi* (3), to which I was a party, and on a re-perusal of the judgment of Beaman, J., in *Muhamad Amin v. Hasan* (4), which was cited on the other side and impressed me at the time, I think that this case, where the alleged relationship admitted of assertion, denial and recognition in a series of transactions extending over a long series of years, comes precisely within the class of cases to which Beaman, J., held the section specially applicable at page 153 of his judgment. If relevant, this evidence is, in my opinion, of great importance as it practically stands uncontradicted, seeing that the Subordinate Judge has rightly, in my opinion, disbelieved all the oral evidence for the defence in any way connecting Venkatapathiya's line with the deceased and we agree with him in this. The effect of this evidence is, moreover, strengthened by the subsequent conduct of

the parties. Timmarasaya, the plaintiff in these suits of 1862 and 1864, did not venture to file another suit, but his son Venkatapathiya filed Original Suit No. 24 of 1871 in the Court of the Principal Sudder Amin of Mangalore, making his father Timmarasaya a defendant, for a declaration that the alienations made by Manjamma were not binding on the reversioners. This suit was dismissed by the first Court and by the High Court in Second Appeal No. 657 of 1872 on the view which then prevailed that only the next reversioner could sue, but neither Timmarasaya nor Venkatapathiya after his death ever instituted any other suit, and the evidence of his daughter Thimmava shows that she and her family never put in any claim until they were asked to sign a claim at the instance of the defendant, after the Collector had issued a notice calling for claim. The Subordinate Judge has really nothing to go upon but the fact that the relationship has been asserted in three successive suits, and this, though it was not proved in the only case in which it was investigated, and the further fact of slight import that both the deceased and the petitioner in the suit of 1847 bore the first name of Zalle. The hesitation shown by Government as to whether they should file this suit or wait for certain deaths which would obviate the necessity of raising this issue proves nothing in support of the defendant's case. Without the evidence of the failure of Venkatapathiya's father to establish the relationship in 1864, there might have been more difficulty in saying that the plaintiff has established the *prima facie* case which he is required by law to make out, but that transaction should, in my opinion, be regarded as more than shifting the onus, and as I have already pointed, the same inference is suggested by the subsequent conduct of the parties. I would allow the appeal, reverse the decision and give judgment for the plaintiff. On the 5th issue we agree with the finding of the Subordinate Judge that the lease is not binding on the plaintiff, and we cannot accept his view that the plaintiff is not entitled to recover this property in the present suit without suing to set it aside. See *Modhu Sudan Singh v. Rooke* (5), *Harihar Ojha*

(3) 17 M. L. J. 518; 30 M. 510; 2 M. L. T. 455.

(4) 31 B. 143; 9 Bom. L. R. 65.

(5) 25 C. 1 (P.C.); 24 I. A. 164; 1 C. W. N. 433.

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v. *Dasarathi Misra* (6) and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (7). There is no ground of appeal as to the defendant's right to improvements, and we are not prepared to allow the point to be raised. We accept the finding of the Subordinate Judge who accepted the finding in paragraph 13 of the 2nd Commissioner's report. We think the Subordinate Judge was wrong in disallowing the plaintiff's right to mesne profits. The amount will be determined by the lower Court and embodied in the final decree, the mesne profits to run from 23rd September 1909, when the defendant was served with notice calling on him to surrender possession. By consent, we also direct the Court to ascertain what changes, if any, must be made in the figures given in paragraph 13 of the 2nd Commissioner's report, having regard to the suggestion that the defendant who has continued in possession, may have cut and carried away the trees valued by the Commissioner or exhausted the improvements for which an allowance was made, any such alteration to be embodied in the final decree. The plaintiff is also entitled to future mesne profits from date of suit to delivery of possession. The appeal is allowed and each party will bear his own costs of this appeal and there will be proportionate costs after mesne profits have been ascertained.

The other Appeal No. 274 of 1913 is dismissed with costs.

SESHAGIRI AIYAR, J.—I agree and wish to say a few words on the general features of the case. If the persons in whose favour a *jus tertii* is set up by the defendant sued to recover the plaint properties, I would have had no hesitation in holding that they have failed to establish their claim. The person put forward as the sister's son of Zalle Subraya, the last male owner, has absolutely failed to prove his relationship. I cannot believe that if he was related to Manjamma as he states, he would never have had any correspondence with her, would not have visited her in Benares and would not have adduced evidence of the observance of pollution on her death. Neither he, as the

alleged nephew of Gundappa, took any objection to the sale of all her property by Manjamma when she left for Benares—no suit was brought subsequently to contest the alienation. Equally unsatisfactory is the evidence regarding the claim of defence witness No. 1. He is unable to prove that he observed pollution when Gundappa's widow Kavaramma died. The Subordinate Judge was not impressed with this evidence and I do not differ from him.

The case of Thimmavva is more difficult. Naturally enough, great stress was laid by the learned Vakils for the respondent on the use of the family name Zalle. The evidence regarding this is very meagre. My Lord has dealt with it and I do not propose to examine it any further. It is noteworthy that in the genealogical trees filed from 1847 onwards, the word Zalle does not appear. There is a singular lack of testimony regarding the identity of Gotram between that of the claimant's father and that of the last male owner. This is very suspicious. In *Mitakshara*, Chapter XI, section 5, placitum 6, the concluding clause runs thus:—"The relationship of *samanodakas* extends to the fourteenth degree; or as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gotra* or the relation of family name." The family name is generally taken from the place in which the common ancestor originally lived. It is possible that this common family name may be the heritage of more than one group of persons. These may not be related to each other at all; but if the family name is associated with the common *gotra* (which is by repute the name of the *Rishi* of pre-historic days from whom descent is traced), then there will be something tangible to go by. I repeatedly asked the learned Vakils whether there was any evidence of the common *gotram*. The absence of this evidence is very significant. I, therefore, do not attach weight to the use of the name Zalle by the claimant's father and grandfather. Barring that, we have only the assertions of right on three occasions and the filing of genealogical trees. On each of the occasions, the course pointed out by the Court which would have brought matters to a head was not followed. Venkatapayya asserted the extravagant claim

(6) 33 C. 257; 1 C. L. J. 408; 9 C. W. N. 636.

(7) 34 C. 329; 9 Bom. L. R. 602; 4 A. L. J. 329; 5 C. L. J. 334; 11 C. W. N. 424; 17 M. L. J. 154; 34 I. A. 87 (P. C.); 2 M. L. T. 133.

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of being undivided in the suit of 1847 (between Kavamma and Manjamma). He was referred to a regular suit. Nothing was done till nearly 15 years after. Timmarasaya, the son of Vankappia, asserted that he was an undivided cousin of the husband of Manjamma in a suit of 1862 and in Original Suit No. 415 of 1864. These suits were dismissed. At this time Manjamma had granted an *arthamulgeni* lease to the defendant's vendor's predecessor; if the claim of being a joint member of the undivided family was found unsustainable, it is difficult to understand why the claim as reversioner or a declaration that the alienation was not binding beyond the widow's life-time, was not subsequently litigated. At the time of the third litigation, the unsuccessful plaintiff of 1864 was alive. His son sued now. He was nonsuited on the ground that his father was alive. Yet, the father did not sue. Nor did the son, subsequent to the death of the father, pursue his remedies. These are very suspicious circumstances. I am, therefore, unable to attach weight to the three assertions of right referred to by the Subordinate Judge.

It was argued by Mr. Ananthakrishna Aiyar that the burden of proof lies on the Secretary of State. He relied on *Gridhari Lall v. Bengal Government* (2). In that case, the defendant in possession was an undoubted relation of the last male-holder. He was the father's maternal uncle of the deceased. The question was whether he was an heir under the Benares School of Law. The Judicial Committee held that he was. Their Lordships further pointed out that "the appellant was entitled to defend his possession not only by proof of his own title, but by setting up any *jus tertii* that might exist. By an alternative plea he did set up such a bar to the respondent's suit; and the title of those persons who, he says, are, failing himself, the heirs of Woopendro Chunder Roy, has never yet been determined." Where a specific individual is put forward in the written statement as an heir and the right of that individual was not determined, the Government could not say that the property has escheated. I do not understand the above passage to lay down, before there can be an escheat, that the Government should affirmatively establish the invalidity of the

claim of the third party whose title was pleaded by the defendant. Their Lordships intimate in the earlier portion of the judgment that the Government should prove *prima facie* that the last male owner died without heirs. This has been done in this case. Nobody claiming heirship to Subaraya is in possession. No persons who, in common parlance, could be said to be relations, have been found to have had any correspondence with the woman who left for Benares 50 years ago. This is all the *prima facie* proof that can be expected. The burden then would be shifted to each of the claimants to establish *prima facie* his relationship to the last male-holder. If that is not satisfactorily done, the Government must succeed. The decision of *Collector of Masulipatam v. Cavalry Vencata Narrainapak* (1) supports this view. I, therefore, agree with the learned Chief Justice that the appeal should be allowed and in the further order which he proposes to make.

Appeal allowed; Suit decreed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1136 OF 1914.

June 26, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Shadi Lal.

THE IMPERIAL OIL, SOAP AND GENERAL MILLS COMPANY, LTD., DELHI—

PLAINTIFF—APPELLANT

*versus*WAZIR SINGH AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Company—Director acting as such for many years
—Third person, if can question his power—Share-holder
—Estoppel.

When a Company is shown to have accepted a certain person for many years as its Director and has never on any occasion repudiated any of his acts as such, it is not open to one who has no concern with the Company to challenge the appointment of such Director or to contest his authority to act on behalf of the Company. [p. 596, col. 2.]

When a share-holder of a Company takes part in nearly all the general meetings of the Company and joins in the annual appointment of its Director without taking exception to his appointment, he is under the circumstances debarred by his conduct from objecting to the validity of the Director's appointment or to his authority to act for and on behalf of the Company. [p. 596, cols. 1 & 2.]

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Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 19th February 1914, affirming that of the Subordinate Judge, 2nd class, Delhi, dated the 30th October 1913, dismissing the claim.

Mr. Obedulla, for the Appellant.

Rai Sahib Lala Moti Sagar, for the Respondents.

JUDGMENT.—This suit was instituted in the Court of the Subordinate Judge, Delhi, on the 21st of April 1913 and purports to be by the "Imperial Oil, Soap and General Mills Company, Limited, Delhi," the plaint being signed, verified and presented on behalf of the said Company by Mr. Clarence Kirkpatrick, who is described in the plaint as the sole Director of the said Company. The claim was for rendition of accounts and for recovery of certain sums due for articles alleged to have been supplied to defendant No. 1, Lala Wazir Singh, through defendant No. 2, Lala Ram Chand. A preliminary objection was taken by the defendants that Mr. Clarence Kirkpatrick had no authority to institute the suit on behalf of the Company or to do any other act in relation to the conduct of the suit. This objection was elaborately considered and discussed by the Subordinate Judge and by the Additional Divisional Judge who, after going into all the facts and history of the Company, were both of opinion that the objection must prevail and accordingly dismissed the suit.

A second appeal has been preferred to this Court on behalf of the Company and we have listened to lengthy arguments on a number of intricate and difficult questions of law, but we find it unnecessary to decide those questions as we hold that ground No. 7 of the grounds of appeal must prevail.

Defendant No. 2, Ram Chand, is a shareholder of the Company and a reference to the Company's General Meeting Minute Book shows that he was present at, and took an active part in, nearly all the General Meetings of the Company from August 1903 to the 24th of February 1912, and that from time to time he joined in the annual appointment of Mr. Kirkpatrick as sole Director of the Company. During all these years Mr. Kirkpatrick, to Ram Chand's knowledge, acted as such Director and there

is no indication on the record nor indeed is it suggested that Ram Chand on any occasion took exception to Mr. Kirkpatrick's acts as such Director. In these circumstances, we consider that Ram Chand has debarred himself by his conduct from objecting to the validity of Mr. Kirkpatrick's appointment or to his authority to act for and on behalf of the Company.

As regards Lala Wazir Singh, the case is somewhat different as he is not a shareholder of the Company and did not in any way participate in electing Mr. Kirkpatrick as Director. On the other hand, however, it is to be remembered that he is a mere outsider and that the Company as such has, so far as we can see, accepted Mr. Kirkpatrick as its sole Director ever since 1905 and that it has never on any occasion repudiated his acts or denied his authority as such *de facto*, if not indeed *de jure*, Director. When a Company is thus shown to have accepted a certain person for many years as its Director and has never on any occasion repudiated any of his acts as such, it is not, we think, open to one who has no concern with the Company, to challenge the appointment of such Director or to contest his authority to act on behalf of the Company. In the present case, it is not urged—and it is certainly not proved—that the Company as such disapproves or repudiates Mr. Kirkpatrick's conduct in instituting the present suit and that being the case, Lala Wazir Singh has no right to ask that this claim shall be dismissed on the ground that Mr. Kirkpatrick had no authority from the Company to institute the suit.

We accordingly accept the appeal and setting aside the orders of the Courts below we remand the case under Order XLI, rule 23, Civil Procedure Code, to the Court of the Subordinate Judge, Delhi, for decision on the merits. The Court-fee stamp on this appeal will be refunded and all other costs will abide the event.

Appeal accepted.

CO-OPERATIVE HINDUSTAN BANK, LTD. v. BHOLA NATH.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT No. 257 OF 1911.*

July 13, 1914.

Present:—Mr. Justice Chitty.

CO-OPERATIVE HINDUSTAN BANK,
LTD.—PLAINTIFF

versus

BHOLA NATH BOROOAH—DEFENDANT.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 3, 8 and 15—Arbitration—Order of reference authorising arbitrator to extend time made by consent of parties—Arbitrator extending time after the period originally fixed by Court had expired—Arbitrator after such time, if functus officio—Award submitted within such extended time, if must be set aside—Arbitrator's interest in subject-matter in suit, when insignificant and unknown to him, if would invalidate award.

Where an order of reference to an arbitrator under Schedule II of the Code of Civil Procedure (Act V of 1908) fixed three months' time for the submission of the award to Court and also empowered the arbitrator to extend the time for such submission from time to time by endorsement in the office copy of the order:

Held, that when the Court had made the order by consent of the parties, there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired. [p. 600, col. 1.]

But the arbitrator could only extend the time in such cases, before the time originally fixed for making the award had expired. If he did not do so, he was by reason of effluxion of time *functus officio* and had no further jurisdiction in the matter. As in this case, the arbitrator had extended the time after the three months originally fixed by Court had expired, the award must be set aside, although it was submitted within the time so extended by the arbitrator. [p. 600, col. 1.]

If an arbitrator, unknown to one of the parties, has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator. If, however, his interest is insignificant and unknown to himself so that it is impossible that it could have influenced his award in any way, the Court would not be disposed to set aside the award. [p. 600, col. 2.]

FACTS.—This suit was referred by consent of the parties by Mr. Justice Fletcher, sitting on the Original Side of the High Court, under the provisions of Schedule II of the Code of Civil Procedure (Act V of 1908), to the arbitration of Babu Jogendra Nath Mukherjee, a Vakild of the Calcutta High Court, on the 21st of July 1913. The material portion of the order of reference was as follows:

"That all matters in difference in this suit between the parties hereto be referred

to the final decision of Babu Jogendra Nath Mukherjee, Vakild of this Court, who is to make his award in writing and submit the same to this Court together with all proceedings, depositions and exhibits before him within three months from date on which an office copy of this order of reference shall be delivered to him or within such further time as the arbitrator shall allow himself by endorsement on the office copy of the order." The arbitrator submitted his award to the Court on the 1st of June 1914.

The defendant thereupon applied to the Court for setting aside the award on, amongst others, the following grounds:—

"That the provision for extension of time by the arbitrator by endorsement on the order aforesaid, is not justified by the provisions of the Code of Civil Procedure and that the said order is without jurisdiction.

That the order of reference was served on the arbitrator on the 18th of August 1913, but neither the petitioner, nor his Solicitor or Counsel was aware when the order was actually served on the arbitrator, as the arbitrator had not drawn their attention to this fact in the course of proceedings before him.

That the arbitrator commenced the proceedings on the 23rd of August 1913 and went on from time to time till the 15th of November, when the same was adjourned to the 22nd of November 1913.

That there were sittings on the 22nd and 23rd of November and that the petitioner's Counsel and Solicitor attended these under a misapprehension that the time had not then expired.

That at the sitting of the 28th of February which followed, the arbitrator mentioned to the petitioner's Counsel that the three months' time fixed by the order of the Court had expired, and that he had not extended the time as he believed that it was understood that he would go on.

That the Counsel for the petitioner thereupon took exception to the portion of the Court's order relating to the extension of the time by the arbitrator and pointed out to him that under Schedule II, Articles 3 (1) and 8 of the Code of Civil Procedure, the Court alone could extend the time and that if the arbitrator extended the time

*The report of this case has been taken from the Calcutta Weekly Notes with permission.—Ed.

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then without reference to Court, he must take the responsibility of the course upon himself.

That thereafter the arbitrator intimated to the parties that he would extend the time to the 31st of May 1914 (which was a Sunday) and that the petitioner (until the award was filed in Court on the 1st of June and that even then he) did not know when the order, extending the time had been endorsed by the arbitrator on the office copy of the order, as he did not give any date of the endorsement. That the petitioner had also discovered since the submission of the award that the arbitrator was a share-holder in the plaintiff Bank and that for this as also other reasons aforesaid, the award should be set aside."

Messrs. B. Chakravarti, S. P. Sinha, J. Chaudhuri and B. K. Lahiri, for the Defendant-Petitioner.

Mr. H. D. Bose, for the Plaintiff Bank.

Mr. B. Chakravarti, for the Petitioner, urged that after the three months originally fixed by the Court, the arbitrator had become *functus officio* and he had no authority to extend the time. The provision in the order of reference which purported to empower the arbitrator to enlarge the time by endorsement in the office copy of the order, must have been embodied in it, under a misapprehension that the reference was made under the Indian Arbitration Act (IX of 1899) which empowers the arbitrator to extend the time from time to time by such endorsement. See Schedule I, para. 3, of the Act. But this was a reference under the Code of Civil Procedure, Schedule II. The Code expressly provides that the "Court shall specify the time" for making the award. See Schedule II, para. 3, Civil Procedure Code. Then Schedule II, para. 8, provides that it is the Court that can enlarge the period, "from time to time either before or after the expiration of the period fixed for the making of the award." This was pointed out by Mr. J. Chaudhuri to the arbitrator before whom he appeared. But the arbitrator did not care to come before Court and apply for extension of time. He had committed other irregularities set out in our petition. If he had come before Court, then we could have brought these to the notice of Court and asked to

annul the proceedings and make a fresh reference. The fact that Mr. Chaudhuri continued to appear before the arbitrator after he had drawn the attention of the arbitrator to the provisions of the law and asked the arbitrator to proceed on his own responsibility, cannot amount to acquiescence on Mr. Chaudhuri's part. In such cases, it is enough if the Counsel protests, and he is not bound to retire from the case. See *Hamlyn v. Betteley* (1). Further, in this case, it was not known to the petitioner when the arbitrator extended the time, as he did not put down any date above or below his endorsement extending the time. One thing is certain, that he did not extend the time within the three months originally fixed by the Court. The power given to the arbitrator to extend time amounted to delegation of the Court's powers and was without jurisdiction. Even assuming, but not admitting, that the provision in the order of reference empowering the arbitrator to extend the time was good in law, still the arbitrator did not extend the time before the three months fixed by Court had expired. He was then *functus officio* and he had in my view no authority to extend the time. But he could have come before Court at any time before submitting the award and applied to Court to have the time extended under Schedule II, para. 8, Civil Procedure Code. Mr. Chaudhuri was, therefore, fully justified in attending before him even after the time had expired. The Court had no jurisdiction to extend the time after the award had been submitted to Court. This is the view that was taken by the Judicial Committee of the Privy Council in *Har Narain Singh v. Bhagwant Kuar* (2). This has been followed in our Court, even after the Code of Civil Procedure of 1908, came into force. See *Shib Krishna v. Satish Chunder Dutt* (3). The wording of Schedule II, para. 15, clause (c), "after the expiration of the period allowed by Court" read with "no award shall be set aside except on one of the following grounds", shows clearly that this amendment of section 521 of the Code of 1882, was made in deference to the Privy Council decision referred

(1) (1880) 6 Q. B. D. 63 at p. 65; 70 L. J. Q. B. 143 L. T. 790; 29 W. R. 27.

(2) 18 L. A. 55; 13 A. 300; 6 Sar. P. C. J. 14; 1 Ind. Jur. 283.

(3) 12 Ind. Cas. 13; 35 C. 522.

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to above. Further, the award should be set aside, because the arbitrator never disclosed the fact to the defendant that he is a shareholder in the plaintiff Bank. See *Dimes v. Grand Junction Canal* (4). In this case, the Lord Chancellor's decree was set aside, because he was a share-holder in the plaintiff Company which was not known to the defendant. In our Court, Maclean, C. J., set aside the award in *Kali Prosanno v. Rajani Kant* (5), because the arbitrator had not disclosed that he was the retained Pleader of a party. [In the course of Mr. Chakravarti's argument, the arbitrator was sent for and examined by the Court. The substance of his deposition will appear from the judgment of Chitty, J.]

Mr. H. D. Bose urged on behalf of the plaintiff Bank that the Privy Council decision relied upon by Mr. Chakravarti had been superseded by the provisions of the Civil Procedure Code of 1908, and referred to Schedule II, para. 15, clause (c), of the Code of 1908 and section 521 of the Code of 1882. The case of *Shib Krishna v. Satish Chunder Dutt* (3) was, therefore, wrongly decided. He referred also to section 148, Civil Procedure Code, which is a new section and which gave the Court an absolute discretion to extend time at any time, the Court pleased. The provision in the order of reference empowering the arbitrator to extend time was not bad, but was sanctioned by long-standing practice on the original side of the Calcutta High Court. Even if the endorsement extending time was bad after the period fixed by Court had expired, the fact that defendant's Counsel attended the proceedings, would operate as estoppel and amount to waiver and acquiescence. See *Tyerman v. Smith* (6).

JUDGMENT.—This is a petition on behalf of the defendant Bhola Nath Borooah that the award made in this case by Babu Jogendra Nath Mukherjee, a Vakil of this Court, may be set aside. Two grounds have been urged in support of this application—(1) that the award was made out of time and (2) that Babu Jogendra Nath Mukherjee is a share-holder in the plaintiff Company and,

therefore, ought not to have acted as arbitrator between the parties. The suit was filed on 9th March 1911, to recover Rs. 25,000 on five hundis said to be signed on behalf of the defendant's firm by the defendant's son, and endorsed over to the plaintiff Bank by Rajendra Chandra Chuckerbutty. The defendant filed his written statement on 1st May 1911, pleading payment of Rs. 15,000. On the 9th July 1912, there was a reference to the arbitration of Babu Tara Kissors Chaudhuri, a Vakil of this Court. Nothing further was done under that order, and on the 21st July 1913 that order was discharged; and a fresh order of reference was made to Babu Jogendra Nath Mukherjee. Under that order, his award was to be made within three months from the date of the service of an office copy of the order upon him or within such further time as the said arbitrator might allow himself by endorsement on the said office copy of the order. The order was served on 18th August 1913. The three months would expire, therefore, on 18th November 1913. It is admitted that no award was made, nor the time extended, within that date. The arbitrator, however, proceeded with the reference and held a number of meetings. On 28th February 1914, it was brought to his notice that the time had expired and had not been extended. I have had the advantage of hearing the evidence of the arbitrator as to what precisely occurred. From his evidence, it is clear that on 28th February 1914, there was a discussion with regard to the confirmation of the arbitration. The arbitrator wanted to know if any objections would be taken; and pointed out to Counsel on either side that there might be a difficulty, and that, in case the award went against either party, that party might make a grievance of it. The plaintiff's Counsel appears to have made no objection to the arbitration continuing. The defendant's Counsel on the other hand said, that he would not commit himself, but left the responsibility of proceeding entirely with the arbitrator. Shortly afterwards, the arbitrator made an endorsement on the office copy extending the time for making the award to 31st May 1914. On 31st May, he made and signed his award. There are three additions or alterations in it, two merely verbal, but one of more importance, relating to the costs of the arbitration. Whether

(4) 3 H. L. C. 759; 88 R. R. 330; 17 Jur. 73; 10 E. R. 301.

(5) 25 C. 141 at pp. 143, 144.

(6) (1856) 25 L. J. Q. B. 359; 6 El. & Bl. 719; 2 Bos. (N. S.) 889; 119 E. R. 1093; 106 R. R. 782.

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he made these alterations on the night of the 31st or early in the morning of the 1st June, is not clear. The award is dated 31st May and was filed by him on 1st June 1914. The defendant against whom the award was made, now complains that the arbitrator had no authority to extend the time after 18th November 1913. This contention is, I think, correct. It was suggested that the order of this Court, dated 21st July 1913, was *ultra vires* in so far as it permitted the arbitrator to enlarge the time for making his award. I do not think that is so. The Court proceeded by consent of the parties and there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired. It is, however, clear that the arbitrator would only have such power as was conferred by the order, and he would, therefore, be bound to enlarge the time before the time originally fixed for making the award had expired. If he did not do so, he was by reason of effluxion of time, *functus officio* and had no further jurisdiction in the matter. It is a matter of great regret that when this difficulty was first noticed, and there was a discussion with regard to it before the arbitrator, an application was not made then and there to the Court under Schedule II, paragraph 8 of the Code of Civil Procedure, in which case the Court could have enlarged the time, even though the time fixed for making the award had expired. This was not done, presumably because the parties were willing to go on with the reference. I think that on the above ground, the award is invalid and must be set aside.

The second ground is that Babu Jogendra Nath Mukherjee was, unknown to the defendant, a share-holder in the plaintiff Company. It appears from Babu Jogendra Nath Mukherjee's evidence that it was also unknown to himself. He had, it appears, applied for one share of Rs. 50, but he says he never paid a pice in respect of it and was unaware until yesterday whether any share had been allotted to him or that his name was on the register of share-holders. It was stated at the Bar that on this share, Rs. 5 had been paid. With regard to this, Babu Jogendra Nath Mukherjee stated that he had paid nothing, but that some friend must have paid on

his behalf. Now it is clear that if an arbitrator, unknown to one of the parties, has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator, as the fact of his having such an interest might influence his decision. But in this case, as his interest was so small and was apparently unknown even to himself, it is impossible that it could have influenced his award in any way. If that were the only ground, I should have been unwilling to set aside the award merely because he held that one share. On the first ground, however, the award must be set aside, and I accordingly order that that be done. It appears to me that both the parties were willing to go on with the arbitration, even when they had been made aware of this difficulty. Under the circumstances, I direct that each party do bear their own costs of this application. I think that the suit should proceed before me with all expedition, as it has now been for three years on the file. The case will be set down for hearing four weeks from to-day, the written statement to be filed within a fortnight.

Messrs. S. D. Dutt and Ghosh, Solicitors for the Petitioner.

Mr. N. C. Bose, Solicitor for the Opposite Party.

Award set aside.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1228 OF 1913.

October 18, 1915.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Shadi Lal.

HARDEO RAM AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

Musammal PARBATI—DEFENDANT—
RESPONDENT.

Hindu Law—Intestate succession—Suit for possession of property on basis of alleged relationship—Onus—Secondary evidence of registered Will admitted without demur—Objection to admissibility, whether can be taken in appeal Pleadings.

The plaintiffs claimed to succeed to the property in dispute as the last male owner's heirs *ab intestato* under the Hindu Law, on the allegation that they were the sisters' sons of the father of the last male owner, and the defendant, a minor daughter of the

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last owner's brother, denied *inter alia*, the relationship alleged by the plaintiffs:

Held, that the *onus* lay on the plaintiffs to prove their allegation with respect to the relationship and as they failed to discharge the *onus*, the suit failed. [p. 604, col. 1.]

Where a Will which had been originally registered could not be found and for that reason the trial Court allowed a party to produce secondary evidence thereof apparently without demur by the appellants:

Held, that the appellants could not object to its admissibility on appeal, more especially as the memorandum of appeal did not contain any objection to that effect. [p. 602, col. 1.]

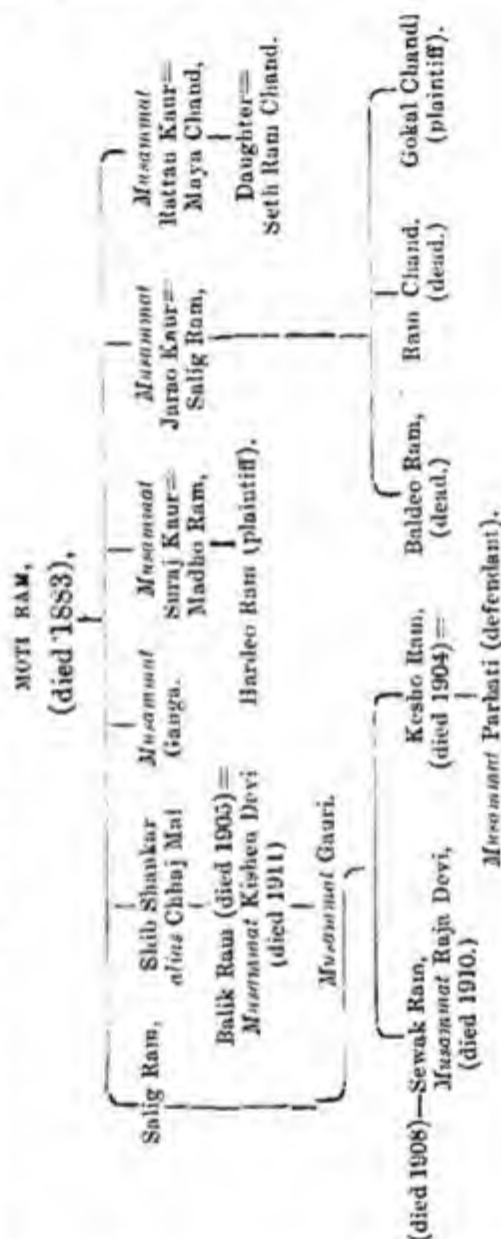
First appeal from the decree of the Divisional Judge, Delhi, dated the 14th March 1913, dismissing the suit with costs.

Messrs. Manohar Lal and Rali, for the Appellants.

The Hon'ble Mr. Muhammad Shafi, K. B.,
and Rai Sahib Babu Wazir Singh and Rai
Sahib Lala Moti Sagar, for the Respondent.

JUDGMENT.—The plaintiffs, who are the appellants in this Court, brought an action for the recovery of the property of one Sewak Ram, grandson of one Moti Ram, a Nagar Brahman of Delhi, and claimed to succeed to the estate as Sewak Ram's heirs *ab intestato* under the Hindu Law, on the allegation that they were the sons of two sisters of Sewak Ram's father. The claim thus set up, was resisted by the defendant Musammatt Parbati, a minor daughter of Sewak Ram's brother Kesho Ram, who denied, *inter alia*, the relationship alleged by the plaintiffs. Upon the pleadings of the parties, the learned Divisional Judge who tried the suit as an original Court framed seven issues, the most important of which is the first issue which runs as follows:—Is the pedigree table propounded by the plaintiffs correct and are they related to Moti Ram as alleged? On the question of fact embodied in this issue, he has recorded his finding against the plaintiffs with the result that he has dismissed the suit, *in toto*. It is against the judgment and the decree dismissing their suit that the plaintiffs have preferred the present appeal to this Court and it is manifest that unless they succeed in establishing the relationship, which is the foundation of their claim, they have no right whatever to the property in dispute.

To understand the point in controversy between the parties, it is necessary to set out the following pedigree table put forward by the plaintiffs :—



Moti Ram, who was the head of the family, died in 1883 leaving a Will, a copy of which has been placed upon the record. The original document, which was a registered one, could not be found and for this reason the trial Court allowed the defendant to produce secondary evidence thereof apparently without demur by the appellants, and we think it is now too late

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for them to object to its admissibility, more especially when we find that the memorandum of appeal does not contain any objection to that effect.

It appears that Salig Ram predeceased his father and that the property which descended from Moti Ram was partitioned in 1885 between his son Shib Shankar alias Chhaj Mal on one side and the two sons of Salig Ram on the other, in accordance with the award of Madho Ram, father of the plaintiff, Hardeo Ram. The deed of partition, which is dated the 30th June 1885, is on the record and will be referred to hereafter in so far as it has a bearing upon the matter before us. It may be mentioned here that the property, which came to Chhaj Mal's share, is in the possession of his granddaughter *Musammât Gauri*, and that, after the death of Kesho Ram in 1904, the remaining half of Moti Ram's estate came into the exclusive possession of Sewak Ram who died in 1908, leaving his widow *Musammât Raja Devi* whose death in 1910 led to the present litigation. Now it is undeniable that the defendant, *Musammât Parbati*, is the daughter of Kesho Ram and that she being in possession of the property, is entitled to retain it until evicted in due course of law by a person or persons who establish their superior right. The plaintiffs assert that Moti Ram had, besides other issue, two daughters, *Musammât Suraj Kaur* and *Musammât Jarao Kaur*, who were their mothers; but this assertion is controverted by the defendant.

It will be observed that, with the exception of these two ladies and their descendants, the rest of the above genealogical tree is admitted by the parties and the question for determination is whether the plaintiffs, on whom the *onus* admittedly lay, have succeeded in proving that *Musammât Suraj Kaur* and *Musammât Jarao Kaur* were daughters of Moti Ram. Now one would expect that in a family of this kind owning a valuable estate in the town of Delhi, there would be some documentary evidence setting the matter one way or the other. But we find that there is no document of any sort or kind that would enable the Court to come to any definite conclusion. The only two

documents, which have been referred to by the learned Counsel for the parties, are the Will of Moti Ram and the partition-deed of 1885, and neither of them is of any importance with respect to the relationship. The former mentions only the male descendants of the testator and omits all reference to daughters, though it is common ground that two, at any rate, were in existence at his death. In the partition-deed, the son and the grandsons of Moti Ram describe Madho Ram, the father of plaintiff Hardeo Ram, as their *rishtedar*; but a reference to Exhibit VI (printed at page 5 of the paper-book) conclusively shows that Madho Ram's grandfather was the brother of one Rattan Chand, who married *Musammât Radhan*, a sister of Moti Ram, and that Madho Ram was, therefore, properly described as their relation by the descendants of Moti Ram. In the face of this admitted relationship, which fully accounts for the use of the above quoted word, the plaintiffs cannot invoke it to support their contention that Madho Ram had another and closer relationship, namely, that he was a son-in-law of Moti Ram. It is clear that both these documents are altogether inconclusive and do not lead to any inference in favour of the plaintiffs.

Turning now to the oral evidence, we observe that the testimony of the plaintiffs' witnesses is flatly contradicted by the evidence of the witnesses produced by the defendant. It is noteworthy that of those examined on behalf of the plaintiffs, there are only two, namely, Chuni Lal and Shankar Lal, who were mentioned in the first application, dated the 1st April 1912, made to the Court for summoning witnesses; and it appears that the remaining witnesses named therein were given up and that other persons were substituted for them, as the case progressed from time to time. This circumstance naturally excites suspicion and detracts from the value to be attached to the oral evidence. Further, we notice that the majority of the witnesses are partisans of the plaintiffs and do not seem to possess any special means of knowing the descendants of Moti Ram or their kinship with the plaintiffs.

The judgment appealed against gives a

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irly correct version of the evidence of the witnesses for the plaintiffs and after examining it in the light of the arguments advanced on both sides, we consider that the learned Divisional Judge has not underestimated the value to be placed upon it. It would make our judgment unnecessarily long, if we were to deal in *extenso* with the evidence of each witness *seriatim* and set forth our remarks in connection therewith. We think that witnesses Chuni Lal, Narain Das, Anant Ram, Sri Ram, Manohar Lal, Nathu Mal, and Basti Ram need not detain us long and may be disposed of with a few general observations. None of them seem to be men of any real *status* in society and are unable to give any satisfactory explanation of their means of knowledge of Moti Ram's descendants. They are interested in the plaintiffs and their evidence appears to be unsatisfactory.

Of the remaining witnesses, Hamir Lal and Shiv Ram are brothers and the former is married to the sister of the plaintiff Hardeo Ram. Consequently both of them are vitally interested in the success of the suit, and as observed already, neither of them was summoned for the first hearing. There are only three witnesses, namely, Shambho Nath, Devi Sahai and Shankar Lal, whose evidence deserves serious consideration. Now Shambho Nath was undoubtedly connected with this family, as his sister was the first wife of Kesho Ram, but the lady seems to have died about 17 or 18 years ago without leaving any issue. The witness is a young man of 33 years of age and has obviously no first-hand knowledge of the facts deposed to by him. Further, he is unable to specify the source of his information beyond stating that he heard of the relationship in his own family. Pandit Devi Shankar, being a Deputy Inspector of Schools in the United Provinces, is a respectable Government officer but it appears that one of his cousins is the wife of the plaintiff Gokal Chand, and he cannot, therefore, be regarded as a disinterested person. His evidence would have been of some importance, if he had disclosed to the Court, the means by which he came to know of the existence and the names of Moti Ram's daughters. The witness admits that he never saw Moti Ram, and as he does not belong either to Delhi (where the deceased resided) or to

Agra (where the plaintiffs are living), we are unable to find how the witness came to know about the female descendants of Moti Ram. In these circumstances, the only inference which we can deduce is that his information is based upon hearsay evidence. Lastly, there is the statement of Shankar Lal, who is alleged to be the *jons et origo* of this litigation. The witness claims to be the *probat* of Moti Ram's family and gives a detailed account of the various members thereof. He cannot, however, produce a single document in support of his testimony and it is plain that he is, by no means, favourably disposed towards the defendant. Not only does he admit that he is not the defendant's *probat*, but it is clear that he is her sub-tenant and that there is a dispute between him and the defendant over the payment of rent and also in connection with a sum of Rs. 1,000.

This summarises the case for the plaintiffs, which we think is amply rebutted by the evidence of the witnesses examined by the defendant. They are practically unanimous in stating that Moti Ram had only two daughters,—Musammatt Ganga and Musammatt Rattan Kaur; and one of the witnesses, Lakshmi Chand, gives very convincing evidence against the plaintiffs. There is no doubt that he was in a position to know of the descendants of Moti Ram, because we find that not only did his wife's sister marry Salig Ram but that his own sister married Salig Ram's brother, Chhaj Mal, and that he himself was a partner of Kesho Ram for nearly nine years. The witness is positive that Moti Ram had only two daughters, Musammatt Ganga and Musammatt Rattan Kaur, and that he never saw or heard of Suraj Kaur and Jarao Kaur. He is not partial to either party and no reason has been shown to us for thinking that he is perjuring himself in order to bolster up a false defence and thereby deprive the rightful owners of their inheritance.

Before we conclude, we should like to mention a few circumstances which, in our opinion, tell strongly against the version of the plaintiffs. The evidence on the record makes it pretty clear that on the occasions of deaths and marriages in the family in question, neither of the plaintiffs was ever present and that one Gokal Chand of Meerut, the grandson of Moti Ram's sister was

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requisitioned to perform at least some of the funeral ceremonies, *e. g.*, on the deaths of Kesho Ram and of the wives of Salig Ram and Sewak Ram. Now if the plaintiffs were the grandsons of Moti Ram, they would be more nearly related than Gokal Chand of Meerut and their abstention from all ceremonies of the families is wholly inexplicable. Further, there is not a particle of evidence to show that on the occasions of their own marriages, or of their brothers and sisters, or of their descendants, the plaintiffs ever received any presents from Moti Ram's family. And if the alleged kinship is not a mere fiction, the social usage demands that they should have been the recipients of the usual presents in cash and dresses at the time of each marriage. Moreover, it seems strange that there should not be any entry in a book, or any letter, or some other document during all these years which would support their assertion as to relationship. Nor is it easy to understand why Gokal Chand, admittedly a collateral of the plaintiffs and a grandson of Moti Ram's sister, and Seth Ram Chand, the son-in-law of Musammatt Rattan Kaur, both of whom are obviously cognizant of the affairs of the family, should not have been produced as witnesses by the plaintiffs.

Upon an examination of the entire material on the record and a careful consideration of the *pros* and *cons* of the case, we have arrived at the conclusion that the plaintiffs have not discharged the *onus* which rested upon them and that the finding of the learned Divisional Judge on the first issue must be affirmed. In this view, it is obviously unnecessary to deal with the other points, which can only arise in the event of the plaintiffs establishing their allegation with respect to the relationship. We accordingly confirm the judgment and the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 476 OF 1914.

September 23, 1915.

Present:—Mr. Justice Tyabji.

GOVINDASAMI PILLAI—DEFENDANT—
PETITIONER

versus

RAMASAMI AIYAR AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Landlord and tenant Occupation rent—Evidence—Unregistered lease deed, if admissible to prove rent fixed—Claim for occupation rent, whether transferable—Vendee of land, right of, to recover occupation rent for period prior to date of conveyance—Transfer of Property Act (IV of 1882), ss. 3, 6 (e)—Registration Act (XVI of 1908), ss. 17 (d), 49.

An unregistered document purporting to be a lease of immoveable property is not admissible in evidence even to prove the rent agreed to be paid. [p. 604, col. 2.]

The right to claim occupation rent is not a mere right to sue incapable of being transferred, but an actionable claim which can be transferred. Consequently, a vendee of a land is entitled to recover the occupation rent due on it even prior to the date of the conveyance. [p. 606, col. 1.]

Metropolitan Railway Co. v. Defries, (1877) 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 811, followed.

Ajoke v. Franklin, (1880) 43 L. T. 317; 44 J. P. 830, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment and decree of the Court of the Subordinate Judge of Kumbakonam, in Small Cause Suit No. 1480 of 1913.

Mr. V. C. Seshachariar, for the Petitioner.

Mr. N. S. Rangaswami Aiyangar, for Mr. T. Narasimha Aiyangar, for the Respondents.

JUDGMENT.—The question in this petition is whether the plaintiffs are entitled to recover a sum of Rs. 290 from the defendant for the use and occupation of certain lands.

There was a document between the parties purporting to be a lease but inasmuch as the agreement was reduced to writing but not registered, it could not affect the immoveable property by reason of sections 49 and 17 (d) of the Indian Registration Act, XVI of 1908.

The learned Subordinate Judge has, however, proceeded on the basis that, though this document is inadmissible for want of registration to prove the leasing or the tenants' right to the term in it, yet it "is admissible to prove the rent agreed to be paid." In my opinion this is an erroneous view of the law. Section

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17 (d) of the Indian Registration Act provides that "leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent" shall be registered; and section 49 provides that "no document required by section 17 to be registered shall affect any immoveable property comprised thereinunless it has been registered." The document Exhibit A, therefore, which purports to be a lease of the property, cannot affect the immoveable property. It has been argued before me that, if the document is looked at for the purposes of fixing the rent between the parties, it does not affect the property and, therefore, it may be operative in this regard notwithstanding sections 49. I cannot accede to this argument. When there is a lease with reference to immoveable property, it seems to me that the terms on which the property is leased "affect" that property within the meaning of section 49, and the rent reserved in the lease is the most important of the terms.

In my view, therefore, the Subordinate Judge's finding on the question of the amount of occupation rent due from the defendant to the plaintiffs is vitiated by the error. I find, however, that he refers to the terms of Exhibit B, which is a previous registered lease of half the land now in question. The rent fixed under that deed was Rs. 130 per annum, and the Subordinate Judge points out that if that document were taken as the basis for fixing the occupation rent in respect of the whole land now in question, the defendant would be liable to pay Rs. 260 per annum. I take it, therefore, that the Subordinate Judge indicates, with sufficient precision for my present purpose, that in his opinion the claim of Rs. 290 made by the plaintiffs is a fair claim. I agree with him; and I think it would be futile to call for a fresh finding on the point.

The next point argued before me is whether the plaintiffs have become entitled to this sum, assuming it to be a fair occupation rent. It is argued before me that they are not entitled, because the plaintiffs became the owners of the property in question only by a sale in their favour, dated the 23rd October 1912, and

that a part of the sum which is decreed to them as occupation rent became due prior to their sale-deed, that the claim for occupation rent is not such a claim as can be validly transferred and that when such a claim is purported to be transferred, it is of no effect and does not empower the alleged transferee to claim it.

The sale-deed, Exhibit E, in favour of the plaintiffs, provides that the plaintiffs shall hold and enjoy the said properties with the income accruing therefrom from the date of Exhibit D, the 8th December 1911, on which date the plaintiffs' vendor purchased the property.

I must here refer to a matter to which neither my attention nor the attention of the lower Court was drawn and which is not taken in the grounds of revision. It is this that the claim is for rent for the period between 1st September 1911 to 14th November 1912 and it has been allowed for that period. But the plaintiffs' sale-deed empowers them to recover the rent only, as from 8th December 1911. In spite of the fact that this point was not taken by the defendant, I considered it right to draw the attention of the Pleaders to it. Mr. N. S. Rangaswami Iyengar, who appeared for the plaintiffs, expressed his willingness to have a deduction made in the claim in respect of the period from 1st September 1911 to 8th December 1911, but said that as during this period also, his clients had a $\frac{1}{4}$ th share in the property, they should be allowed to recover $\frac{1}{4}$ th of the proportionate rent for that period. This offer, which I am informed, means a deduction of Rs. 48-12-0 from the decree amount, was not accepted. I do not think that I ought to interfere in this matter without the consent of the parties. Moreover, it seems to me that the calculation of the occupation rent is on a rough basis not too favourable to the plaintiffs, and I am not prepared to hold that on a fair basis, the deduction for the period between 1st September and 1st December ought necessarily to be proportionate or that the amount fixed for the period claimed would not be a fair amount for the period between 8th December and 14th November 1912.

I proceed to consider the question with reference to the period after the date of Exhibit D.

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The argument for the petitioner before me has been that the terms of the Transfer of Property Act, IV of 1882, section 6 (e), prohibit the transfer to the plaintiffs of any right to recover the occupation rent due from the defendant prior to the sale-deed in their favour, namely, prior to the 23rd October 1912.

The question shortly, therefore, is whether the right to claim occupation rent is:

(1) "a mere right to sue" incapable of being transferred, or

(2) such an actionable claim as is defined in section 3 of the Transfer of Property Act, which can be transferred under the sale-deed, and by being so transferred, empower the vendee to recover the occupation rent due on the land prior to the date of the conveyance.

In the *Metropolitan Railway Company v. Defries* (1), it was decided by the Court of Appeal in England, agreeing with the Divisional Court, that where premises are transferred with the rights to recover "all rents and profits", the right to recover occupation rent is also transferred.

In that case, the facts were that the plaintiffs agreed to purchase certain property from the defendants and the purchase was to be completed on the 29th September 1869, from which time the plaintiffs were to receive all rents and profits and to pay interest on the purchase-money until the completion of the purchase. The purchase, however, was not as a matter of fact completed until the 13th March 1876. The defendants had remained in possession, but had paid no rent. It was held that the defendants were liable to pay occupation rent for the period in question. Mr. Seshachariar sought to distinguish the *Metropolitan Railway Company's* case (1), on the ground that the amount that ought to have been allowed for occupation rent was admitted there, whereas in the case before me that amount has had to be determined in the manner mentioned in an earlier part of my judgment. This circumstance seems to me to be quite irrelevant to the real point. The *Metropolitan Railway Company's* case (1)

seems to me to be indistinguishable from the present except on one point (which was not taken before me), namely, that the occupation rent claimed there was not for a period prior to the date of the agreement for the sale of the property; but I do not consider that to be an important distinction.

What seems to me to be of substance is that the right to recover occupation rent was considered to follow the title to the property and to be included in the term "rents and profits." If the rent recoverable in respect of the period in question had been not occupation rent, but rent under a valid lease, the plaintiffs would have been entitled to succeed, and it seems to me that the case of *Metropolitan Railway Company v. Defries* (1) is authority for the proposition that in this regard, occupation rent is not different from rent due under a lease. The same point seems to have been assumed, though it did not come up for decision, in *Anker v. Franklin* (2).

A point was also taken before me that the defendant ought to have the benefit of section 132 of the Transfer of Property Act. But it was not suggested in the written statement or at the trial in the lower Court that there were any such equities or liabilities as the section contemplates. Mr. Seshachariar took the point for the first time in his grounds, but is not able even now to give any particulars of the equities or liabilities that may be in question. There is no substance, therefore, in this point.

It seems to me for these reasons that the plaintiffs were entitled to recover the amount decreed to them by the Subordinate Judge, and I dismiss the petition with costs.

Petition dismissed.

(2) (1880) 43 L. T. 317; 44 J. P. 830.

(1) (1877) 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 841.

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 69 of 1914.*

February 26, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Woodroffe.

PATIRAM BANERJEE—PLAINTIFF—

APPELLANT

versus

KANKINARRA COMPANY, LTD., AND

ANOTHER—DEPENDANTS—RESPONDENTS.

Broker—Undisclosed principal—Bought and sold notes—Contract—Construction by similarity—Contract Act (IX of 1872), ss. 222, 230—Arbitration.

The plaintiff was a broker who bought on behalf of the agents of the defendant mills a certain quantity of jute and he sent to the mill agents a bought note stating—"We have bought to your order and for your account from our principals, etc.", and at the same time he sent to the firm from whom the jute was bought, a sold note saying—"We have sold by your order and for your account to our principal, etc." The plaintiff disclosed to the mill agents the name of the firm of whom jute was bought about the time delivery was due, but more than three months after the contract was effected, whereupon the mill agents refused to recognise this firm and sought to make the broker liable as seller.

Held, by Jenkins, C. J.—that the plaintiff here was no more than an intermediary, and was not an agent for sale to whom the provisions of section 230 of the Indian Contract Act would apply so as to make him liable as an agent who has not disclosed his principal's name. [p. 613, col. 2.]

Contracts should be interpreted by themselves and it is improper to interpret one contract by reference to another because they may seem to differ very little, as it may result in identifying contracts which are wholly different. [p. 613, col. 2.]

Gubboy v. Aetoom, 17 C. 449, distinguished.

Southwell v. Bowditch (1876) 1 C. P. D. 374; 15 L. J. C. P. 630; 35 L. T. 196; 24 W. R. 838, followed.

Woodroffe, J.—A broker is an agent to find a contracting party and as long as he adheres strictly to his position as broker, his contract is one of employment between him and the person who employs him, and not a contract of sale or purchase with the party whom he in the course of such employment finds. [p. 614, col. 1.]

FACTS.—This was an appeal from a judgment of Chitty, J., by the plaintiff Patiram Banerjee.

It was a suit for a declaration that an award made by the Bengal Chamber of Commerce is invalid and inoperative as against the plaintiff, that the said award may be set aside, that in case the said award be held to be valid, the second

defendant K. D. Shaha may be declared liable to indemnify the plaintiff.

The bought and the sold notes were sent to the parties on the 2nd June 1913. The names of the opposite parties to the contract were disclosed by the plaintiff in writing on the 16th September 1913.

The material portions of the bought and the sold notes addressed by the plaintiff-appellant were as follows:—

Calcutta, 2nd June 1913.

Messrs. Jardine, Skinner and Co.,

Agents, Kankinarra Jute Mills Co., Ltd

Dear Sirs,

We have this day bought by your order and for your account from our principals

Two hundred and fifty kutchha bales of jute (quality, mark, weight and price and other conditions are then mentioned, etc., etc., etc.

Yours faithfully,

(Sd.) S. N. Banerjee & Co.,

Brokers.

Calcutta, 2nd June 1913.

Babu B. K. Shaha,

Calcutta.

Dear Sir,

We have this day sold by your order and for your account to our principals

(Then follow identical details of quantity, weight, price and other terms.)

Yours faithfully,

(Sd.) S. N. Banerjee & Co.,

Brokers.

Each of the above bought and sold notes concludes with an arbitration clause, which was in the following terms:—

"Any dispute arising out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce whose decision shall be accepted as final and binding on both parties to this contract."

The other material facts of the case will appear from the judgment of Chitty, J., which is as follows:—

"This is a suit brought by Patiram Banerjee, who carries on business as a broker in the name of S. N. Banerjee & Co., to have set aside an award which was made under the Rules of the Bengal Chamber of Commerce, and which ordered that he should pay to Messrs. Jardine, Skinner & Co., as Managing Agents for the Kankinarra

*The report of this case has been taken from the Calcutta Weekly Notes with permission.—Ed.

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Co., Ltd., the sum of Rs. 4,593-12 and the costs of the arbitration Rs. 197. The plaintiff has joined as defendants the firm of Messrs. Jardine, Skinner & Co., the Kankinarra Co., Ltd., and also K. D. Shaha. Against K. D. Shaha the plaintiff claims in the alternative that, in case the award be held to be valid, the defendant K. D. Shaha may be declared liable to indemnify the plaintiff and may be ordered to pay to the plaintiff the sums of Rs. 4,593-12 and Rs. 197. Against Messrs. Jardine, Skinner & Co., the plaintiff has obviously no case at all. It was argued that this award was made between him and Jardine, Skinner & Co. This is clearly not the case. The persons to receive payment were, no doubt, Messrs. Jardine, Skinner & Co., but only in their capacity of Managing Agents of the Kankinarra Co., Ltd., whose business, as such Managing Agents, they transact. The suit must, therefore, fail against Messrs. Jardine, Skinner & Co.

"The plaintiff put through a contract between the Kankinarra Co., Ltd., and K. D. Shaha on 2nd June 1913, the bought and sold notes being Exhibits A1 and A2 in this case. The plaintiff in doing that acted as broker, but in each case, he refrained from mentioning to the opposite party the name of the principal with whom the contract was being made. Thus he informed Messrs. Jardine, Skinner & Co., as Managing Agents of the Kankinarra Co., Ltd., that he had bought by their order and for their account from his principal 250 *kutch* bales of jute, the time for delivery of the jute being within September 1913, and the delivery to be made to the Kankinarra Jute Mills. On 11th September he wrote to K. D. Shaha to say that he had not yet received the documents for the contracts in question and directed him to see that the jute was delivered within due date. On 16th September the plaintiff wrote again to K. D. Shaha declaring Messrs. Jardine, Skinner & Co., as Managing Agents of the Kankinarra Co., Ltd., as principals in the above contract, and on the same day, he wrote a similar letter to Messrs. Jardine, Skinner & Co., declaring K. D. Shaha as the seller. Messrs. Jardine, Skinner & Co. at once, on 17th September 1913, wrote to the plaintiff saying that they

did not care to accept the principal's name in the contract, and added 'this contract must, therefore, stand as originally made out'. On 29th September 1913, Messrs. Jardine, Skinner & Co. wrote to the plaintiff for documents for the 250 bales of jute due on 30th September under this contract. The plaintiff had done nothing up to that day in consequence of the refusal of Messrs. Jardine, Skinner & Co. to recognise K. D. Shaha as the contracting party. On 30th September, he wrote to K. D. Shaha to say that he was still without documents from him against his contract, and that the due date for delivery was over on that day. He added 'we shall, therefore, be reluctantly obliged to buy against you and shall proceed to take legal proceedings to realize the amount of the market difference, if so advised'. On the same day, he writes to Messrs. Jardine, Skinner & Co. requesting them to ask the seller direct for the jute due under the contract. On the 3rd October 1913, Messrs. Jardine, Skinner & Co. replied that they had applied to him direct for the delivery of the September portion of the contract, and that they did not recognise his sellers and could have no dealings with them, and asked him further to note that, as he had not applied for extension of delivery, a bill for difference would be made against him. On the same day he appears to have intimated to K. D. Shaha for the first time that Messrs. Jardine, Skinner & Co. would not accept him as the principal under the contract. On 23rd October 1913, Messrs. Jardine, Skinner & Co. billed the plaintiff for the amount now in question, Rs. 4,593-12, and on the 25th, the plaintiff writes to K. D. Shaha: 'As you have failed to deliver 250 bales of jute due on 30th September last under this contract, we present our bill for the market difference of the jute on that day'. Subsequently Messrs. Jardine, Skinner & Co. acting on behalf of the Kankinarra Co., Ltd., as they have been acting throughout, referred the matter to the Bengal Chamber of Commerce for arbitration. The plaintiff asked for time of the Chamber of Commerce to consider his position in the matter of the arbitration, which was expressed to be between the Kankinarra Co., Ltd., on the

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one side and the plaintiff on the other. After two postponements for him to consider his position, the plaintiff ultimately stated that the contract was not between him and the Kankinarra Co., Ltd., but between his principal K. D. Shaha and the said Company. He, therefore, maintained that the agreement for reference did not bind him, and submitted that the Tribunal had no jurisdiction in the matter. The arbitration proceeded *ex parte*, with the result that the award was made against the plaintiff for the sums mentioned. So far as the plaintiff's case against the Kankinarra Co., Ltd., is concerned, it was argued that the contract and arbitration were not with that Company at all, but with Messrs. Jardine, Skinner & Co. With that I have already dealt. There can be no doubt whatever that the contract was one between the Company and the seller, and that Messrs. Jardine, Skinner & Co. were merely the Managing Agents carrying on the business of the Company and working on its behalf. The Company is a limited Company and such matters would be naturally transacted by its Managing Agents. Then, it is argued that the plaintiff did not submit to arbitration as between himself and the Kankinarra Co., Ltd. That appears to me to turn on the question of the plaintiff's liability under the contract. By section 230 of the Indian Contract Act, in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract is presumed to exist in certain circumstances, one of which is when the agent has not disclosed the name of his principal. Here he did not at first disclose the name of his principal, and it would be presumed that the contract was, if necessary, enforceable against him. He did, however, at a later stage disclose the name of K. D. Shaha as his principal, and the Kankinarra Co., Ltd., through Messrs. Jardine, Skinner & Co., declined to accept that person as seller. Now the obvious course for the plaintiff was to have told both the Company and K. D. Shaha that as the Company would not recognise K. D. Shaha as principal, there could not be any contract between them. If he had done that, there was no answer, and

he clearly could not have been made liable in any way. The plaintiff, however, did not take this course. He did not even inform K. D. Shaha of what Messrs. Jardine, Skinner & Co. had said until 3rd October, when the time for performance had gone by. He accepted the position which they proposed in their letter of 17th September that the contract should stand as it was, namely, with himself as broker and an undisclosed principal. He would, therefore, be liable to the undisclosed principal. The question is raised—whether that covers the clause referring to arbitration. It is a nice point and so far as I know is not covered by authority. I have no recollection of its ever arising before, but it appears to me that if the contract is enforceable against the broker as though he were a principal, it must necessarily follow that it is enforceable in its entirety and as he is entitled to the benefit of any clause in his favour, so also is he liable for any obligations which may be thrown upon him. He becomes for the purpose of the contract, a party to the contract and I think that he must be taken to be bound by the clause which accepts the arbitration of the Bengal Chamber of Commerce and agrees to take the decision of that Tribunal as binding. The plaintiff in clause 10 of his plaint has put forward a number of grounds for setting aside the award, but the 2nd, 3rd and 4th grounds have not in any way been pressed. With the 1st, 5th and 6th grounds I have dealt. It follows, therefore, that so far as the Kankinarra Co., Ltd., is concerned, the award must be held to be valid and binding on the plaintiff and cannot be set aside.

Then, there is the question whether the plaintiff has any claim to be indemnified by K. D. Shaha against the award, which stands against the plaintiff as a decree of this Court. I do not think that he has any present case against K. D. Shaha for two reasons. In the first place, he accepted the position that Messrs. Jardine, Skinner & Co., for the Kankinarra Co., Ltd., would not accept K. D. Shaha as a contracting party, and at the same time, he appears to have regarded K. D. Shaha as a principal contracting party with himself. That is clear from his letters of 30th September and 25th October 1913,

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and by the fact that he billed K. D. Shaha as liable to him for non-delivery of the jute. If that be so, it is obvious that he cannot now proceed against him as a principal for whose default the broker has been made liable. The second reason is that the plaintiff has not yet paid anything to the Kankinarra Co., Ltd., and cannot, therefore, ask K. D. Shaha to indemnify him in any particular amount. Mr. Pugh in reply for the plaintiff insisted very much on the principles laid down in *Wolmershausen v. Gullick* (1). I do not wish to appear as in any way dissenting from the correctness of that decision or of the various decisions which Mr. Justice Wright there reviewed. It appears to me that the facts there are totally different from the facts of this case. Here, moreover, we have the Contract Act which is perfectly plain. If this be regarded as an ordinary case of guarantee, then by section 145, the surety is only entitled to recover from the principal debtor whatever sum he has rightfully paid on the guarantee, but not sums which he has paid wrongfully. Under section 222 of the same Act, the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. It may be doubted whether the plaintiff and K. D. Shaha any longer stood in the position of agent and employer having regard to the line which the plaintiff took up; but even supposing it were so, then K. D. Shaha would only be bound to indemnify the plaintiff against the consequences of his acts. We do not yet know what the consequences may be. It may possibly be that the plaintiff may compromise the case with the Kankinarra Co., Ltd., and have to pay very much less, or even nothing at all, in respect of this award. It would obviously be premature in this case to pass a prospective decree against K. D. Shaha for payment of such sum as the plaintiff may have to pay to the Kankinarra Co., Ltd. For these reasons, I think the suit fails against all the defendants and it must be dismissed with costs on scale No. 2.

"Mr. Pugh.—I ask that there be one set of costs.

(1) (1893) 2 Ch. 514, 62 L. J. Ch. 773; 3 R. 610; 68 L. T. 783.

"CHITTY, J.—Certainly not. You have chosen to join the three parties as defendants and must pay to each of them their costs.

"This decision covers the Suit No. 266 of 1914 which is between the same parties, with the exception that the Kamarhatty Co., Ltd., is substituted for the Kankinarra Co., Ltd. That suit must also fail against all the defendants and be dismissed with costs on scale No. 2."

On appeal from the above judgment:—

Mr. N. N. Sircar, with him Mr. J. N. Sinha, for the plaintiff-appellant.—The two parties were K. D. Shaha (seller) and Messrs. Jardine, Skinner & Co. as agents for the Kankinarra Jute Mills (buyers). There is no dispute that the plaintiff acted merely as a broker. "Both parties" in the arbitration clause obviously refers to the buyer and the seller.

[JENKINS, C. J.—You say there is no contract with you and the Kankinarra Mills. Does the arbitration clause extend to a case, when there is a dispute as to the existence of the contract?]

Mr. Sircar.—No. In this case, the real dispute is whether there was any contract at all between the appellant and the respondent Mills. I cannot be made liable under this contract [*Piercy v. Young* (2)].

Section 230 of the Contract Act does not apply where a person acts as the common agent of both parties. The section merely raises a presumption which can be rebutted and ordinarily the form of the contract would rebut it.

If section 230 applies to a common agent and then if you apply section 222 to the same common agent, what will be the position? The principal will get damages from the common agent under section 230 and will have to indemnify the same common agent under section 222 for the same amount.

[WOODROFFE, J.—How long can an agent keep from disclosing the name of his principal?]

Mr. Sircar.—It is sufficient, if he discloses the name at any time before the completion of the contract.

(2) (1879) 14 Ch. D. 200 at pp. 205, 211; 42 L. T. 710; 28 W. R. 545.

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Even Petheram, C. J., in *Gubboy v. Avetoom* (3) said, "I am not by any means prepared to say that the disclosure must be on the face of the contract".

[JENKINS, C. J.—Is there any departure in section 230 from the principles as laid down in the English cases?]

Mr. Sircar.—It is suggested in the order of reference, though not in the judgment in *Gubboy v. Avetoom* (3), that section 230 is not in accordance with English Law. A passage from Pollock's Law of Contract, 2nd Edition, is cited in *Hasonbhoy Visram v. H. Clapham* (4) to show that Indian Law is different from English Law. That passage, however, does not appear in Mr. Pollock's Contract Act, 3rd Edition.

[JENKINS, C. J.—Pollock's view of Indian Law now is that it is identical with English Law.]

Mr. Sircar.—*Gubboy v. Avetoom* (3): This case merely decides that "Avetoom for Principal" does not rebut the presumption arising under section 230. We are not relying merely on those words as in *Gubboy v. Avetoom* (3). The whole contract in our case rebuts the presumption. Cites *Southwell v. Bowditch* (5). Contracts must not be construed on the ground of the language being somewhat similar: *Bristol Waterworks Company v. Uren* (6). I submit that in *Gubboy v. Avetoom* (3) the law was not rightly interpreted. It relied on the judgment in *Fleet v. Murton* (7) which was cited at the Bar. But *Fleet v. Murton* (7) decided absolutely the contrary. The Court overlooked the point of usage in *Fleet v. Murton* (7). If the Court should hold that the award is valid, then I submit K. D. Shaha ought to indemnify me: *Lacey v. Hill Crowley's Olaim* (8).

Mr. Avetoom (with him Mr. McNair), for the Respondent Mills, refers to *Southwell v. Bowditch* (5).

[WOODROFFE, J.—Does the case come under section 230? You must distinguish between the contract as to the employment of the agent and the contract of sale.]

Mr. Avetoom.—The whole law is to be found in Benjamin on Sale, 5th Edition, page 256. Cites *Hutcheson v. Eaton* (9).

[JENKINS, C. J.—I don't think there is any intention in *Gubboy v. Avetoom* (3) to depart from *Sopromonian Setty v. Heilgers* (10).]

Mr. Avetoom.—*Gubboy v. Avetoom* (3) is good law until it is overruled by a Full Bench.

[JENKINS, C. J.—Is the construction of one document by one Court binding on another Court construing another document? Reads arguments of Mr. Cohen, Q. C., in *Southwell v. Bowditch* (5).]

Mr. Avetoom.—The broker may increase his liability by acting in a certain way. Cites *Parker v. Winlow* (11) and *Ramji Das v. Janki Das* (12).

Mr. S. R. Das, for the Defendant-Respondent K. D. Shaha, contends that he cannot in any case be made liable on the contract. Adopts Mr. Sircar's argument that the plaintiff was not my agent to sell. I am bound to indemnify him against such consequences as arise directly from my order: *Halhronn v. International Horse Agency and Exchange Limited* (13). It cannot be said that the award made against him was the direct result of any order.

Mr. Sircar (in reply) cites *Mackinnon, Mackenzie & Company v. Lang, Moir & Company* (14), *Paul Brier v. Chotalal Javerdas* (15), *Lakshmandas Narayandas v. Anna R. Lane* (16), *Parker v. Winlow* (11) and *Gadd v. Houghton* (17). The presumption in section 230 would not apply to a broker. Once the contract is made and is complete,

(3) 17 C. 449 at p. 453.

(4) 7 B. 51 at p. 65.

(5) (1876) 1 C. P. D. 374; 45 L. J. C. P. 630; 35 L. T. 196; 24 W. R. 838.

(6) (1883) 15 Q. B. D. 637 at p. 645; 54 L. J. M. C. 97; 52 L. T. 655; 49 J. P. 561.

(7) (1871) 7 Q. B. 126; 41 L. J. Q. B. 49; 26 L. T. 181; 20 W. R. 97.

(8) (1874) 18 Eq. 182 at p. 191; 43 L. J. Ch. 551; 30 L. T. 484; 22 W. R. 586.

(9) (1884) 13 Q. B. D. 561; 51 L. T. 346.

(10) 5 C. 71; 4 Ind. Jur. 517; 4 C. L. R. 377.

(11) (1857) 7 El. & Bl. 942; 27 L. J. Q. B. 49; 4 Jur. (n. s.) 584; 110 R. R. 904; 119 E. R. 1497.

(12) 17 Ind. Cas. 973; 39 C. 802.

(13) (1903) 1 K. B. 270; 72 L. J. K. B. 90; 85 L. T. 232; 51 W. R. 622; 19 T. L. R. 138.

(14) 5 B. 584 at p. 588.

(15) 30 B. 1; 6 Bom. L. R. 948.

(16) 32 B. 356; 6 Bom. L. R. 731.

(17) (1876) 1 Ex. D. 357; 46 L. J. Ex. 71; 35 L. T. 222; 24 W. R. 975.

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subsequent disclosure is immaterial: *Keighley Marston & Company v. Durant* (18).

[JENKINS, C. J.—Unless that was so, the whole of the language of section 230 would be inapt.]

Mr. *Sircar* cites *Adams v. Hall* (19) and reads arguments and questions put by Coleridge, C. J., to Counsel. Cites *Glover v. Langford* (20). Reads Storey, paragraphs 339, 341. Cites *Fairlie v. Fenton* (21).

[WOODROFFE, J.—Has *Gubboy v. Aetoom* (3) ever been dissented from?]

Mr. *Sircar*.—So far as I have been able to find out, it has not been dissented from or affirmed, or referred to.

[JENKINS, C. J.—*Gubboy v. Aetoom* (3) so far as it was sought to be justified by *Fleet v. Merton* (7), is erroneous.]

Mr. *Sircar*.—In *Gubboy v. Aetoom* (3), there was no exchange of bought and sold notes.

JUDGMENT.

JENKINS, C. J.—The plaintiff carries on business as a jute-broker under the name of S. N. Banerjee & Co., and he has brought this suit for a declaration that an award, dated the 14th February 1914, is invalid and inoperative, and for consequential relief. In the alternative, he seeks a decree for indemnity.

This award professes to have been made on a dispute between Messrs. Jardine, Skinner & Co., Managing Agents, Kankinarra Co., Limited, and Messrs. S. N. Banerjee & Co., with reference to a claim for damages for non-delivery of 250 bales jute bought and sold under contract No. D/2382 of 2nd June 1913.

The bought note was in these terms:—

No. D/2382.

Indian Jute Manufacturers' Association,
Jute Contract.

Calcutta, 2nd June 1913.

Messrs. Jardine, Skinner & Co.

Agents, Kankinarra Jute Mills Co., Ltd.

Dear Sirs,

We have this day bought by your order and for your account from our principals

(Here follows a description of the jute and provisions not material at this stage).

Arbitration.—Any dispute arising out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce, whose decision shall be accepted as final and binding on both parties to this contract.

Yours faithfully,

(Sd.) S. N. Banerjee & Co.,
Brokers.

A corresponding sold note was sent to Babu K. D. Shaha on the same date.

On the 16th September 1913, S. N. Banerjee & Co., by letter declared Messrs. Jardine, Skinner & Co., Agents. Kankinarra Co. Limited, on the one hand, and Babu K. D. Shaha on the other, their principals.

On the 17th September, Messrs. Jardine Skinner & Co. replied to Messrs. S. N. Banerjee & Company:—

"We do not agree to accept your principals' names under this contract. The contract must, therefore, stand as originally made out."

On the 29th September, Messrs. Jardine, Skinner & Co. called on Messrs. Banerjee & Company to hand them documents for 250 bales, and on the 30th, Banerjee & Co., replied requesting them to ask the seller direct for the jute due under the contract. There was further correspondence but no delivery or payment was made, and ultimately Messrs. Banerjee & Co. received notice from the Registrar, Bengal Chamber of Commerce, that Messrs. Jardine, Skinner & Co. had applied for arbitration. Messrs. Banerjee & Co. repudiated the jurisdiction of the Chamber of Commerce and the arbitrators appointed by it. The arbitrators, however, proceeded with the arbitration and made their award directing Messrs. Banerjee & Co. to pay Messrs. Jardine, Skinner & Co. the sum of Rs. 4,593-12.

This is the award now impugned. Chitty, J., has dismissed the plaintiff's suit, and from this judgment, the present appeal has been preferred.

It is contended by the appellant that there was no contract between Messrs.

(18) (1901) A. C. 240 at p. 244; 70 L. J. K. B. 662; 81 L. T. 777; 17 T. L. R. 527.

(19) (1877) 37 L. T. 70.

(20) (1892) 8 T. L. R. 628.

(21) (1870) 5 Ex. 169; 39 L. J. Ex. 107; 22 L. T. 373; 18 W. R. 700.

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S. N. Banerjee & Co. and Messrs. Jardine Skinner & Co., or the Kankinarra Co., Ltd., that authorised the reference to arbitration.

The Kankinarra Co., Ltd., on the other hand maintain that the reference is justified by the clause providing for arbitration in the bought note.

The arbitration clause contemplates two parties, each a party to the contract, and there can, I think, be no doubt that those two parties are the sellers and the buyers.

Was then the plaintiff a party to the contract so as to be bound by the arbitration clause, was he a seller or buyer?

This question is not to be solved by describing the plaintiff as an agent with an undisclosed principal and finding what the Contract Act says about a person in that predicament; that would be a superficial mode of investigation. We must find out what was the contract between the plaintiff on the one hand, and Messrs. Jardine, Skinner & Co., as representing the Kankinarra Co., Ltd., on the other. For this purpose, we must examine the bought note and also the surrounding circumstances, among them being the fact that a corresponding note was sent to Babu K. D. Shaha. The bought note is no doubt signed by the plaintiff, and *prima facie*, that would bind him, but it would only bind him to that which is expressed in the document.

If the document be examined, it does not purport to be a sale by the plaintiff even as an agent; it is an intimation that Messrs. Jardine, Skinner & Co.'s order has been carried out by a purchase made by the plaintiff on their account not from himself, but from some one else.

The note may be an admission of the plaintiff's employment by Messrs. Jardine, Skinner & Co. to buy on their behalf, but the contract (if any) as between the plaintiff and them, which it evidences, is a contract not of sale, but of employment.

This employment was to negotiate a sale and to be an intermediary, not to sell on behalf of another. The position is described by Jessel, M. R., in *Southwell v. Bowditch* (5), where he says, "Blackburn, J., in a remarkably clear judgment says: 'there is no doubt at all in principle that a broker, as such, merely dealing as broker and not as purchaser, makes a contract from the

very nature of things between the buyer and the seller, and he is not himself either buyer or seller' (the phrase 'the very nature of things' hitting the fallacy of the Court below in this case), 'and that consequently where the contract says "sold to A B" or "sold to my principals", and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods'."

That a person signs simply as broker may be clear from the terms of the contract as well as from any statement to that effect appended to his signature, and this is illustrated by Mellish, L. J., in the same case at page 379, where he says:—

"Now there is, I think, a material difference between the words 'sold for you to my principals' and 'bought of you for my principals'. The rule of law, no doubt, is that, if the principal is undisclosed, the broker saying 'bought of you for my principals' is himself liable; but this contract says 'sold for you to my principals, i.e., I, your broker, have made a contract for my principals, the buyers.'"

I have already pointed out that the note in this case is in the 2nd of these two forms, and, on its true construction, I hold that the plaintiff was no more than an intermediary, and was not an agent for sale, to whom the provisions of section 230 of the Contract Act applies, so as to make him liable as an agent who has not disclosed his principal's name.

It has been contended before us that the present case is governed by *Gulboy v. Astoom* (3). It is true that it was there held that the defendant in that case was an agent for an undisclosed principal within the meaning and operation of section 220. But to treat the construction placed on the document, and circumstances under consideration in that case, as a decision binding us in this case, is to fly in the teeth of the doctrine propounded by Jessel, M. R., in *Southwell v. Bowditch* (5) where he says "There is no more vicious line of argument, if I may say so with deference to the Court below, than that which was adopted by the Court below in this case of comparing one contract with another and saying it differs very little; you arrive ultimately at identifying wholly different contracts."

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And yet this is the way Mr. Avetoom would have us go. In a word, the Court there on the construction of the document before them, came to the conclusion that a particular relation was established: this cannot bind us in our construction of a different document written under wholly different circumstances. I do not propose to discuss the competence of a suit like the present, for no objection on this score has been raised. Nor is it necessary to consider the plaintiff's claim to indemnity against K. D. Shaha. In my opinion, the judgment of Chitty, J., must be modified and a decree passed in the plaintiff's favour setting aside the award. The respondent Company must pay the plaintiff's costs of the suit and appeal, and the plaintiff must pay K. D. Shaha's costs of the suit and appeal.

WOODROFFE, J.—We must look at the terms of section 230 of the Contract Act. The first question is whether the appellant, who is a broker, is as such an agent. I think, a broker is an agent. For what purpose he is an agent is another question. Primarily and for some purposes, he is the agent of the party by whom he was originally employed. He is also generally the agent of each of the two parties for whom he negotiates. The engagement of a broker is like that of an ordinary agent, but with this difference, that the broker being employed by persons who have opposite interests, he is, as it were, agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in the execution of what each of them entrusts him with. A broker, when he closes a negotiation as the common agent of both parties, usually enters it in his business book and gives to each party a copy of the entry or a note or memorandum of the transaction, which as given to the seller, is the sold note, and as given to the buyer, is the bought note. *Prima facie* a broker is employed to find a purchaser or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to his position as broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he

in the course of such employment finds. A broker may, however, make himself a party to the contract of sale or purchase. For he can go beyond his position of mere negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. The section, therefore, refers to contracts "entered into by him on behalf of his principal." The next question is, therefore—did the appellant enter into the contract in suit on behalf of his principal, that is, was he an agent to sell to the respondent or was he a mere negotiator to bring the parties together, but otherwise not concerned? If in this case, the broker did enter into a contract, then I think on the facts he would be liable. For his principal was undisclosed at the date of the contract and the effect of the subsequent disclosure some three months later, would not in itself affect the right of the respondents to proceed against the appellant though they might, if they chose, elect to proceed against the principal when disclosed. Whilst, however, I am of opinion that the appellant would be liable to the buyers if the case falls within section 230, the question is whether that section applies.

Prima facie, a broker does not make himself liable and upon the question whether he has entered into a contract or not, we must look at the terms of the contract itself. Reference has been made to the fact that the appellant did not disclose his principal until three months later and did not, when Messrs. Jardine, Skinner & Co. attempted to make him personally liable, repudiate the liability then sought to be put upon him. He also appears to have billed the seller for the difference. There is, however, a letter in which he refers Messrs. Jardine, Skinner & Co. to the sellers, and the difference bill is headed "Kankinarra Account". Subsequently, personal liability was denied. It is not contended that these facts amount to acquiescence or estoppel, or constitute a new contract. So far as the contract in suit is concerned, we must look to the terms of the contract itself. I should have had no difficulty as to this, had it not been for the case of *Gubby v. Avetoom* (3), on which the respondent relies, and which is very similar to the case before us, and which (whether it has been rightly or

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wrongly decided) is, it is contended, binding on us. I felt some difficulty on this point during the hearing, but as the learned Chief Justice is of opinion that this case does not stand in our way and his decision is in accord with the natural justice of the case, I do not dissent from the order he would pass. I wish to note with reference to the observation that in Calcutta, this would be regarded as a principal contract, that there is no evidence of such usage before us.

Babu Krishna Kisore De, Attorney, for the Appellant.

Messrs. Orr, Dignam & Co. and T. B. Roy, Attorneys, for the Respondents.

Appeal allowed.

S. N. Das

Advocate High Court

Jammu & Kashmir

Srinagar.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 160 OF 1913.

October 15, 1915.

Present:—Sir John Wallis, Kt., Chief Justice and Mr. Justice Kumaraswami Sastri
 AYYAKUTTI MANKONDAN—PLAINTIFF
 —APPELLANT

versus

PERIASAMI KOUNDAN—DEFENDANTS

Nos. 1, 2 AND 3—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—
 Book containing formal declaration of division of status of members of joint Hindu family unregistered, admissibility of, in evidence for proving divided status of family.

In the course of certain partition proceedings among the members of a joint Hindu family, consisting of a father, his two undivided sons and a grandson by a predeceased son, separate lists were prepared of the properties, both moveable and immoveable, in the possession of the several members of the family and available for division. These were entered in a book together with the value of such properties. The several lists were then totalled up and the value of the share of each member ascertained and thereunder the following note appeared:—"In the presence of the witnesses named hereunder we divided." Below this note, the parties and the witnesses signed:

Held, that the book containing the above entries was a formal declaration of division of status attested by witnesses and that as such, it affected the immoveable properties mentioned therein and that not being registered, it was inadmissible in evidence to prove even the divided status of the members of the family. [p. 615, col. 2.]

Appeal under clause 15 of the Letters Patent against the judgment of Mr. Justice Spencer, in Second Appeal No. 1282 of 1912 (reported in 24 Ind. Cas. 771), preferred to the High Court against the decree of the District Court of Madura, in Appeal Suit No. 389 of 1910 (Original Suit No. 546 of 1908, on the file of the Court of the District Munsif of Dindigul).

FACTS of the case are set out in 24 Ind. Cas. 771.

Mr. V. C. Seshachariar, for the Appellant.—The learned Judge erred in holding that Exhibit VIII was admissible in evidence to show the divided status and that it did not require registration. It is a document whereunder the parties divided their properties both moveable and immoveable. The words used in Exhibit VIII "In the presence of the witnesses named hereunder we divided," clearly show that the parties divided their properties under that document and that it was not intended as a mere memorandum recording the fact that they had previously become divided. Exhibit VIII is, therefore, clearly inadmissible in evidence for any purpose whatsoever. See *Kannupatti Subbaya v. Kuruani Muddaletiah* (1). *Subrahmanya Aiyar v. Savitri Ammal* (2) is wrongly decided. [Further argument was stopped and arguments on other points were reserved].

Mr. T. V. Muthukrishna Iyer, for the Respondents:—Exhibit VIII is only a memorandum of a division which had already taken place and is admissible to prove the divided status. Vide *Subrahmanya Aiyar v. Savitri Ammal* (2).

JUDGMENT.—We think that Exhibit VIII is a formal declaration of division of status attested by witnesses and that as such, it affects the immoveable properties mentioned therein, and is inadmissible in evidence. We accordingly direct Exhibit VIII and the evidence relating thereto to be excluded from the record, and have decided to call on the District Judge to submit revised findings on issues 1 and 4 on the evidence on record. The findings should be submitted in six weeks. Seven days will

(1) 17 M. L. J. 463

(2) 3 Ind. Cas. 321; 13 M. L. J. 228; 4 M. L. T. 351.

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be allowed for filing objections. The other questions are reserved.

[In compliance with the order contained in the above judgment, the District Judge of Madura submitted findings which were in favour of the appellant and the High Court, accepting the same, set aside the decree of the lower Appellate Court and restored that of the Munsif with costs in the High Court and the lower Appellate Court].

Appeal allowed.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION SUIT
No. 163 of 1914.*

January 11, 1915.

Present:—Mr. Justice Chitty.

KUMAR KRISHNA MITTER—PLAINTIFF

versus

AMULYA CHARAN MITTER—DEFENDANT

Civil Procedure Code (Act V of 1908), s. 73 (1), (c)—Surplus sale-proceeds, distribution of amongst attaching creditors—Money standing to credit of one suit, application for transfer to another suit, if to be made in former—Practice—Rateable distribution, application for, on Original Side—Certificates of Accountant-General and Registrar, necessity of.

Where money in Court stands to the credit of one suit and the plaintiff in another suit has, by reason of being an attaching creditor or mortgagee or otherwise, an interest in such money and desires the fund to be transferred to the credit of his suit in order to be dealt with therein, he should in all cases make the application in the suit to whose credit the money stands for the transfer. [p. 617, col. 1.]

In an application on the Original Side of the High Court for the transfer and rateable distribution of funds to which the provisions of section 73 (1), clause (c), of the Code of Civil Procedure (Act V of 1908) may possibly apply, the applicant should be required to produce, in addition to the certificate of the Accountant-General, a certificate of the Registrar. [p. 617, col. 2.]

FACTS.—This is an Application in Chambers, the facts of which are set out in the judgment.

JUDGMENT.—This is an application by Kumar Krishna Mitter, decree-holder in Suit No. 163 of 1914, asking that a fund of Rs. 4,650-2-7 lying in the hands of the Accountant-General of this Court to the credit of the said suit be, after payment of the petitioner's costs, divided rateably between the petitioner and Ram Chandra

Ray Chaudhuri, execution-creditor in Suit No. 453 of 1910. The facts are as follows:—Property which had belonged to Hari Das Mitter, deceased, was subject to a mortgage, dated 19th December 1901, in favour of Byomkesh Chuckerbutty. The mortgagee instituted a suit on his mortgage (No. 179 of 1911) making the representatives of Hari Das Mitter party defendants. The final decree in that suit, dated 15th January 1913, ordered a sale of the mortgaged property. The sale took place on 2nd May 1914, and after making the first and second payments prescribed by section 73 (1), proviso (c), (it does not appear that there were any subsequent incumbrances), there remained a sum of Rs. 4,650-2-7 as surplus sale-proceeds.

On 6th April 1914, the present petitioner obtained a decree in this Court for Rs. 1,644-15-9, interest and costs against the estate of Hari Das Mitter. On 18th June 1914, he applied for execution and attached the surplus sale-proceeds above mentioned. In November last, he applied to have the said fund transferred to the credit of his suit, No. 163 of 1914, and it was so transferred under an order of 2nd December 1914. That transfer was made without notice to other creditors. The certificate of the Accountant-General, which was the only certificate required on the application for transfer, showed no attachment or other impediment as regards that fund.

On 22nd December 1908, Ganga Das Mahta had obtained a decree in Small Cause Court Suit No. 22785 of 1908, against the estate of Hari Das Mitter for Rs. 1,684-2-0, including, costs and interest up to 26th April 1911. The statement in paragraph 13 of the present petition, that that was a personal decree against Amulya Charan Mitter and Bireswar Mitter, is incorrect. That decree was transferred to this Court for execution on 1st May 1911, and on 28th August 1911, that execution-creditor attached the mortgaged property.

On 29th July 1910, Ram Chandra Ray Chaudhuri obtained a decree in Suit No. 453 of 1910 for Rs. 2,701 with further interest and costs against the estate of Hari Das Mitter. In execution of that decree, he also on 10th January 1913, attached the mortgaged property.

*The report of this case has been taken from the Calcutta Weekly Notes with permission.—Ed.

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There was a further execution-creditor, Gourhari Mukerjee, who held a money-decree for Rs. 2,000 odd against the estate of Hari Das Mitter, but as he did not apply for execution until 12th December 1914, i. e., after the assets had been received by the Court, it is obvious that he has no *locus standi* on the present application, and his claim may, therefore, be left out of consideration.

On 22nd December 1914, the present petitioner applied that the fund might be rateably distributed between himself and Ram Chandra Ray Chaudhuri. For the purpose of this application, it was necessary for him to produce certificates, not only of the Accountant-General, but also of the Sheriff and the Registrar. From the two latter, it appeared for the first time that there were attachments against the property at the instance of Ganga Das Malita and Ram Chandra Ray Chaudhuri. It is clear that by the provisions of section 73 (1), proviso (c), these persons are entitled to be paid rateably out of the proceeds of sale in priority to the present petitioner, whose attachment was issued after the sale, and then only against the surplus sale-proceeds. As their claims are more than sufficient to absorb the whole fund, Rs. 4,650-2-7, it follows that there will be nothing left for the petitioner, and his present application must necessarily fail. It is a matter of regret that it should have been possible for the petitioner to obtain the order for transfer of the fund, without its transpiring that there was in reality no fund to transfer in which he could hope to share. This is due to two defects in our procedure, one of which has already been recently dealt with by the issue of a general order. Till recently, it was uncertain in which suit an application for transfer of a fund should be preferred, the suit to the credit of which the fund lay, or the suit to which it was to be transferred. I have intimated that in future, it should in all cases be made in the suit to the credit of which the fund is lying. The second defect is that in applications for transfer, such as that in the present case, orders have been passed on the certificate of the Accountant-General only. From this certificate all the attachments or incumbrances on a property or its sale-proceeds do not

necessarily appear. If on such applications, the petitioner were required to produce a certificate also from the Registrar, he would be compelled to search the registers of that officer as well, and any objections which might exist to the transfer, would necessarily be disclosed. In my opinion this practice should be followed in the future, and on an application for the transfer of a fund to which the provisions of section 73 (1), proviso (c), Code of Civil Procedure, may possibly apply, the applicant should be required to produce, in addition to the certificate of the Accountant-General, a certificate of the Registrar.

This application fails and must be dismissed. Under the peculiar circumstances, I direct that each party do bear his own costs. As the order for transfer should never have been made, I direct that the funds in question be transferred back to the credit of Suit No. 179 of 1911, to be dealt with under section 73 (1), proviso (c), if and when the parties or either of them entitled thereunder make an application for that purpose.

Application dismissed.

Mr. N. M. Chatterjee, Attorney, for the Plaintiff.

Messrs. B. N. Basu & Co. and Mr. T. B. Ray, Attorneys, for the Respondent.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REFERENCE NO. 1 OF 1915.

March 31, 1915.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

HORI AND OTHERS—DEFENDANTS—
APPELLANTS

versus

SRI THAKURJI MAHARAJ AND OTHERS—
PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 115—
Withdrawal of suit with permission to re-file it—
Omission to consider question of costs—Failure to exercise jurisdiction vested in Court—Revision.*

A suit was withdrawn with permission to re-file it. The question of the terms on which the suit should be allowed to be withdrawn, especially as to costs, was not considered by the Court granting the permission.

Held, that the omission to consider the question of costs, which resulted in substantial injustice

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being caused to the defendant amounted to a failure to exercise the jurisdiction vested in the Court.

Reference from the Commissioner of the Allahabad Division, for revision of an order allowing an enhancement suit to be withdrawn.

ORDER.

HOLMS, S. M.—The other side has not appeared although duly informed, so no objection has been raised by them to the order which the Additional Commissioner recommends should be passed. In this case, the Assistant Collector passed the order allowing the suit to be withdrawn with permission to re-file it on the 17th August last, the same day on which the application for withdrawal was put in. The defendant was not called on, and apparently, the question of the terms on which the suit should be allowed to be withdrawn, especially as to costs, was not considered by the Assistant Collector at all. Following the principle laid down in *Kallan v. Dildar* (1) and *Kalika v. Ram Charan* (2), the omission to consider the question of costs, which resulted in substantial injustice being caused to the defendant, amounted to a failure to exercise the jurisdiction vested in the Court.

I would, therefore, set aside the order of the Assistant Collector and order that permission be given to the plaintiff in the enhancement suit to withdraw from it with liberty to institute a fresh suit on paying the whole of the defendant's costs in the former proceedings in all the Courts.

CAMPBELL, J. M.—I agree.

Appeal decreed.

(1) Selected Decision No. 4 of 1907.

(2) Selected Decision No. 7 of 1903.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 55 of 1914.*

July 31, 1914.

Present:—Mr. Justice Woodroffe and
Mr. Justice Coxe.

NARENDRA NATH BASU—PLAINTIFF—
APPELLANT

versus

H. L. STEPHENSON—DEFENDANT—
RESPONDENT.

Bengal Medical Act (VI B. C. of 1914), s. 27—

*The report of this case has been taken from the Calcutta Weekly Notes with permission.—Ed.

Rules framed under the Act by Local Government, ultra vires—Specific Relief Act (I of 1877), s. 45—Mandamus—Omission of qualified candidate's name from Election Roll—Mistake of Returning Officer—Jurisdiction of High Court to interfere.

The petitioner was a Licentiate in Medicine and Surgery of the University of Calcutta and as such was admittedly entitled to be registered under section 4 of the Bengal Medical Act. The petitioner's name was omitted from the preliminary list of persons qualified to vote at the first elections under the Act published by the Returning Officer appointed by the Local Government. His name was also omitted from the final Election Roll. The petitioner's application to the Returning Officer to have his name entered was not considered by that officer. The petitioner applied to the High Court under section 45 of the Specific Relief Act for an order compelling the Returning Officer to include and publish his name in the final Election Roll.

Held, that the High Court had no jurisdiction to interfere. [p. 624, col. 2.]

Under rule 16 of the rules framed by the Local Government under the Bengal Medical Act, the decision of the Local Government on any question that may arise as to the intention, construction or application of the rules shall be final, and under section 27 of the Act no suit or other legal proceedings shall lie in respect of any act done in the exercise of any power conferred by the Act on the Local Government or the Council or the Registrar. [p. 624, col. 1.]

The act which is referred to in section 27 of the Bengal Medical Act is not one done by the Local Government, but done in exercise of any power conferred by the Act on the Local Government. [p. 624, col. 1.]

Per Woodroffe and Coxe, JJ.—Even assuming that rules framed by the Local Government under section 33 of the Bengal Act are *ultra vires*, an application under section 45 of the Specific Relief Act for an order compelling the Returning Officer to include and publish the applicant's name in the final Election Roll based on the assumption that the rules are not *ultra vires* but that they are valid rules which have not been given effect to in one particular by the Returning Officer, cannot be entertained. [p. 623, col. 2.]

FACTS.—This is an application under section 45 of the Specific Relief Act to compel the Hon'ble Mr. H. L. Stephenson, Financial Secretary to the Government of Bengal, who was appointed by the Government to be the Returning Officer under the Bengal Medical Act in respect of the first elections to the Council of Medical Registration, to include and publish the name of the Applicant, Dr. Narendra Nath Basu, in the final Election Roll, so as to enable him to take part in that election.

The facts are shortly as follows:—Dr. Basu is a Licentiate in Medicine and Surgery of the Calcutta University, having obtained his degree in 1896, and he is a

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medical practitioner practising in Calcutta. Under the rules published by the Local Government under section 33 of the Bengal Medical Act, a preliminary list of persons appearing to be qualified to vote at the first elections was published by the said Returning Officer in the Calcutta Gazette of the 10th June 1914. Dr. Basu's name was not included in that preliminary list. Under the rules all objections to and applications for inclusion of names in the said list, were to be sent to the office of the said Returning Officer before the 4th of July 1914. Dr. Basu sent an application for inclusion of his name on the 2nd of July 1914. His application was not considered by the Returning Officer at all. It was admitted by the Counsel for the Returning Officer that such failure to consider the application was due to an oversight. On the 15th of July 1914, a list purporting to be the final Election Roll was published in the Calcutta Gazette and the name of Dr. Basu was again omitted from the final list. On the 17th of July 1914, Dr. Basu again applied to the Returning Officer for inclusion of his name. In reply to such application, the Returning Officer on the 21st of July 1914, wrote saying that, since the name of Dr. Basu was not included in the final Election Roll, it was not possible under the rules to enter his name in the list of voters. Upon such refusal, this application was made to the High Court.

The case came on for hearing in the first instance before Chaudhuri, J.

Mr. H. D. Bose (with Mr. B. L. Mitter and Mr. Sarvadhikary), for the Applicant, argued that it was a proper case under section 45 of the Specific Relief Act, and nothing in the Bengal Medical Act had taken away or interfered with the jurisdiction of the High Court. Section 27 of the Bengal Medical Act had no application, as the Returning Officer under the rules was independent of the Local Government or the Council or the Registrar under the Act. He was a public officer whom the Court could compel to perform his duty. Rule 4, which provided that on publication, the final Election Roll should be "deemed to be final and conclusive", meant that it should be conclusive for the purpose of the election and any election

held on the basis of the said final Election Roll as published, could not be challenged on the ground of the Election Roll being incorrect. He further submitted that rule 3 provided that the Returning Officer "shall" consider all objections and applications in respect of the preliminary Election Roll and prepare therefrom a final Election Roll. In the present case, the Returning Officer having admittedly failed to consider Dr. Basu's application, the Election Roll published on the 15th of July was not the final Election Roll within the meaning of rules 3 and 4, and, therefore, there was no finality or conclusiveness in the Election Roll published on the 15th of July 1914, although it was called the final Election Roll. The Court had power to compel the Returning Officer, as the Returning Officer had himself the power of his own motion, to correct the admittedly incorrect Election Roll.

Mr. B. C. Mitter, Standing Counsel, appeared for the Returning Officer and said that the name of Dr. Basu had been omitted by mistake. He argued that the Court had no jurisdiction to make any order as it was clearly the scheme of the Act to oust the jurisdiction of the Court. The right of franchise was given by the Act and unless a remedy was also given by the Act, there was none for the violation of that right. Section 27 of the Act expressly excluded the jurisdiction of the Court. He further argued that under rule 4, the final Election Roll upon publication became final and conclusive for all purposes and there was no power either in the Court or in the Returning Officer to correct that Election Roll.

The following judgment was delivered by

CHAUDHURI, J.—I regret I have to refuse this application. It is conceded that the applicant is qualified as a Licentiate in Medicine and Surgery of the University of Calcutta. It is also conceded that in the preliminary list made by the Returning Officer, his name was not entered; that he protested against it and sent in an application for the inclusion of his name; and that the Returning Officer has failed to consider his application. His contention was that he was entitled to be registered

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under section 4, clause (d) or clause (e). The Returning Officer apparently did not think that he was qualified under clause (d) and overlooked the contention about clause (e). The Returning Officer then prepared the final Election Roll. It is also conceded that if the matter of the applicant's contention based upon clause (e), had been present before the Returning Officer's mind, the omission would not have occurred. The final Election Roll was then published in the Calcutta Gazette as provided for in the rules. It is clear that this application satisfies all the requirements of section 45 of the Specific Relief Act, clauses (a) to (d), namely, that the applicant is entitled to exercise his franchise, and that his right to exercise it would be injured, that it was clearly incumbent on the Returning Officer to consider his application, that he has failed to do so in his public character, and that it was right and just on his part to consider the application and include the applicant's name, and that the applicant has not other specific legal remedy. But the question arises as to how far the election rules applicable to this matter oust my jurisdiction, and whether the Court can exercise its power in favour of the application. It is quite clear that under section 33 of the Bengal Medical Act, the Local Government has power to make rules for the purpose of carrying out the Act. Rules have been framed with that object. The rules I have referred to, about the preparation and publication of the Election Roll, can in no sense be said to fail to carry out the purposes of the Act. It is the failure of the Returning Officer to comply with the rules which has created the difficulty. The rule says he shall consider the application and prepare the Election Roll and publish it. I was at one time under the impression that the duty of the Returning Officer was to consider the applications, and to prepare the final Election Roll and to send it to the Local Government for publication and that the Local Government eventually published the Election Roll. But the rule is clear, that the Returning Officer is the person who has to publish the Election Roll in the Calcutta Gazette in manner directed by the Local Government. The rule, however, lays down that on such publication, the

Election Roll as published is to be deemed as final and conclusive. I do not see that this rule is at all *ultra vires*. It appears also, looking at section 27 of the Act, that it was not intended that the Law Courts were to interfere in these matters. The Election Roll on publication becomes final and conclusive. It gets its finality as soon as it is published. It does not seem open to any process of revision. If the Returning Officer considered the application and wrongly decided the matter, or even arbitrarily did so, the publication of the Election Roll made it final. I do not think it could be then revised by the Court. If an arbitrary adverse decision may not be revised, it seems hardly open to revision for failure of consideration. The Court could perhaps compel the Returning Officer to consider the application before the publication of the Election Roll, but I fear it is now too late. Having regard to the facts, I regret I am unable to help the applicant, as I should like to, in a matter of this character. In view, however, of the default on the part of the Returning Officer in considering the application, I shall make no order against the applicant for the costs of this application.

[The petitioner preferred an appeal which came on for hearing before Woodroffe and Coxe, JJ.]

Mr. Norton (with him Messrs. Chakravarti and H. D. Bose), for the Appellant, referred to the provisions of the Act. Section 33 provides the machinery, but the rules in question in this case are made under subsection 2, clause (a), which refers to the election after the Medical Council has come into existence. These rules which have been impleaded against me and which were published in the Calcutta Gazette of the 3rd June 1914, cannot have anything to do with my right to have my name entered in the list of persons qualified to be registered under the Act.

The proviso to section 6 deals with the first election. It speaks of persons qualified under the Act and the qualifications are set out in the Schedule. I am duly qualified and entitled to claim registration in the preliminary list. The effect of the construc-

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tion which the lower Court has put on the rules (which say that the list when published shall be final) would be that the Local Government in framing rules will be entitled to abrogate the undoubted qualification which under the Act I have.

Under section 33 (1), the Local Government is empowered to frame rules regulating the qualification of persons to form the Electoral College for the Bengal Medical Council. This the Government has not done. They have issued rules under the section which deals with the Council after it has come into existence. The proviso to section 6 with the Schedule, makes it quite clear (and it is admitted) that I am qualified.

The rules pleaded in extenuation of their conduct do not apply. That is my first contention.

Secondly, even assuming that the rules are valid, I can ask your Lordships to correct what is evidently a mistake.

[WOODROFFE, J.—Where is it said that the rules published are final?]

It is in the rules.

The rules say that the Returning Officer shall consider objections, etc. It is imperative that the Returning Officer shall consider objections.

[WOODROFFE, J.—Rule 4 is subject to 3. They are conclusive as regards all matters which have been considered.]

Yes.

The rules framed under the Act throw on the Returning Officer an obligation to consider all objections and where that course has not been followed, the rules cannot be final.

Mr. B. C. Mitter, for the Respondent.—I may mention to your Lordships that this point that the rules have not been properly framed, was never alluded to in the Court of first instance. This is the first time that I hear this objection.

Mr. Norton.—I have given notice of this ground. My second ground is strong enough. There has admittedly been a mistake. My client is undoubtedly qualified under the Act, and I can ask your Lordships to correct it.

[WOODROFFE, J.—Is it admitted that the Returning Officer omitted to consider the objection?]

Mr. Mitter.—It is admitted that so far as regards his qualification as an L. M. S. of the Calcutta University [clause (c), section 4], there was a mistake; but as regards his qualification under clause (d), section 4, it was duly considered and the Returning Officer held against him.

Mr. Norton.—I am entitled to come here for a mandamus.

Refers to section 27 of the Medical Act, which bars proceedings in Court. If the section applies to my case, I am outside it, because it is a case of omission.

Secondly, it is not an act done by the Local Government, but an officer created by the Local Government for carrying out certain preliminary purposes. There are sections in the Act where acts contemplated to be done by the Local Government are to be found.

Sections 26 and 27 refer to statutory prohibition with regard to the acts of Government other than the preparation of the preliminary list. These sections are not intended to apply to anything anterior to the creation of the Council. Even taking the worst view, the omission complained of, is not an omission of the Local Government but of the Returning Officer.

To sum up.

If the Act gives the right, no rule framed under the Act can take it away.

The mere publication of a list without considering the objections cannot make the list final. Suppose by a mistake of the printer, pages of the list are omitted; is it to be said that there is no remedy and the imperfect list is final?

Refers to section 45 of the Specific Relief Act.

[WOODROFFE, J.—The Medical Act is a Bengal Act, can it interfere with the right of mandamus? I believe, there have been cases.]

Our case is that no Bengal Act can take away a right given by an Imperial Act. Cites *Hari Pandurang v. Secretary of State for India* (1).

[WOODROFFE, J. (to Mr. Mitter).—Your contention is that the right of mandamus has been taken away.]

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Mr. Mitter.—The whole jurisdiction of the Courts has been taken away. There is the Act of Parliament which authorises the Local Government to repeal or amend any Act passed by the Government of India (53 and 56 Vict., Chap. 14, section 5).

[WOODROPPE, J.—Then the point would be that if this mandamus rested on any power of the High Court derived from the Charter, it could not be interfered with, but this power being derived from the Specific Relief Act passed by the Government of India, it can be taken away.]

Mr. Mitter.—Yes. That is the point. The whole Specific Relief Act can be repealed by the Local Government under the authority of the Parliamentary Statute. Refers to *Empress v. Burah* (2). This point was feebly suggested by my friend in the Court below and at once withdrawn.

Mr. Norton.—The inherent jurisdiction of the High Court cannot be taken away by any Legislature in India. The relief given by the *habeas corpus* still exists in spite of the Code of Criminal Procedure. So the relief given by a writ of mandamus still exists.

Refers to section 27.

What is the power conferred on the Local Government? It is the power conferred by section 33 to frame rules. That right they had. Some person other than the Local Government proceeds to do an act. That is not an act of the Local Government which is protected by the section.

[WOODROPPE, J.—Assuming for the sake of argument that Mr. Norton was right in his contention and could show that these rules are *ultra vires*, would you still contend that section 27 stands in his way?]

Mr. Mitter.—I will deal with this point.

Mr. Norton.—Your Lordships have power to ascertain whether an act done was done in pursuance of the powers conferred by the Act. If your Lordships find that it is not so, then you have power to interfere.

Under the Act, the Returning Officer has no discretion. If a man has got the qualification required by the Statute, he is bound to return him.

(2) 4 C. 172; 5 I. A. 178; 3 C. L. R. 197; 3 Sar. P. O. J. 834; 3 Suth. P. C. J. 556; 2 Ind. Jur. 618; 2 Shome L. R. 63.

For the meaning of final and conclusive, see *Board of Education v. Rice* (3). Discretion must be exercised genuinely: *Leslie Williams v. Haines Thomas Giddy* (4), *Stiles v. Galinski* (5).

It has been said that the question whether I was qualified under the English Medical Act (1886) was considered and decided against me. Your Lordships will see that the decision was arrived at arbitrarily. I was not heard, no explanation was taken from me. I was entitled to be heard. Refers to the English Act.

Mr. Mitter.—This point was not pressed in the Court of first instance. I do not mind if your Lordships decide the point, but it is inconvenient if points not pressed in the first Court, are taken and pressed in the Appeal Court.

The objection is that the rules are bad, because published under sub-section (2), section 33, and cannot have any application to the first election under the Act.

[WOODROPPE, J.—The application is on the assumption that the rules are good.]

Yes. In that case, he must submit to his application being dismissed and then apply for an injunction restraining any election.

In a writ of mandamus, the duty must be clearly incumbent on the public officer.

The question of the validity or otherwise of the rules is hardly a matter within section 45 of the Specific Relief Act.

The present rules are copied from the rules framed by the Government of India to regulate elections to the Supreme Legislative Council, so your Lordships' decision, if you so decide, that these rules are *ultra vires*, would in one sense affect the Government of India rules. Your Lordships will not go into that, for in that case, the Government ought to have notice and for the matter of that, the Government of India should also be before you.

The whole scheme of the Act is that the jurisdiction of the Courts is ousted.

(3) (1911) A. C. 179; 80 L. J. K. B. 796; 104 L. T. 689; 75 J. P. 393; 9 L. G. R. 652; 55 S. J. 440; 27 T. L. R. 378.

(4) 11 Ind. Cas. 509; 15 C. W. N. 669; 21 M. L. J. 64; 10 M. L. T. 288.

(5) (1904) 1 K. B. 615 at p. 621; 73 L. J. K. B. 485; 68 J. P. 183; 52 W. R. 462; 90 L. T. 437; 20 T. L. R. 219; 2 L. G. R. 341.

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Sections 17, 23, 24, 25, 26, and 27. These are the sections it will be necessary for me to refer to.

Under the Act, the Courts have no jurisdiction. Secondly under the rules, if they are valid rules, the Courts have no jurisdiction in respect of anything done under the rules.

If rule 16 is a valid rule, the argument on the other side at once falls to the ground.

[Mr. Chakravarti.—Assuming that the rules are valid, rules 15 and 16 do not apply to the proviso to section 6 or to rules 3 and 4, but they apply specifically to rule 6, clause (2), and rule 10, clause (4).]

There is no limitation as to the application of the rules.

The Returning Officer had no power to correct the mistake. The only course left to them was to go to the Local Government.

[WOODROFFE, J.—Could they go to the Local Government? Under what section?]

Under section 16 of the rules.

So far as the Returning Officer is concerned, section 4 is conclusive. The words "deemed to be final and conclusive" are stronger than "final and conclusive." Whether final and conclusive or not, they shall be by a fiction deemed to be final and conclusive. Cites *In re Hadleigh Castle Gold Mines Ltd.* (6).

Mr. Chakravarti in reply.—My friend assumes that we have been proceeding on the validity of the rules. That is not so.

My application is—put me on the list under the proviso to section 6.

The rules have been set up in defence by the other side.

Section 27 can only apply after the Council has come into existence and a Registrar has been appointed.

I do not rely on the rules, but even regard being had to rules 15 and 16, it appears that they were necessary because section 27 did not apply.

As regards appealing to the Local Government, where is the provision within the four corners of the Act of appealing to the

Local Government in case there has been a violation of the proviso to section 6?

The Local Government has power to appoint any one to make up a list under the proviso to section 6 and if my name is omitted therefrom, I can come to your Lordships and pray for relief.

JUDGMENT.

WOODROFFE, J.—It has been pointed out to us on behalf of the appellant that the rules were published under section 33 (2) (a), and it has been argued that clause (a) refers to the election after the Medical Council has come to existence, and not to the election for the purpose of bringing the Council into existence. Therefore, it has been argued that the rules were "*ultra vires*," although it is conceded that they would have been valid, had the notification purported to proceed under the first clause of section 33. This argument was not raised in the first Court. But if we assume without deciding that the rules were *ultra vires* as is contended, then the application must fail; for it is clearly based on the assumption that the rules were not *ultra vires*, but that they were valid rules which had not been given effect to in one particular by the Returning Officer; for, what the application asked for is an order on the Returning Officer to publish, by notification in the Calcutta Gazette as a part of the Election Roll published in the Calcutta Gazette on the 15th July 1914, the name of the applicant as a person qualified to vote and to do all acts and things necessary in that behalf. Whereas, if there were no valid rules under which the election took place, the remedy would not be mandamus, but if there were a remedy at all, it would be in the nature of an injunction staying proceedings which were challenged on the ground of their invalidity. It is quite obvious to me that when this notice of the applicant was issued on the 24th July 1914, it was not intended to dispute the validity of these rules, but to proceed upon the assumption that valid rules had not been given effect to. I need not further consider this matter, because it was not argued in the Court of first instance, and the Local Government who would be affected by any decision as

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to the validity of the rules which they have published are not before the Court. This argument, in my opinion, fails. I do not wish to express any opinion upon the argument itself as to whether the rules are or are not *ultra vires*, for it is not necessary to do so. I may note, however, that it is pointed out on behalf of the respondent that these rules in the Bengal Medical Act are in the same terms which govern the election in the Council of the Government of India. Assuming then that the rules are valid, the question is whether the applicant has made out a case. Now under rule 15, the decision of the Local Government on any question that may arise as to the intention, construction or application of these rules shall be final, and under section 27 of the Act, no suit or other legal proceedings shall lie in respect of any Act done in the exercise of any power conferred by the Act on the Local Government, or the Council or the Registrar. The act which is there referred to is not one done by the Local Government, but done in exercise of any power conferred by this Act on the Local Government. Moreover, what is referred to in the notice is not an omission, even if there is any force in the contention which distinguishes between the words "act" and "omission." It has been conceded on behalf of the applicant that the object of the Act was to oust the jurisdiction of the Court. But it has been submitted to us that this was the intention of the Act when and after the Bengal Medical Council was constituted and that the Courts were to exercise jurisdiction up to that point. I cannot myself believe that this was the intention. I need not dwell upon this part of the case, because I agree with Mr. Justice Chaudhuri who would have been, as he says, willing to have acceded to the application, if he thought that he could under the law possibly do so. I agree with him that it is not open for us to interfere. On the facts, it has been conceded that the case is a hard one, because there is no doubt that the applicant is a person who is qualified to be registered under the Act. It is admitted that he is a Licentiate in Medicine and Surgery of the University of Calcutta. The fact that he was a Licentiate in Medicine and Surgery of the University of Calcutta

was not considered, with the result that his name was excluded from the list. As Mr. Justice Chaudhuri has pointed out, it was owing to inadvertence that the name of the applicant had been omitted from the list. I think, however, that there is much force in the contention that after the list had been published under rule 4, it was final and conclusive, and the Returning Officer was *functus officio*.

Mr. Mitter, who appeared on behalf of the respondent, pointed out to us that under rule 16, the Local Government has power to decide questions arising as to the intention, construction or application of these rules, and certainly it is a question of construction of these rules as to whether or not there can be said to be a final and conclusive publication under rule (4), so far as the applicant is concerned, seeing that there has been no consideration of his case, as I have already described, under clause (3). For, it may be reasonably contended that clause (4) is to be read as subject to clause (3), if effect is to be given to both provisions. The only remedy which appears to me to be open to the applicant is to represent his case to the Local Government. So far as we are concerned, we have no jurisdiction to interfere. The result is that this appeal must be dismissed. No costs are asked for.

COKE, J. I agree.

Messrs. Leslie and Hinds, Solicitors, for the Applicant.

Mr. C. H. Kesaven, Government Solicitor, for the Respondent.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE SECOND APPEAL NO. 2 OF 1915.

April 1, 1915.

Present:—Mr. Holms, S. M., and

Mr. Campbell, J. M.

BISHESHAR PATHAK PLAINTIFF—
APPELLANT

versus

RAM PRASAD PATHAK—DEFENDANT—
RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 138—Partition

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of under-proprietary right in specific plots, suit for, maintainability of.

Held (per *Holms, S. M.*)—An application to partition specific plots held in an under-proprietary tenure does not lie in the Revenue Court. [p. 615 col. 2.]

Held, per *Campbell, J. M.*)—An application to partition specific plots held in an under-proprietary tenure on which no revenue is assessed can lie in the Revenue Court [p. 625, col. 1.]

Second appeal from an order of the Commissioner of the Fyzabad Division, dated the 14th May 1914.

ORDER.

CAMPBELL, J. M.—I am unable to agree with the finding of the Commissioner that "specific plots held in under-proprietary tenure on which no revenue is assessed and which are not part of a *mahal* on which revenue is assessed, cannot be partitioned under section 138, Land Revenue Act; but that application for partition should have been made in the Civil Court."

The procedure for conducting applications for partition of under-proprietary *mahals* is laid down in section 138, and says that such partitions shall be carried out according to the provisions of Chapter VII, so far as they are applicable. The first section of that chapter says that "partition" means the division of a *mahal* or of a part of a *mahal* into two or more portions, and that in "imperfect partition" the several portions remain jointly responsible for the revenue assessed. I cannot, therefore, see why part of an under-proprietary *mahal* should not be imperfectly partitioned under this section, the under-proprietors being jointly responsible for the rent of the part partitioned.

There is no dispute in this case as to what the area or rent is of the portion for which partition is applied for, and the details of the fields affected are supplied from the *khatauni* on the record. The partition is also not objected to by the superior proprietor.

That such partitions among under-proprietors have hitherto been allowed in Oudh is, I think, clear from *Saddiq Husain v. Mir Fida Husain* (1). In his judgment in that case Mr. D. C. Baillie wrote: "Applications for partitions by co-sharers in an under-

proprietary *mahal* are made as a matter of course, and it has never been disputed that an under-proprietor is entitled to partition as against his co-sharers in the under-proprietary title."

I would, therefore, set aside the order of the Commissioner and restore the order of the Collector sanctioning the partition. I would hold respondent liable for appellant's costs both in the Commissioner's and this Court, and order him to pay Rs. 32 as Pleader's fees in each Court.

HOLMS, S. M.—I have looked further into the question, and adhere to my finding as Commissioner quoted by my colleague. In 1874 the Commissioner of Fyzabad referred the question to Government in the Oudh Revenue Department, whether or not *sir* and other forms of under-proprietary tenure could be partitioned by the Revenue Courts under the then Oudh Land Revenue Act, 1876. The reply was that "as section 100 (to which section 138 of the present Act of 1901 corresponds) gives a right to partition in under-proprietary *mahals*, i. e., sub-settled estates and these alone, section 69 section 68 and section 69 correspond to sections 106 and 107 of the present Act) cannot be construed into covering the case of other forms of under-proprietary tenure." The Board in their decision of 21st December 1905 on petition No. 3 of 1904-5 came to the same conclusion under the present Land Revenue Act. Mr. Hooper wrote: "The property of which partition is sought is an under-proprietary holding of 22 *bighas* 1 *biswa* paying a rent of Rs. 55. It is no doubt included in the area of a *mahal*, as are all other lands in the village in which it is situated, but that does not make it a 'part of a *mahal*' in the sense in which the phrase is used in section 106. The part must be of the same nature or tenure as the whole. Section 138 provides for the partition of under-proprietary *mahals* and of *mahals* held by lessees whose rent has been fixed by a Settlement Officer or other competent authority; and in this connection the words 'part of a *mahal*' must be read as meaning 'part of an under-proprietary *mahal*,' that is, if they apply at all, a point on which I give no opinion. In the present case there is no under-proprietary

(1) Selected Decision No. 10 of 1909.

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mahal of which the holding forms a part, and the provisions of Chapter VII of the Revenue Act do not apply."

The partitioning of subordinate rights, except in the case of sub-settled under-proprietors and persons holding under heritable non-transferable leases, who owing to their peculiar position in Oudh were treated as *quasi*-proprietors, is not provided for in the Act. I have ascertained that as a rule in Oudh partition of under-proprietary holdings consisting of specific plots is not entertained in the Revenue Courts, and apart from any legal difficulty there would be great administrative inconvenience if this were done. In the last year or two, hundreds of small rent-free grants have been converted into under-proprietary holdings by the operation of the law of resumption, and the imperfect partition of these among numerous owners would often result in fields so small that they could not be shown on the village map.

Apart from the question discussed in the Board's Decision of 1905 referred to above of an under-proprietary holding in specific plots not being 'a part of a *mahal*' under section 106, some other provisions of Chapter VII of the Land Revenue Act seem to me of importance in this connection. The application for partition must be presented by two or more of the recorded co-sharers in a *mahal*, and this must be accompanied by a certified copy of the annual register of proprietors prescribed by section 33. This in the case of sub-settled under-proprietors or those holding under heritable non-transferable leases would be the register prescribed by section 32 (b), in which section persons holding *mahals* or *pattis* on such tenures are termed under-proprietary co-sharers or co-lessees. The head-note of *Saddiq Husain v. Mir Fida Husain* (1) is worded in too general terms, and that decision should not be taken as deciding anything more than the questions which arose out of the somewhat peculiar facts of that case. It does not seem to me to support the proposition that a co-sharer in an under-proprietary holding of specific plots is a co-sharer in an under-proprietary *mahal*.

I would dismiss the appeal with costs.

CAMPBELL, J. M.—I see that such great experts on Oudh Law and Custom as the late Mr. J. Woodburn and Mr. J. Hooper

are opposed to my view of the law and I feel bound to defer to their views. I think that the matter should be definitely cleared up when the Revenue Act next comes under revision. The question has been the subject of repeated differences of opinion during the past 30 years.

As the case now stands, this appeal will be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 42 of 1914. *

March 25, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Woodroffe.

KEDAR NATH MITTER—DEFENDANT—

APPELLANT

versus

DENO BANDHU SHAHA AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20, proviso—Payment by cheque, if would save limitation—Continuous account—Cause of action.

If a cheque be delivered to a payee by way of payment and is received as such by him, it operates as a payment and is an extinguishment to that extent of the debt, subject to the condition that if upon due presentation the cheque is not paid the original debt revives. [p. 629, col. 2; p. 630, col. 1.]

Such cheque signed by a debtor and given in part-payment of the principal and received by the creditor as such would save limitation as contemplated by the proviso to section 20 of the Indian Limitation Act. [p. 630, col. 1.]

Mackenzie v. Tiruvengadathan, 9 M. 271, referred to.

Where there are dealings between two parties which give rise to a continuous account so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. [p. 630, col. 1.]

Bonsey v. Wordsworth, 1856) 18 C. B. 325 at p. 334; 25 L. J. C. P. 205; 2 Jur. (N. S.) 494; 4 W. R. 506, 139 E. R. 1395; 107 R. R. 318, followed.

FACTS.—This appeal arose out of a suit for the recovery of a sum of money claimed to be due for the price of timber sold by the plaintiffs-respondents to the defendant-appellant, including a sum of interest. The facts which are not disputed are that between the 7th of January 1903 and the 23rd of September 1911, the plaintiffs sold to the defendant various quantities of teak wood, *sal*

* The report of this case has been taken from the Calcutta Weekly Notes with permission.—Ed.

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wood, iron wood, etc., for prices agreed upon between the parties aggregating the sum of Rs. 9,997-7, and the defendant from time to time paid to the plaintiffs between the 5th April 1903 and the 27th of March 1912 various sums of money on account and in part-payment of the price of the goods so sold and in some instances returned to the plaintiffs some of the goods so sold for which he was duly credited with the price thereof, the total credits and receipts amounting to Rs. 6,289-13-6. After deduction there remained a balance of Rs. 3,707-9-6 due and owing from the defendant to the plaintiffs. The plaintiffs appropriated earlier payments to certain debits in order of time, so that the earlier debits were paid and satisfied, and as to the later debits part-payments or payments on account were made in each and every year in most cases by cheques drawn and signed by the defendant or his agent duly authorised in that behalf. Such payments appeared to be in the handwriting of the defendant or his agent. The defendant was advised to submit that the claim to recover the prices of goods supplied to the defendant up to the 16th of December 1909 was barred by the law of limitation by reason of the fact that on the 12th of April 1907, there was an adjustment of account upon which a sum of Rs. 6-30 was found due and that since that date other goods were supplied under separate orders on various dates up to the 28th of September 1911. The defendant was agreeable to pay all accounts after the 24th of December 1909.

On the 16th of March 1914 the Hon'ble Mr. Justice Chandhuri decreed the suit and in doing so delivered the following Judgment:—

"This is a suit for the recovery of a certain sum of money claimed to be due for the price of timber sold by the plaintiffs to the defendant, including a sum for interest. The facts of this case are not disputed, except with regard to the agreement for payment of interest. The plaintiffs annex to the plaint a statement of the goods sold and of the payments received. There is no dispute as regards them. The defendant, however, says that there was no agreement for payment of interest as alleged in the plaint, and also relies

on the Statute of Limitation in respect of the price of goods sold between *Asarh* 1314 B. S. up to the 1st *Pous* 1316. This portion of the claim is said to be barred. There was undoubtedly an adjustment of accounts on the 29th *Chaitra* 1313 corresponding to the 12th April 1907. Payments on account, however, continued to be made by the defendant by cheques, which, I find, was the ordinary method of payment up to *Chaitra* 1318. I am excluding from these payments of small sums of money on the new-*khata* day. On the adjustment mentioned about Rs. 650 was found due by the defendant. This amount was paid in instalments beginning from the 12th April 1907 up to 1st October 1908. There are, therefore, two questions to determine, namely, (1) was there any such agreement for payment as alleged by the plaintiffs, (2) is the claim between *Asarh* 1314 and the 1st *Pous* 1316 barred by the Statute of Limitation, that is to say, do the payments by cheques operate in favour of the plaintiffs under the provisions of section 20 of the Limitation Act and keep alive his claim for the price of the goods supplied during this period? So far as the question of interest is concerned, the specific case made in the plaint is that there was an express agreement that interest would be charged after 60 days of delivery at the rate of 12 per cent. The first point one has to remember in this connection is that this was not a transaction as between traders. The defendant is a big land-holder in Calcutta and bought timber for his own houses. The evidence in support of the agreement alleged in the plaint has, however, varied. It was stated by the witnesses for the plaintiffs that it was subsequent to the earlier transaction that the matter of interest was discussed, after the adjustment of *Chaitra* 1313, namely, in or about the month of *Bhadra* or *Aswin* 1314. Having regard to this discrepancy, I am not prepared to hold that there was any such agreement, as alleged in the plaint. In the books of the plaintiffs no entry appears showing that interest was ever charged. Reliance has, however, been placed upon the fact that in the *chalans* of the plaintiffs, a printed copy of which has been put in, there is mention of the rate of interest as claimed in this plaint, the plaintiffs saying

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that whenever goods were sent, such *chalans* used to accompany the goods. The defendant has not produced any of these *chalans*, but I consider that even if it were held that *chalans* such as have been produced or similar *chalans* reached the hands of the defendant they are not sufficient to charge him with interest. This would be varying the express agreement to pay interest pleaded in the plaint. At no time was any account sent to the defendant mentioning the matter of interest. If the plaintiffs were entitled to interest or if they considered that they were entitled to it and if there was an express agreement for charging interest, the books would certainly have contained entries relating to it. The plaintiffs' witness also mentioned a figure in the witness-box as due for interest which was different from the figure mentioned in the plaint. He said that the figure in the plaint was wrong. It was perhaps calculated on a different basis. Taking all these circumstances together, I am unable to hold that the plaintiffs are entitled to the interest as claimed in the plaint.

"The next point is as regards the question of limitation. Payments were admittedly made by cheques as alleged by the plaintiffs, and the question for my determination is whether a person drawing a cheque in favour of his creditor, by the fact of drawing such a cheque, can be said to be making a payment the fact of which appears in his handwriting. Now so far as the word 'payment' is concerned, Lord Campbell in construing 9 Geo. IV. c. 14, section 1, held that the word 'payment' was used by the Legislature in a popular sense and cited Justice Maule's dictum in the case of *Maillard v. Duke of Argyle* (1): 'Payment is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises.' So far as the Contract Act is concerned, payments may be made in various ways. See section 50 of the Contract Act and the illustrations. It was held in *Sukhamoni Chowdhurani v. Ishan Chunder Roy* (2) that there was no particular mode or form of payment which was specified in the Limitation Act, that

there were many modes in which payments might be made. In *Kariyappa v. Rachappa* (3), it was held that a settlement of account was a payment. The question is whether a cheque so drawn, paid and honoured can be considered a payment, and if it is a payment, does the fact of the payment appear in the handwriting of the debtor? I would not have entertained much doubt about this point, had it not been for the decision of a very eminent Judge in Madras in *Mackenzie v. Tiruvengadathan* (4) where it was held that a cheque was only an order for payment, that it did not evidence any payment at all, nor did it show for what purpose the payment was made. This case, I find, was considered by this Court in *Mandhardhar Aitch v. Secretary of State* (5), when Mr. Justice Banerjee said that he was not prepared to go quite so far as the Madras case did. So far as the payment by cheque is concerned, it has been held in a great many cases to be a payment when the cheque is honoured. In *Currie v. Misa* (6), it was held that a security of that character was taken as money's worth. In *Irving v. Veitch* (7), it was held that the date of payment by a bill drawn is the date of the delivery of the bill by the debtor, not the time of its payment. In various cases it was considered to be a conditional payment in the event of its being dishonoured. I will only refer to the case of *Trney v. Dodrell* (8) in this connection. I consider that a cheque drawn by a debtor in favour of his creditor specifying the amount to be paid which is in part of the claim then outstanding against him, is a payment the fact of which appears in the handwriting of the debtor and, therefore, I will allow the plaintiffs' claim to the extent of Rs. 3,707-9-6, the amount of principal with interest at 6 per cent. on decree and costs on scale No. II, 4 per cent. on the amount pending suit. Interest will cease to run on the amount paid into Court from the date of such payment."

(3) 24 B. 493 at p. 493; 2 Bom. L. R. 378.

(4) 9 M. 271.

(5) 6 C. W. N. 218.

(6) (1875) 10 Ex. 153 at p. 164; 1 App. Cas. 554.

(7) (1837) 3 M. & W. 90; 7 L. J. Ex. 25; 150 E. R. 1069; M. & H. 313; 4 R. 1, 511.

(8) (1854) 3 Ell. & Bl. 116; 2 Com. L. R. 666; 13 L. J. Q. B. 117; 19 Jur. 187; 118 E. R. 1091; 22 L. T. (o. s.) 38; 27 R. R. 409.

(1) (1843) 6 Man. & Gr. 40; 134 E. R. 801 at p. 803.

(2) 25 I. A. 95 at p. 101; 2 C. W. N. 402; 25 C. 844.

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Against this judgment the defendant appealed.

Mr. S. R. Das (with Mr. A. Rusul), for the Appellant.—A cheque is not a payment, it is a mere order for payment: *Mackenzie v. Tirurengadathan* (4) and *Ram Chandar v. Chandi Prasail* (9). At any rate it cannot be relied upon as a part-payment within the meaning of section 20, Limitation Act, because payment by cheque is not an out-and-out payment but at most a conditional payment. The true test is whether it will support a plea of satisfaction if a suit were brought for the recovery of the amount [*Maber v. Maber* (10) and *Mylan v. Annabi Madan* (11)]. A cheque may be a good payment for certain purposes, but it is not a payment for the purposes of section 20.

[JENKINS, C. J.—Is there not a distinction between payment by way of advance as loan and payment in discharge of a debt?]

Mr. S. R. Das—None on principle.

Marreco v. Richardson (12) can be distinguished, as there the Judges were considering the meaning of payment from the point of view of limitation which prevails in England, which only requires such a part-payment as would imply a promise to pay.

The next point is that the proviso to section 20 requires a fact of payment appearing in the handwriting of the person actually making the payment. Here the person actually making the payment was the Bank, and not the defendant.

The next point is that a tradesman's account of goods supplied is not one account, but each item constitutes separate contract [*Satowrie Singh v. Kristi Bangal* (3)].

[JENKINS, C. J.—Do you say that the tradesmen could bring as many suits as there are items in the account?]

Mr. S. R. Das.—Yes.

Mr. M. Zorab (with him Mr. B. L. Mitter) for the Respondents.—A cheque is payment

unless dishonoured: *Marreco v. Richardson* (12), *In re Boswell*, *Merritt v. Boswell* (14) and *Felix Hadley Company v. Hadley* (15). In this case the cheques were honoured; therefore, payment was made on the dates the cheques were made over and accepted. A fresh period of limitation ran from each of the said dates. The making over and acceptance of the cheques constituted the payment. The defendant made over the cheques and, therefore, he was the person making the payment, and not the Bank which paid the amounts of the cheques. The defendant's signature on the cheques satisfied the requirements of the proviso to section 20.

The payments by cheques were not appropriated by either party. They were general payments on account and reduced the balance of the account. All the unpaid items in the account were saved by such payments [*Walker v. Butler* (16)].

In *Mackenzie v. Tirurengadathan* (4), the endorsement was not proved and it was not necessary to decide whether payment by cheque was a payment. The opinion expressed was mere obiter and is erroneous.

Mr. Das, in reply, referred to *Garden v. Bruce* (17) and section 61, Indian Contract Act.

JUDGMENT.

JENKINS, C. J.—The only question that arises in this appeal is whether a cheque given in part-payment of principal is sufficient to take the case out of the Indian Statute of Limitation having regard to the terms of section 20 of that Act.

The facts are not in dispute. And if the cheque is sufficient for the purpose of section 20, then this appeal must fail.

It seems to me clear that if a cheque be delivered to a payee by way of payment and is received as such by him, it operates as payment and is an extinguishment to that extent of the debt, though this is no doubt subject to a condition subsequent that if upon the presentation the cheque is not paid the original debt revives. There is no suggestion in this case that the cheque upon

(4) (1906) 2 Ch. 359 at p. 366; 75 L. J. Ch. 234; 94 L. T. 243; 22 T. L. R. 247.

(5) (1898) 2 Ch. 680; 67 L. J. Ch. 694; 79 L. T. 299; 47 W. R. 238.

(6) (1856) 6 El. & Bl. 506; 25 L. J. Q. B. 377; 2 Jur. (N. S.) 687; 19 E. R. 953; 108 R. R. 691.

(7) (1868) 37 L. J. C. 112; 3 C. P. 300; 17 L. T. 544; 16 W. R. 305.

(9) 19 A. 307; A. W. N. (1897) 49.

(10) (1877) 2 Ex. 153; 36 L. J. Ex. 70; 16 L. T. 26.

(11) 29 M. 234; 16 M. L. J. 99.

(12) (1908) 2 K. B. 584; 77 L. J. K. B. 859; 99 L. T. 426; 24 T. L. R. 624.

(13) 11 W. R. 529.

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presentation was not paid, in fact, it was : and so there was payment in the fullest sense of the term, and thus a part of the principal of the debt has, before expiration of the prescribed period, been paid by the debtor to the creditor.

Then, it is said that the proviso to the section has not been complied with. That proviso is that in the case of a part-payment of the principal of a debt the fact of the payment must appear in the handwriting of the person making the same. If I am right in the view that the cheque actually was a payment, the very payment was in the handwriting of the person making the same. I cannot for a moment suppose that this proviso was inserted as a sort of a trap to enable debtors to escape from the result of what they have done, and yet that would be the practical result of the argument advanced on behalf of the appellant. It seems to me that the words of the Act are amply satisfied by the circumstances of this case, and I say this notwithstanding the decision in the case of *Mackenzie v. Tiruvengadathan* (4) which is capable of distinction from the present.

A point was made before us as to the appropriation of payment and the nature of the plaintiffs' claim. This has not been made a ground of appeal. But even if it had been, it seems to me that it is valueless. It rests upon the supposition that where, as here, there is a continuous account, there is a separate cause of action in respect of each item. That seems to me to be quite opposed to the proper character of such accounts. In *Bonsey v. Wordsworth* (18), it is said on the strength of the previous authorities that "where a tradesman has a bill against a party for any amount, in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one continuous demand, the whole together forms but one cause of action and cannot be divided."

In my opinion the learned Judge was right in the conclusion at which he arrived. This appeal is dismissed with costs.

(18) (1856) 18 C. B. 325 at p. 334; 25 L. J. C. P. 205; 2 Jur. (N. S.) 494; 4 W. R. 566; 139 E. R. 1395; 107 R. R. 318.

WOODROFFE, J.—I agree.

Appeal dismissed.

Solicitor for the Appellant: Babu Hirendra Nath Dutta.

Solicitor for the Respondents: Mr. W. G. Rose.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 841 of 1914.

November 8, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

CHINNAPPA THEVAN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

PAZHANIAPPA PILLAI—PLAINTIFF—
RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 76 (a)—
Tenancies created by mortgagee in possession, whether
binding on mortgagor—Ejectment—Mortgagor, right
of.*

Tenancies created by a mortgagee in possession are binding on the mortgagor even after the redemption of the mortgage in so far that the relationship of landlord and tenant continues. [p. 631, col. 2.]

A person, therefore, who is in possession as a tenant from year to year under a mortgagee and who continued in possession after the mortgage is redeemed by the owner, should be deemed to be a tenant from year to year under the owner thereafter instead of under the mortgagee. [p. 631, col. 2.]

Seshamma Shettati v. Chickaya Hegade, 25 M. 507; 12 M. L. J. 119; *Collector of Bosti v. Sarnam Gharak*, 11 Ind. Cas. 817; 8 A. L. J. 802, followed.

Where, in the deed of redemption the mortgagee assured the mortgagor that all his (the mortgagee's) rights in the mortgaged property had been extinguished and that thereafter the mortgagor (owner) was to obtain rents from the tenants who had been let into the lands by the mortgagee:

Held, that the right of the mortgagee as the tenants' lessor became transferred to the mortgagor and he was entitled to evict them. [p. 631, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 885 of 1913, preferred against that of the Court of the District Munsif of Palghat, in Original Suit No. 42 of 1912.

Mr. P. Appu Nair, for the Appellants.

Mr. C. V. Ananthakrishna Aiyar, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants are the appellants. The plaintiff is the *jenmi* of the plaint lands. Anganna Mudali became the lessee in 1882 under Exhibit C from the

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jeemi's mortgagee, Chinnasawmy Pillai. The *jeemi* redeemed the mortgage in 1893 (see Exhibit G executed by Chinnasawmy Pillai), the mortgagee having continued in possession even after the redemption of the *jeemi* title by the *jeemi* in 1893. The defendants set up title by adverse possession from 1893. The question, therefore, is whether persons who were in possession as tenants from year to year under a mortgagee and who continued in possession after the mortgage was redeemed by the owner should be deemed to have been in adverse possession from the date of the redemption by the owner, or should be deemed to be tenants from year to year under the owner thereafter instead of under the mortgagee. In *Seshamma Shettati v. Chickaya Hegade* (1), the following passages occur at page 512:

"In the present case, on the footing that the defendants were let into possession by the mortgagee, whether as tenants from year to year or professedly as tenants with a permanent right of occupancy, the tenancy between them and the mortgagee would have continued until the redemption of the mortgage in 1894, and such possession cannot be adverse either to the mortgagee or much less to the mortgagor, and the plaintiff's cause of action would have accrued and the period of limitation commenced to run only in 1894, *if such tenancy ceases by the mere fact of redemption, or subsequent thereto, when the term of notice to quit had expired, if the right view should be that a lease given by the mortgagee, as being incidental to the managements of the mortgaged property, is binding upon the mortgagor—at any rate, as a lease from year to year, until he determines the same.*" Though the alternative view put forward in the italicised portion is not stated definitely to be the right view, the inclination of the learned Judges seems to tend in that direction. Section 76 (a) of the Transfer of Property Act also says that a mortgagee in possession must manage the property as a person of ordinary prudence would manage it if it were his own, and the granting of *puttoms* by an usufructuary mortgagee is not contended to be imprudent management in Malabar. In

Collector of Basti v. Sarnam Gharak (2), Piggott, J., says at page 506: "I do not see how it can be held that the defendant in the present case became a trespasser liable to ejectment... from the date of redemption of Mr. Churcher's mortgage, unless the Court is prepared to hold that the same would be the case with any tenant of agricultural land to whom a usufructuary mortgagee had granted a lease during the period of his mortgage. In my opinion the correct view is that *tenancies thus created by a mortgagee in possession are binding on the mortgagor after redemption of the mortgage, in so far that the relationship of landlord and tenant continues, and that if the mortgagor desires to bring the tenancy to a close, he must do so by a regular suit under the Tenancy Act.*"

In the decree passed in a redemption suit (see section 92, Transfer of Property Act) the mortgagee is directed to deliver up to the mortgagor on redemption all documents in his possession or power relating to the mortgaged property. In the present case, it appears from Exhibit G itself that the mortgagee assured the mortgagor that all his (the mortgagee's) rights in the mortgaged property had been extinguished and that thereafter the mortgagor (owner) was to obtain rents from the tenants who had been let into the lands by the mortgagee. Thus under the terms of Exhibit G itself the right of the mortgagee as the defendants' lessor became transferred to the *jeemi*.

The lower Courts having found that the *jeemi* (plaintiff's predecessor-in-title) had no notice of the defendants' setting up of adverse possession within 12 years before suit, the suit is not barred by limitation, even if it is held that a tenant by setting up adverse possession to the knowledge of the landlord can prescribe for an adverse title from the date when the landlord gets such a definite notice.

The decrees of the lower Courts are, therefore, confirmed and this second appeal will stand dismissed with costs.

NAPIER, J.—I agree.

Appeal dismissed.

(1) 25 M. 507; 12 M. L. J. 119.

(2) 11 Ind. Cas. 817; 8 A. L. J. 802.

BARKAT RAM v. ANANT RAM.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 2111 OF 1913.

June 14, 1915.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Leslie Jones.BARKAT RAM—PLAINTIFF—APPELLANT
versus

ANANT RAM—DEFENDANT RESPONDENT.

Contract Act (IX of 1872), s. 29—Partnership, written contract of Terms uncertain—Construction of document Contract, written, ambiguous Parole evidence, whether admissible—Evidence Act (I of 1872), s. 93—Court, powers of—Partnership—Agency—Pleadings—Plea raised for first time, whether allowable.

A covenant of partnership giving one party the right of specifying the share of the profits to be assigned to the other and affording not the slightest indication as to the proportion of losses which one party is to bear in the partnership is void for uncertainty [p. 632, col. 2; p. 633, col. 1.]

Ramasami v. Rajagopala, 11 M. 200, followed.

Sree Sankarachari Swamiar v. Varada Pillai, 27 M. 332; 13 M. L. J. 449; *New Beerboom Coal Company v. Bularam Mahata*, C. 932; 7 I. A. 107; 7 C. L. R. 247; 4 Sar. P. C. J. 145; 3 Sath. P. C. J. 737; 4 Ind. Jur. 513, distinguished.

A Court cannot supply defects or ambiguities in a document according to its own notions of what is reasonable nor can it admit parole evidence to determine the intention of the executant of the document. [p. 643, col. 1; p. 632, col. 2.]

Davies v. Davies, (1887) 36 Ch. D. 359; 56 L. J. Ch. 481; 56 L. T. 401; 35 W. R. 697, referred to.

Where a partnership is contemplated, but the terms thereof cannot be ascertained, the covenant cannot be taken as creating the relationship of principal and agent between the parties. [p. 643, col. 2.]

A plea which was mentioned neither in the Court below nor in the memorandum of appeal cannot be raised for the first time in the Chief Court. [p. 643, col. 2.]

First appeal from the decree of the District Judge, Delhi, dated the 15th July 1913, dismissing the claim.

Mr. D. C. Ralli, for the late Mr. Pestonji Dudabhoy, and Rai Sahib Lala Moti Sagar, for the Appellant.

Mr. Broadway and Bhagat Gobind Das, for the Respondent.

JUDGMENT.—This appeal arises out of an action brought by the appellant, Barkat Ram, against the respondent, Anant Ram, for the dissolution of partnership and the rendition of accounts. The learned District Judge has dismissed the suit on the ground that the contract relied upon by the plaintiff is void for uncertainty, and the main question for determination in this appeal is whether that finding should or should not be upheld.

The document evidencing the contract is

set out at pages 2 and 3 of the printed paper-book and it is unnecessary to encumber this judgment with a lengthy quotation from it. The deed was executed by Anant Ram in favour of Barkat Ram and though there is no counterpart by the latter in favour of the former, it appears that Barkat Ram by accepting the document impliedly agreed to its terms. Now assuming that it created between the parties the relationship of partners, the question arises whether the terms of the partnership can be ascertained with reasonable certainty. The answer to this question depends upon the construction to be placed upon two clauses relating to profits and losses respectively.

The stipulation in regard to profits, which is contained in the earlier part of the deed, runs as follows:—

"I am only entitled to a part of the profits for my services, that is, I shall accept such amount or part of the profits which the Lala Sahib (*i. e.*, Barkat Ram) will allow me."

This is obviously an uncertain term, and in view of the principle, which finds expression in the maxim *certum est quid certum reddi potest*, we have carefully examined the terms of the document and are unable to find therein anything which would help us in determining the share of the profits which was agreed to be given to the defendant. The learned Pleader for the appellant wants to get over the difficulty by referring us to the vague statement of the witness Amar Nath, but it seems to us clear that when the terms of a document are ambiguous on the face of it, parole evidence is inadmissible to prove the intention of the executant (*vide*, section 93 of the Indian Evidence Act).

We are unable to accept the contention urged by Mr. Moti Sagar that a covenant giving one party the right of specifying the share of profits to be assigned to the other is not open to the objection of uncertainty. It is beyond dispute that the plaintiff has not up to this time exercised his option in accordance with the agreement, and it cannot, therefore, be contended that the term of the contract, which was uncertain in itself, has been rendered certain.

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But the insurmountable obstacle in the way of the plaintiff is created by the covenant relating to losses. Here the difficulty is increased rather than decreased, and our observations in regard to the covenant dealing with profits apply with greater force in this connection. The stipulation in regard to the share of losses is contained in the penultimate sentence of the document and is to the following effect:

"If, in any work, any loss is incurred, I shall be liable therefor at the most to the extent of 4 annas" in the rupee. Now we entertain not the slightest doubt that this provision, which stands by itself and is not, therefore, liable to be controlled by the agreement as to profits, cannot give the Court the slightest indication as to the proportion of losses which the defendant was to bear in the partnership. It is observable that the clause does not even confer upon the plaintiff the right of specifying the share of losses and it is, therefore, impossible to determine this vital term of the contract.

Our conclusion is confirmed by the principle of the judgment in *Ramasami v. Rajagopala* (1), which lays down that an agreement in a *patta* to pay whatever rent the landlord may impose, is bad for uncertainty. The decisions in *Sree Sankarachari Swamior v. Varada Pillai* (2) and *New Beerbhoom Coal Company v. Bularam Mahata* (3) deal with cases in which the terms of the contract were capable of being made certain, and they have, therefore, no bearing upon the point in controversy in this appeal.

The doctrine of law, which makes vague contracts incapable of enforcement and which finds expression in section 29 of the Indian Contract Act, rests upon practical common sense. It is obviously impossible for a Court of Justice to give effect to a contract, the meaning of which it is unable to find out with reasonable clearness. The principle is firmly established that a Court cannot undertake to supply defects or ambiguities according to its own notions of what is reasonable; for this would be not to enforce a contract made by the parties but to make a new contract for

them. As observed by Lord Justice Fry in *Davies v. Davies* (4), "it is the function of the Courts of Law to interpret contracts to say whether a contract is or is not reasonable, to say whether it is or is not void, but that it is not the duty of the Courts to make contracts between parties."

It is urged on behalf of the plaintiff that if the case on partnership fails, he is, in any case, entitled to the rendition of accounts from the defendant and it is argued that the defendant stood to the plaintiff in the relation of agent to his principal. This contention we are unable to accept. The document P-1, discussed above, shows that a partnership was apparently contemplated, but the terms thereof cannot be ascertained. We do not think that the defendant ever became the agent of the plaintiff, and the alternative relief on the ground of agency was, in our opinion, rightly refused by the District Judge.

Finally, Mr. Moti Sagar argues that the defendant, having received benefit under a void contract, should be ordered to restore it to the plaintiff. The provisions of section 65 of the Contract Act undoubtedly empower the Court to direct *restitutio in integrum*, but it is plain that in the present case, it cannot be done without amending the plaint and directing the trial of the suit *de novo*. The plaintiff in the Court below did not claim any relief upon that ground and even the memorandum of appeal to this Court does not contain a prayer to that effect. We cannot, therefore, consider a point which is raised for the first time in this Court at the time of the hearing. The plaintiff may, if so advised, institute a suit to enforce his rights under section 65, but we cannot obviously pronounce an opinion upon the merits of that claim.

The result is that we affirm the decree of the District Judge and dismiss the appeal with costs. The cross-objections by the respondent against the order of the lower Court directing the parties to bear their own costs, have not been argued before us and we see no valid reason to interfere with that order. We, therefore, reject the cross-objections.

Appeal and cross-objections both rejected.

(1887) 36 Ch. D. 359; 56 L. J. Ch. 481; 56 L. T. 401
35 W. R. 697.

(1) 11 M. 200.

(2) 27 M. 332; 13 M. L. J. 429.

(3) 5 C. 932; 7 I. A. 17; 7 C. L. R. 247; 4 Sar. P. C. J. 146; 3 Sath. P. C. J. 737; 4 Ind. Jur. 313.

NARPAT RAI v. DEVI DAS.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1434 OF 1912.

April 28, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge and Mr. Justice LeRoussignol.

NARPAT RAI—PLAINTIFF—APPELLANT
versusDEVI DAS AND OTHERS—DEFENDANTS—
RESPONDENTS.*Hindu Law—Mitakshara—Joint family—Son, vested right of—Partition—Burden of proof.*

According to the Law of the Mitakshara where a son is born to a man governed by Hindu Law, he and that son at once form a joint undivided Hindu family, and anybody later on asserting that they were not at any given time such a family, must prove disruption before that time. (p. 635, col. 1.)

Tulsi Ram v. Shib Das, 19 Ind. Cas. 11; 228 P. L. R. 1913; 5 P. R. 1913, explained.

First appeal from the decree of the Court of the District Judge, Lahore, dated the 16th July 1912, decreeing possession of 1/6th of the house.

Mr. Nanak Chand and Lala Hukam Chand, for the Appellant.

Messrs. Kirkpatrick and Nihal Chand and Bhagat Govind Das, for the Respondents.

JUDGMENT.—In this case a father sued his five sons for possession of a house and for Rs. 250 on account of profits of, which he had been wrongfully deprived through their unauthorised trespass. This house was purchased on 20th December 1904 from Bahadur Ali Shah (see Exhibit P1) for Rs. 1,100, and the deed is in favour of plaintiff alone. In the *rokar bahi* of that date Rs. 1,100 is debited to plaintiff—see Exhibit P4—and again in Exhibit P3, which is a sort of ledger account of plaintiff's, the transaction is again shown as one affecting plaintiff. Then on 20th March 1907, one Malak Shah executed in favour of plaintiff alone—Exhibit P2—a lease of the house. In August 1908, when plaintiff called upon Malak Shah to vacate, defendants took forcible possession. This is in brief plaintiff's case.

Defendants (except No. 5, who took sides with his father) pleaded Order II, rule 2, and section 11, Civil Procedure Code, in connection with certain earlier litigation. On the merits they contended that the purchase was made in the name of plaintiff merely for convenience, he being the head of the family, and similarly he leased it out and so forth; that the purchase was made out of joint family funds; that they (defend-

ants Nos. 1 to 4), when the house fell down, re-built it at their own expense after the family separated (January 1905), that at most plaintiff was entitled to 1/6th of the site and not at all to the house or the mesne profits.

In the end the lower Court found against defendants on their technical pleas. It then went on to hold that the house was bought with joint family money; that the value of the old *malba* utilised by defendants was some Rs. 40; that defendants spent Rs. 4,087 in all on the new building and that the fair solution of the dispute was to let plaintiff have joint possession with defendants of house and site to the extent of 1/6th share on condition of his paying 1/6th of Rs. 4,087, *minus* Rs. 40, i.e., Rs. 674-8, to defendants Nos. 1 to 4; and he directed the parties to bear their own costs.

Mr. Kirkpatrick for defendants-respondents has not revived the technical pleas under the Civil Procedure Code referred to above, but has been content to meet plaintiff-appellant on his own ground and to contend that the property in suit is at the worst joint property of all the parties. His clients merely wish that the decree of the lower Court should stand.

The memorandum of appeal is very long and contains some irrelevant matter and some contentions which Mr. Nanak Chand has not seen fit to touch upon; but Mr. Nanak Chand's contentions in actual argument before us, can be reduced to a very small compass and may fairly be stated thus:—

(i) admittedly none of the property came down to plaintiff from an ancestor.

(ii) It was all acquired by plaintiff.

(iii) No doubt when this house was acquired, the defendants were adult and were still living in commensality with plaintiff—it being admitted that disruption of the family took place in January or February 1905; but according to correct views of Hindu Law for the Panjab, a man's sons have no title to share with their father in aught but "ancestral" property.

(iv) Though there was some joint property up to January-February 1905, the family was not in December 1904, a true joint undivided Hindu family.

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(v) Indications on the record—see facts and incidents stated in the latter part of the first paragraph of this judgment—point to this that as a matter of fact this house was bought by plaintiff for himself out of separate funds, and not for the family or out of family funds.

To take up (v) first, the lower Court has disposed of part of the argument in discussing Exhibit P3, see page 113 of paper-book, lines 9—13. No doubt, the item on the debit side of Rs. 1,100, price of house, and the heading of the account are *pro tanto* in favour of plaintiff's contention, but it must never be forgotten in such cases as this, who was the head and manager of the family and what the common practice is in such cases; and further, scrutiny of the items Rs. 125, Rs. 168-2-10 and Rs. 119-6-7 on the credit side destroys the allegations that this is really plaintiff's private account. In the previous case the arbitrators found the Rs. 125 item to be joint family property—cf. page 38, paragraph 20, serial Nos. 5 and 6, and page 57, 2nd item; and the other two items Rs. 168-2-10 and Rs. 119-6-7 are shown in a manner that indicates that the practice was to give the names of members of the family immediately concerned with each particular piece of business. Similar arguments suffice to dispose of Exhibits P2 and P4.

Turning to (iv) we are inclined to dissent. It requires no reference to authority to lay it down that according to the Law of the Mitakshara, when a son is born to a man governed by Hindu Law, he and that son at once form a joint undivided Hindu family, and anybody later on asserting that they were not at any given time such a family, must prove disruption before that time. In the previous litigation, it was definitely held that this family was joint until early in 1905, and, whether that matter is now *res judicata* or not, we can find on the present record no proof of any earlier disruption. Mr. Nanak Chand, however, argues that *Tulsi Ram v. Shib Das* (1) is authority for the proposition that this branch of Mitakshara Law does not hold good in the Punjab, and that here a son of a Hindu as such has no indefeasible rights in his father's estate; but we cannot

(1) 19 Ind. Cas. 11, 228 P. L. R. 1913; 5 P. R. 1913.

help thinking that that ruling has been misunderstood. It merely lays down that among Punjabi Hindus a son cannot compel his father to partition, and it quotes *Jowahir v. Musammam Chandi* (2) (Stogdon and Bullock, JJ.). Neither of those learned Judges supports Mr. Nanak Chand's contention. Thus Stogdon, J., says: "A son is born with a share," and the ambiguity arises from the peculiar wording of a long "note" by Plowden, J.—page 311 of the volume—in which, after stating the restrictions among Brahmins of a male proprietor's powers of alienation, the learned Judge went on to say—"In the Punjab, at least generally, the Mitakshara doctrine of a son being born with a share is not known, nor has a son a right to compel partition." It is clear to us that a mere *ex parte* note of this kind by a Judge, however eminent, not followed by the Bench dealing with the case as a whole, cannot be taken as an authority. Mr. Nanak Chand also refers us to *Jagan Nath v. Tulsi Das* (3), which, however, seems to us beside the mark.

We, therefore, overrule contention (iii) and this really disposes of the whole case, but in conclusion we may note that, even if the family was not, in the strict sense, a joint undivided Hindu family in December 1904, at least it was a family joint in food and business generally and that the presumption even so is in favour of joint acquisition of this house.

The defendant's case, therefore, abundantly succeeds, and we dismiss the appeal with costs.

Appeal dismissed.

(2) 90 P. R. 1892.

(3) 72 P. R. 1898.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1656 OF 1915.

October 28, 1915.

Present:—Mr. Justice Scott-Smith.

HARBHAGAT AND OTHERS—DEFENDANTS—
APPELLANTS

versus

KALA—PLAINTIFF AND OTHERS—DEFENDANTS
—RESPONDENTS.

Pre-emption—Purchase by person having preferential right of pre-emption along with person having inferior

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right, effect of—Several vendees—Price paid in lump sum—Construction of document. Pre-emptor, sale by, after pre-emption decree, effect of.

When a person having a preferential right of pre-emption joins in the purchase a person having an inferior right, he loses his right of pre-emption. [p. 636, col. 2.]

Where the purchase-money for a sale is paid in a lump sum without specification of the amounts paid by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed. [p. 637, cols. 1 & 2.]

Maghi v. Narain 20 Ind. Cas. 31; 6 P. R. 1914; 256 P. L. R. 1913; 165 P. W. R. 1913, referred to.

Dulla v. Hari Kishen Das, 28 Ind. Cas. 217; 6 P. R. 1915; 190 P. L. R. 1915, distinguished.

A pre-emptor does not lose his right of pre-emption by selling the land subsequent to the decree for pre-emption. [p. 636, col. 2.]

Mahmud Bakhsh v. Hassan Bakhsh, 11 Ind. Cas. 708; 239 P. L. R. 1911; 155 P. W. R. 1911; 7 P. R. 1912, referred to.

First appeal from the decree of the District Judge, Hissar, dated the 20th May 1913, decreeing the claim.

Messrs. Beni Parshad Khosla and Roshan Lal, for the Appellants.

Dr. Mohammad Iqbal and Lala Har Gopal, for the Respondents.

JUDGMENT.—On the 30th of August 1912 Lachhmi Narain sold the land in dispute, 72½ *bighas* 10 *biswas* *pukhta*, by registered deed of sale to defendants Nos. 2 to 7 and to the father of defendants Nos. 8 to 10 for a sum of Rs. 14,500 as entered in the deed. Kala, a *biswadar* in the village in which the land was situate, sued for pre-emption and was given a decree conditional on payment of Rs. 8,000. The defendants-vendees have appealed to this Court. Only three points have been argued before me by Counsel.

The first point argued was whether defendants Nos. 2 to 7, who are *biswadars* in the village, lost their right of pre-emption by joining with themselves in the purchase the father of defendants Nos. 8 to 10, who is only a tenant with a right of occupancy. In the deed of sale the shares of the vendees are specified, but it is not stated what proportion of the price has been paid by each of them. In *Maghi v. Narain* (1), it was held that where the purchase-money for a sale is paid in a lump sum without specification of the amounts paid

by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed. I agree with the lower Court that in accordance with this ruling it must be held that the defendants Nos. 2 to 7 by joining with themselves the father of defendants Nos. 8 to 10 whose right was inferior to that of the plaintiff and themselves, have lost any right of pre-emption which they had. *Maghi v. Narain* (1) is exactly on all fours with the present case. Counsel for the appellants has referred me to *Dulla v. Hari Kishen Das* (2), but the facts of that case are clearly distinguishable, and were distinguished by the learned Judges, from those in *Maghi v. Narain* ().

The next point urged is that the plaintiff Kala by selling the land subsequent to the decree to Yakin-ud-Din has lost his right of pre-emption. I am unable to accede to this proposition. As laid down in *Mahmud Bakhsh v. Hassan Bakhsh* (3), "a man who has a right to pre-empt has merely to produce the money just as any other purchaser; he can no more be asked 'what are you going to do with the land,' or 'where did you raise the money,' than any purchaser in a shop could be asked such questions by the shop-keeper. The pre-emptor has nothing to do but to prove his right to take over the bargain and when he has proved this right all that he has left to do is, to produce the money within the time fixed by the Court." I, therefore, hold that the plaintiff Kala has not lost his right of pre-emption merely by the fact that subsequent to the decree he sold the land to Yakin-ud-Din. The present appellants, if so advised, could have brought a suit against the latter for pre-emption. I am informed that other persons have already done this and that the suit was compromised.

The third point argued is that of price. The first question in regard to this is whether the sum of Rs. 14,500 entered in the deed of sale was actually paid.

(1) 20 Ind. Cas. 31; 6 P. R. 1914; 256 P. L. R. 1913; 165 P. W. R. 1913.

(2) 28 Ind. Cas. 213; 190 P. L. R. 1915; 6 P. R. 1915.

(3) 11 Ind. Cas. 708; 7 P. R. 1912; 239 P. L. R. 1911; 155 P. W. R. 1911.

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Out of this two items of Rs. 1,001 and Rs. 2,354 respectively are said to have been paid on two different occasions prior to the execution of the deed of sale. The exact dates on which the payments were made have not been disclosed and there is no documentary proof in support of either of them. One witness only has deposed to the payments. I agree with the lower Court that his evidence is quite insufficient to prove the payments. The item of Rs. 1,001 is said to have been paid some two months prior to the sale. It cannot be believed that such a large sum would have been paid without taking a receipt or getting a bond executed. A third item, namely, one of Rs. 145, which is said to have been advanced for the purchase of stamp on which the deed was written, may very well have been so advanced. The balance of Rs. 11,000 was paid before the Sub-Registrar. It is alleged that Rs. 3,000 out of this was returned when the parties to the sale came out of the Sub-Registrar's Office. One witness Phooa has been called by the plaintiff in support of this allegation. He states that the bargain of sale was made through his agency for Rs. 8,000. Evidence of this sort is very easy to give, and though it does not appear that the witness is interested in the plaintiff, it is doubtful whether much reliance should be placed upon him. It is, however, proved that the price entered in the deed of sale was not fixed in good faith and it was, therefore, necessary for the Court to consider the market value of the land. This it has done and it has come to the conclusion that it does not exceed the sum of Rs. 8,000 which is admitted to have been paid. The *patwari* gave a list of 13 sales which the lower Court has examined in detail. Certain sales it has excluded from its consideration for various reasons, and I am not prepared to say that it has excluded them without sufficient reason. I am inclined to agree with the lower Court that the market value as evidenced by these sales certainly does not exceed Rs. 8,000. The *patwari's* evidence shows that out of 723 *bighas* 10 *biswas* sold 06 *bighas* 6 *biswas* *preeti* are in the possession of occupancy tenants whose rent is equivalent to the land revenue. The proprietor practically gets nothing

out of this portion of the land. The land revenue assessed on the land is less than annas 3 per *bigha*, which shows that it must be of very inferior quality. The price of Rs. 8,000 is more than 80 times the land revenue assessed on the land.

Counsel for the appellants asks that if I am not disposed to fix Rs. 11,000 as the price to be paid, I will order a further inquiry into the market value. It is, however, not suggested that there have been numerous sales in this village which would assist in arriving at a conclusion as to the real value. The *patwari* was examined in Court and gave a list of 13 sales. He was not asked whether there had been any other sales in recent years in this village. Under the circumstances I do not consider that a sufficient case has been made out for a remand.

I have considered all the evidence produced and am of opinion that the market value does not exceed the sum fixed by the lower Court. The appeal fails and is dismissed with costs. Respondents' costs will be borne by the appellants.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF PENANG).

March 9, 1915.

Present:—Lord Dunedin, Sir George Farwell, and Sir Arthur Channell.

CHUAH HOOI GNOH NEOH—PLAINTIFF

—APPELLANT

versus

KHAW SIM BEE (SINCE DECEASED)—

DEFENDANT—RESPONDENT.

Evidence—Birth-day books, admissibility of—Conditions—Husband—Evidence as to wife's age—Affidavit, previous, admissibility of.

The birth-day books are admissible in evidence under the Straits Settlement Ordinance No. 3 of 1893 as under the Indian Evidence Act, if the parol evidence concerning them is accepted. [p. 639, col. 2.]

Where a husband's statement as to his wife's age is admissible for what it was worth, an affidavit in

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which he had sworn to the same date previously before the controversy is admissible in evidence. [p. 640, col. 1.]

Appeal from a decision of the Supreme Court of the Straits Settlements.

JUDGMENT.

SIR ARTHUR CHANNELL.—This is an appeal from an order of the Court of Appeal of the Supreme Court of the Straits Settlements, dated 21st August 1911, whereby it was ordered that an action brought by the appellant in the Supreme Court should be dismissed with costs. This order in substance, although on different grounds, affirmed the judgment of Mr. Justice Thornton before whom the cause had been tried so far as that judgment related to the matters in dispute in the Court of Appeal and here, one matter dealt with in the judgment below having been disposed of by a cross-appeal allowed by consent.

¶ The action was brought by the appellant, a married woman, for the administration of the estate of one Khaw Soo Chang, her great grandfather (hereinafter called the testator), who had died possessed of considerable property at Penang in the Straits Settlements and also at Renong in the kingdom of Siam. By his Will he directed that his business should be carried on for 16 years after his death (which took place on the 25th May 1882) and that there should then be a distribution, and he gave to one of his sons Khaw Sim Chuan, the grandfather of the appellant, five-sixtieths of the residue. The Will contained a clause to the effect that if any son should die in the testator's life-time or before the period of distribution, such son's share was to go to his issue. The appellant's grandfather did so die, and she claims through him five-sixtieths of the residue. The Will is in several respects far from clear, and amongst other things the translation of the clause under which the appellant claims her grandfather's share was in doubt. Proceedings in Court were taken by originating summons before the present action, which resulted in a decision in the appellant's favour on the construction of this clause, and it is not now disputed that she did become entitled to the five-sixtieths of the residuary

estate. This makes it unnecessary to consider further the family pedigree.

The estate of the testator was not wound up at the end of 16 years, and so far as appears, the estate at Renong has not been wound up yet, but the Penang property was in fact distributed in 1904.

The appellant, who had been married to her present husband in December 1901, executed on the 15th January 1904 a power-of-attorney whereby amongst other things she authorised her husband to represent her in all matters connected with the estate of the testator and to execute deeds in her name. Her husband to some extent at any rate investigated the accounts, and ultimately on the 18th May 1904 executed a release to the executors. The estate had been divided into portions, and it had been arranged that the beneficiaries should draw lots for the order of choice of the portions.

The appellant was fortunate enough to get first choice, and she, or her husband for her, chose a lot including a valuable hotel which she afterwards sold for considerably more than it had been valued at in the apportionment. No complaint was made by or on behalf of the appellant as to this distribution until the 1st September 1910 (after the sale of the hotel), but the appellant had on the 25th April 1908 commenced the present action for administration of the testator's estate. She, however, then complained only of the Renong estate not having been distributed, and in her first statement of claim she alleged that the executors had duly distributed the Penang property and that a release had been executed.

On the 1st September 1910 she delivered an amended statement of claim alleging for the first time that she was under 21 years of age at the time of the execution by her of the power-of-attorney, and that by reason of her infancy she was not bound by it, or by the release executed on her behalf under it. She and her husband alleged that although they knew her age, they had only just discovered the legal effect of it, as there was a Chinese custom to treat a married woman who had borne a child, as the appellant had, as being of full legal capacity whatever her actual

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age. They also alleged that the husband had been induced to execute the release by misrepresentations made to him by one of the executors, and that there had been wilful misconduct and breaches of trust in the administration.

These allegations were denied by the respondents, and the case went to trial before Thornton, J. The trial lasted nine days, and there was a large body of evidence, the effect of which, so far as now material, can be stated quite shortly. On the question of infancy the principal witness was the appellant's grandmother, who stated that the appellant was born on the 19th December 1885. She was present at the birth, and gave as the reason for remembering the date that it was her first and only grandchild. She seemed not very accurate in her estimates of the periods which elapsed between various events of which she spoke. In particular she spoke of one period as "several months," when if all her other statements of periods and the date of her grandchild's birth were correct, the period described as several months must have been about four years. Two so-called birth-day books were produced, each of which contained an entry of the appellant's birth at the date spoken to by the witness. The evidence showed a practice to make entries of dates of births in books more or less of this character, in order to obtain the opinion of astrologers as to good or ill fortune, but one at least of the two books was of a somewhat suspicious character, and neither seems of very great weight.

The appellant's husband also gave evidence as to his wife's age, which obviously was in the nature of hearsay, and there was produced, and received in evidence, subject to an objection to its admission, which does not appear to have been afterwards argued or dealt with, an affidavit by the husband sworn on the 16th August 1902, in which he stated that his wife, the appellant, was then a minor of the age of 17 years only, which of course corresponded with the date spoken to of her birth.

There was no evidence on the other side on this point of date of the appellant's birth, and on this Thornton, J.,

found that the appellant had proved that she was an infant in 1904. He found on the evidence before him that the alleged misrepresentation was not proved, and he held that notwithstanding her infancy, no ground was shown for disturbing the distribution of the Penang property which had been made in 1904. He, however, made an order as to the Renong property. The appellant appealed to the Court of Appeal, and the respondents gave notice of a cross-appeal as to the Renong property, on the ground that the property was out of the jurisdiction of the Court and also on the merits, and the appellant consented to the cross-appeal being allowed.

The Court of Appeal differed from the finding of Thornton, J., as to the infancy, holding that it was not satisfactorily proved. There is no contemporaneous note of the reasons for the judgment of the Court of Appeal, but there is a note made by one of the Judges from his recollection about a year after the judgment was delivered. The Judges seems to have considered that the judgment below was open to review on the question of fact on the ground, *first*, of wrong admission of evidence, and, *secondly*, because the learned Judge stated his conclusion without giving reasons in detail.

The Board have a difficulty in holding these grounds to be sufficient for setting aside the finding of the Judge who had heard the witnesses. There does not seem to have been any evidence wrongly received. The objections go rather to the weight of the evidence than to its admissibility, and the learned Judge had expressly stated that he relied little on the documents in question. The Straits Settlements Ordinance No. 3 of 1893 is identical, so far at any rate as the sections material in the present case are concerned, with the Indian Evidence Act, and under it the birth-day books, if the parol evidence concerning them was accepted, appear clearly admissible.

The parol evidence of the appellant's husband was also admissible under that Code. The affidavit could not have been admissible as a material document if the deponent had not been called or if his parol evidence had not been admissible, but as he was called and his statement as

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to his wife's age was admissible for what it was worth (which of course was very little), he could not have been prevented from saying that he had sworn to the same date before the question now in issue arose, and that of course was the materiality of the affidavit. The Board have not heard Counsel for the respondents on the question of the admissibility of evidence or on the proof of infancy generally, but if it had not been for the view they entertain on the remaining questions, they must have done so, as they are not satisfied that the Court of Appeal was right in the reasons given for dismissing the appeal to them.

Their Lordships, however, are of opinion that, assuming the fact of infancy to be proved, the appellant failed to show sufficient ground for re-opening the settlement of the Penang property, and in substance they agree with the judgment of Thornton, J., on this point, which was not gone into in the Court of Appeal. There can of course be no ratification by the infant after coming of age of the invalid power-of-attorney, but the infant may have, and in their Lordships' opinion has, after coming of age, adopted the division of the property which was in fact made, and made by independent arbitrators. She had valuable property allotted to her under it, which she sold at a profit some time after she came of age, and it was only when the greater part of what she had received had been dissipated that she complained. She has been acting throughout with her husband and has not complained of his acts, and as pointed out by Thornton, J., if the infancy had been known, the husband would no doubt have been appointed guardian of his wife instead of attorney, and as guardian would have acted exactly as he did as attorney.

It is impossible now for the appellant to restore the property she has received, and a general re-distribution of the property divided could not possibly be ordered. In fact the appellant's Counsel did not argue strongly for a general administration, but pressed this Board to make an order that the executors should account for profits they had made by carrying on the testator's business under the name of a Company, or that they should be charged with

some sum which in fact they had never received, for the good-will of the business taken over by the Company. Taking the translation which is on the record of the Will of the testator, a doubt arises as to whether the strict carrying out of the testator's directions in the 4th clause to "stop" the Penang business, and specifically divide the assets, would not destroy any good will, but it would not be right to decide against the appellant's contention on that ground, without some inquiry as to the exact effect of the Chinese words used. The answer to the appellant's contention is that the transaction under which the Company was formed, without making any specific payment for good-will, was not concealed in any way, and was part of the settlement by which the appellant must be held bound. It does not appear how the good-will of the hotel which the appellant took was dealt with, but it is stated that the valuation of the hotel was a low one, and there is nothing to show that the distribution as a whole was an unfair one.

It appears to their Lordships that there is no more ground for re-opening the part of the arrangement now complained of than there is for re-opening the settlement generally.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the Appellant: Messrs. *Rawle, Johnson & Co.*

Solicitors for the Respondents: Messrs. *Loughborough, Gedge, Nisbet & Drew.*

Appeal dismissed.

EMPEROR V. LEHNA SINGH.

PUNJAB CHIEF COURT.

ORIGINAL REVISION PETITION No. 1849 OF 1914.

January 23, 1915.

Present:—Mr. Justice Shah Din.

EMPEROR—PROSECUTOR

versus

LEHNA SINGH—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 195, sub-sections (1) (c) and (2)—Offence committed in course of proceedings before Revenue Officer—Sanction, whether necessary—Penal Code (Act XLV of 1860), ss. 465, 468, 471.

Where the offence of forgery was committed in the course of mutation proceedings held by a Naib Tahsildar in his administrative capacity of a "Revenue Officer."

Held, that the proceedings were not those of a "Revenue Court" within the meaning of section 195 (2) of the Criminal Procedure Code and that the previous sanction of the Naib Tahsildar was not essential to the institution of criminal proceedings under sections 465, 468 and 471, Indian Penal Code. [p. 641, col. 2.]

Case reported by the Sessions Judge, Ferozepore, with his No. 561-J. of 1914.

FACTS.—In some mutation proceedings there was a dispute as to certain entries in a *bahi*, which were to prove whether the land had been redeemed or not. The present accused, Lehna, was referred to a Civil Court by the Revenue Officer where the matter could be threshed out. But before he started his civil suit, the other party Rahmat Ali lodged a criminal case under section 465, Indian Penal Code. This was heard and a charge framed under section 465, Indian Penal Code.

The accused was charged by *Shahzada Sultan Asad Jan* exercising the powers of a Magistrate of the first Class in the Ferozepore District, and was sentenced, by order, dated 10th August 1914, under sections 465, 468-471 of the Indian Penal Code. The accused is on bail.

GROUND.—An application for revision has now been presented. It is no doubt unusual to interfere at such a stage, but it seems clear that sanction should have been granted by the Revenue Officer before whom the document was produced under section 195, Indian Penal Code. And it is also undesirable that when parties have been expressly referred to a civil suit one of them should try and get an advantage by starting a criminal suit of this description. I, therefore, send the case to the Chief Court with the recommendation that the

criminal proceedings so far as they have gone, be set aside.

Mr. Nand Lal, for the Petitioner.

Mr. Sham Lal, for the Respondent.

ORDER.—The mutation proceedings, dated the 22nd April 1913, in the course of which the petitioner Lehna Singh produced his *bahi* which contains the entry that is alleged to have been forged, were held by the Naib Tahsildar in his administrative capacity of a "Revenue Officer", and not in his judicial capacity as a "Revenue Court;" and, therefore, under section 195, sub-section (1) (c), read with section 195, sub-section (2), the previous sanction of the Naib Tahsildar was not essential to the institution of criminal proceedings against the petitioner under sections 465, 468 and 471, Indian Penal Code.

Section 4, clause (14) of the Punjab Tenancy Act draws a distinction between a "Revenue Officer" and a "Revenue Court," and the distinction is clearly observed in the provisions of the Act that follow; and in section 3, clause (12), of the Punjab Land Revenue Act the expression "Revenue Officer," as used in any provision of the Act, is defined as meaning "a Revenue Officer having authority under the Act to discharge the functions of the Revenue Officer under that provision." The Naib Tahsildar before whom the *bahi* was produced on the 22nd April 1913, was acting under the provisions of sections 34 and 36 of the Land Revenue Act and his proceedings were those of a "Revenue Officer" and not of a "Revenue Court" within the meaning of section 195 (2) of the Criminal Procedure Code.

The ruling in *Queen-Empress v. Munda Shetti* (1) on which the petitioner's Counsel has relied, had reference to the provisions of the Madras Act III of 1869 and cannot help us in the decision of the question whether in this province, a Naib Tahsildar acting in the exercise of his powers under Chapter IV of the Punjab Land Revenue Act is a Revenue Officer or a Revenue Court.

In this case, we have to look to the provisions of the Punjab Land Revenue Act, and according to that Act, the Naib Tahsildar,

(1) 24 M. 121; 2 Weir 170.

In re RANGASAMI PADAYACHI.

in the circumstances stated above, was dealing with the matter before him in his capacity as a Revenue Officer only and not as a Revenue Court.

I, therefore, hold that the previous sanction of the Naib Tahsildar concerned, was not a condition precedent to the institution of the criminal prosecution against the petitioner, and I decline to interfere.

Revision rejected.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 530 OF 1915.

CRIMINAL REVISION PETITION NO. 424
OF 1915.

November 11, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re RANGASAMI PADAYACHI AND

OTHERS—ACCUSED NOS. 2 TO 8—

PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 256, 257—Cross-examination of prosecution witnesses—Accused, right of—Charges framed, reasonable opportunity after, to be given to get legal assistance.

Where the charges framed are complicated and the accused are ignorant persons, a reasonable time should be given to the accused to get proper legal advice and assistance before they are called upon to cross-examine the prosecution witnesses. [p. 642, col. 2.]

It is not giving an accused person reasonable opportunity to ask him immediately, after the charge is framed, to cross-examine witnesses. [p. 642, col. 2.]

Arumugam Pillai v. Emperor, 12 Ind. Cas. 524; (1911) 2 M. W. N. 192; 12 Cr. L. J. 548, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Tanjore, in Criminal Appeals Nos. 84 to 90 of 1915, preferred against that of the Court of the 1st Class Sub-Divisional Magistrate of Mayavaram, in Calendar Case No. 17 of 1915.

Dr. S. Swaminadhan, Messrs. V. L. Ethiraj and T. Muthiah Pillai, for the Petitioners.

Mr. O. Sidney Smith, for the Government.

ORDER.—The way in which Rao Sahib Raja Chariar, the first Class Sub-Divisional Magistrate, has disposed of this case is hardly satisfactory. The accused were charged with offences under sections 148, 426, 506

and 326 of the Indian Penal Code. The 3rd accused is 18 years old, and 5th accused is 16 years, 6th and 7th accused 14 years and 8th accused 20. They are ignorant coolies. The Magistrate framed charges under the above sections on the 27th April 1915 in camp at Tranquebar and immediately asked the accused to cross examine the prosecution witnesses. They expressed inability to do so as their Vakil was not there and wanted time. The Magistrate insisted on their going on and there was no cross-examination. Only prosecution 3rd witness was asked a few questions by 2nd accused. On the 29th April 1915, their Pleader put in a petition to be allowed to cross-examine the prosecution witnesses. The Magistrate deferred passing orders for one month and on the 29th May, he passed the following order: "I do not think it necessary to call these witnesses again as they have been cross-examined already." He does not state that the application was vexatious or for the purpose of causing delay, and it is impossible to see how he can with any sense of fairness, have refused the application on the ground that the witnesses had been cross-examined already. The charges were complicated and it is difficult to see how the accused could have cross-examined the witnesses with any effect. The whole procedure adopted by the Magistrate is, in my opinion, not only harsh but against the spirit of the provisions of sections 256 and 257 of the Criminal Procedure Code, which give the accused an undoubted right to cross-examine the prosecution witnesses after a charge is framed.

Where charges framed are complicated and the accused are ignorant persons, a reasonable time should be given to the accused to get proper legal advice and assistance before they are called upon to cross-examine the prosecution witnesses. As observed in *Arumugam Pillai v. Emperor* (1), it is not giving an accused person reasonable opportunity to ask him immediately after the charge is framed, to cross-examine witnesses and a reasonable time should be granted to enable the accused to engage a Pleader. The conviction in that case was set aside.

I think the accused were seriously prejudiced by the way in which the Deputy

(1) 12 Ind. Cas. 524; (1911) 2 M. W. N. 192; 12 Cr. L. J. 548.

EMPEROR V. RAMJILAL.

In re APPU ATLA.

Magistrate acted. The Sessions Judge set aside the conviction on the charges under section 506, in respect of all the accused except 3rd accused and under section 326 in respect of accused Nos. 3 to 8 and converted the conviction under section 148 into one of section 147. If the Vakil for the accused had cross-examined the prosecution witnesses, it may well be that circumstances would have been brought to light which would have resulted in their acquittal.

I set aside the conviction and sentence. So far as the accused except 2nd accused are concerned, the learned Public Prosecutor does not press for a re-trial and I think he is perfectly right. I do not think it necessary to order their re-trial.

The 2nd accused will be tried for an offence under section 325 by some other Magistrate.

Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 115 OF 1915.

April 16, 1915.

Present:—Mr. Justice Shah Din.

EMPEROR—PROSECUTOR

versus

RAMJILAL—ACCUSED.

Stamp Act (II of 1899), ss. 65, 70—Failure to affix stamp to receipt—Sanction of Collector, if necessary for prosecution.

A Magistrate has no jurisdiction to try a person in respect of an offence alleged to have been committed under section 65 of the Stamp Act, 1899, without the sanction of the Collector being first obtained to the institution of the prosecution.

Queen-Empress v. Jethmal Jayraj, 9 B. 27, followed.

Case reported by the District Magistrate, Rohtak, with his No. 30-G of 8th January 1915.

FACTS.—Mehun, complainant, owed some money to the accused Ramji Lal, whom he paid a sum of Rs. 36 in the month of Bhadon last. The accused gave him the receipt, Exhibit PA, written by himself in Hindi, but which he did not sign, nor affix a receipt stamp to. The complainant's suspicions having been roused by the nature of the receipt, he instituted

a complaint under section 420, Indian Penal Code, and section 65 of the Stamp Act.

The accused, on conviction by Sheikh Khurshaid Muhammad, exercising the powers of a Magistrate of the First Class in the Rohtak District, was sentenced, by order dated 23rd November 1914 under section 65 of the Stamp Act, to pay a fine of Rs. 25 or to undergo rigorous imprisonment for one month in default.

GROUND.—The Court of the Revenue Assistant convicted the petitioner under section 65, Stamp Act, although the Collector had not sanctioned the prosecution as required by section 70, Indian Stamp Act. The irregularity is according to *Queen-Empress v. Jethmal Jayraj* (1), material. I, therefore, forward the record to the Hon'ble Judges, Chief Court, in order that the conviction may be set aside.

Mr. Brij Lal, for the Accused.

ORDER.—As held in *Queen-Empress v. Jethmal Jayraj* (1) the Magistrate had no jurisdiction to try the petitioner in respect of the offence alleged to have been committed by him under section 65 of the Indian Stamp Act, II of 1899, without the sanction of the Collector being first obtained to the institution of the prosecution. The conviction is, therefore, bad in law and is set aside. The fine must be refunded to the petitioner.

Revision accepted.

(1) 9 B. 27.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 540 OF 1915.

CRIMINAL REVISION PETITION NO. 433 OF 1915.

November 15, 1915.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Abdur Rahim.

In re APPU ATLA—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 193 (1) (b)—"Such Court". interpretation of—Court abolished but re-established with curtailed territorial limits Jurisdiction—Sanction for prosecution for offence committed before abolition.

A Court once abolished but re-established two years later with its territorial limits somewhat

EMPEROR v. GUL MUHAMMAD.

curtailed, is not "such Court" within the meaning of section 195 (1) (b) of the Code of Criminal Procedure, and the latter Court has no jurisdiction to grant sanction for prosecution in respect of an offence committed before the former.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session, South Canara Division, in Criminal Revision Petition No. 7 of 1915, presented against that of the First Class Sub-Divisional Magistrate of Mangalore, in Calendar Case No. 55 of 1913.

Mr. K. Y. Adiga, for the Petitioner.

Mr. P. R. Grant, for the Government.

ORDER.

ABDUR RAHIM, J.—In this case, the question is whether the Court of the Sub-Magistrate of Bantwal which granted sanction for prosecution was within the meaning of section 195, Indian Penal Code, the same Court before which one of the statements with reference to which the petitioner has been prosecuted, was made. It appears that, by a notification in the Fort St. George Gazette, dated 10th September 1910, the office of the Deputy Tahsildar at Bantwal was abolished. That means that there was no Sub-Magistrate at Bantwal as a result of the notification. Then, there was certain shuffling of the jurisdiction of the villages covered by the original Bantwal Court. We need not go into that.

The next fact which is of relevance is that on the 15th June 1912, the Bantwal Court was restored with some slight modification, that is to say, its territorial jurisdiction was somewhat curtailed. The Deputy Tahsildar was vested with 3rd class powers on 22nd June 1912. It appears, therefore, that there was an interval of two years during which time, there was no Sub-Magistrate's Court at Bantwal at all. The old Sub-Magistrate's Court ceased to exist, and if it was revived two years afterwards, it is difficult to say that there was any such continuity as would enable us to hold that the Court that was re-constituted in 1912, was the same as of 1910.

I, therefore, hold that the sanction granted was without jurisdiction. The order

of the Sessions Judge directing re-trial, is set aside.

AYLING, J.—The point is not free from difficulty, but I am inclined to agree with the view taken by my learned brother.

Petition allowed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 346 of 1915.

May 17, 1915.

Present:—Mr. Justice Shah Din and
Mr. Justice LeRossignol.

EMPEROR—PROSECUTOR—APPELLANT
versus

GUL MUHAMMAD—ACCUSED—

RESPONDENT.

Police Act (V of 1861), ss. 7, 36—Police Constable punished for corruption departmentally, whether can be also prosecuted criminally—Penal Code (Act XLV of 1860), s. 163.

A Police Constable who has been dealt with departmentally for corruption under section 7 of the Police Act (V of 1861) can be prosecuted and punished under section 163 of the Penal Code. [p. 645, col 1.]

Appeal from the order of the Sessions Judge, Sialkot, dated the 15th January 1915.

The Assistant Legal Remembrancer, for the Appellant.

Mr. Muhammad Saleem, for the Respondent.

JUDGMENT.—This case relates to a charge brought against a Police Constable under section 163 of the Indian Penal Code. He was convicted by the first Court, but the learned Sessions Judge on appeal set aside the conviction on the ground that the appellant had already been punished for the offence by his departmental superiors. From that decision, the Crown has preferred this appeal, which in our opinion cannot but succeed. Mr. Muhammad Saleem on behalf of the respondent attempts to support the decision of the learned Sessions Judge by quoting section 36 of the Police Act. The learned Sessions Judge has not quoted that section but has referred only to section 7 of the Police Act. It appears to us that the learned Sessions Judge has entirely misunderstood the matter. Section 7 of the Police

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Act does not deal with the punishment of offences made punishable by this Act. Section 7 deals merely with the powers of superior Police Officers in regard to the control of their subordinate officers. Under that section, the controlling authorities are empowered to punish not offences but acts of negligence. Section 36 on the other hand, deals with offences which might be punishable either under Act V of 1861 or some other Act, such as the Indian Penal Code. For example, an individual convicted under section 34 of Act V of 1861 for furious riding, is secured from further prosecution in respect of the same offence under section 279 of the Indian Penal Code.

For these reasons, we accept the appeal and setting aside the order of the learned Sessions Judge direct that he should re-hear the appeal and decide it on the merits.

Appeal accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 274 OF 1915.

CRIMINAL REVISION PETITION NO. 225 OF 1915.

November 19, 1915.

Present:—Mr. Justice Kamaraswami Sastri.

VELAYUDA KONE—PETITIONER

versus

NARAYANA KONE AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145, cl. (4), order under—Police report—Breach of peace, likelihood of—Notice—Subsequent finding of no breach without inquiry, legality of.

When once on the perusal of a Police report, a Magistrate passes an order under section 145 of the Code of Criminal Procedure, that there is a likelihood of a breach of the peace, he cannot afterwards say that there is no likelihood of such breach without an enquiry and without taking the evidence which the parties are willing to offer.

Sreeman Kumara Tirumalraja Bahadur Raja of Karvetnagar v. Sowcar Lodd Govin Doss Krishna Doss, 29 M. 681; 16 M. L. J. 419; 1 M. L. T. 405; 5 Cr. L. J. 91; Gaizuddi Howladar v. Ainuddi Howladar, 22 Ind. Cas. 431; 14 C. W. N. 94; 15 Cr. L. J. 79; Juthan Singh v. Ram Narain Singh, 22 Ind. Cas. 946; 19 C. L. J. 356; 18 C. W. N. 700; 15 Cr. L. J. 202, followed.

Petition, under section 15 of the Charter Act and section 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Melur, in Miscellaneous Case No. 6 of 1915, dated the 27th February 1915.

Mr. K. N. Aiyar Aiyar, for the Petitioner.

Mr. T. Narasimha Aiyangar, for the Respondents.

The Public Prosecutor, for the Government.

ORDER.—The Magistrate after perusing the Police report, passed an order on the 5th February 1915, holding that there was a likelihood of breach of the peace and issued notice to the parties. On the 27th February 1915, the Magistrate without any evidence and without any enquiry held that there was no likelihood of any breach of the peace. It is represented by petitioner's Vakil that his client was ready with evidence to show that he was in possession and that he apprehended that he would be ousted by force. The mere fact that a prior application was dropped by a Magistrate prior to the order passed by the Magistrate on the 5th February 1915, is no ground for refusing an inquiry. In spite of the prior proceedings, the Police reported that there was a likelihood of breach of the peace and the Magistrate was of opinion that a breach of the peace was likely.

Having come to that conclusion and having issued notice, the Magistrate ought to have held an enquiry as provided by clause 4, section 145, of the Code of Criminal Procedure and examined witnesses called by both or either of the parties. His failure to do so, has been held to be illegal and to afford grounds for interference by the High Court: *Sreeman Kumara Tirumalraja Bahadur, Rajah of Karvetnagar v. Sowcar Lodd Govind Doss Krishna Doss (1), Gaizuddi Howladar v. Ainuddi Howladar (2) and Juthan Singh v. Ram Narain Singh (3).*

I set aside the order of the lower Court and direct that he dispose of the petition according to law.

Petition allowed.

(1) 29 M. 561; 16 M. L. J. 419; 1 M. L. T. 405; 5 Cr. L. J. 91.

(2) 22 Ind. Cas. 421; 18 C. W. N. 94; 15 Cr. L. J. 79.

(3) 22 Ind. Cas. 986; 18 C. W. N. 700; 19 C. L. J. 356; 15 Cr. L. J. 202.

BHOLA RAM v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 2145
OF 1914.

May 4, 1915.

Present:—Mr. Justice Rattigan.

BHOLA RAM—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

N.W. Frontier Crimes Regulation III of 1901,
applicability of—General Clauses Act (X of 1897), s. 24.

Frontier Crimes Regulation, III of 1901, is still in force in Leiah Tahsil, Muzaffargarh District, and it applies to all persons not being 'European subjects' born or residing in districts to which the Regulation applies. [p. 646, col. 2.]

Though the Regulation IV of 1887 has been repealed by Regulation III of 1901, the notifications issued under Regulation IV of 1887, must be deemed to be still in force by virtue of section 24 of the General Clauses Act, 1897. [p. 646, col. 2.]

Game Shah v. Emperor, 8 P. R. 1903 Cr.; 102 P. L. R. 1903, referred to.

Petition for revision of the order of the District Magistrate, Muzaffargarh, dated the 21st October 1914.

Bhagat Gobind Das, for the Petitioner.

Mr. B. Bevan Petman, for the Respondent.

JUDGMENT.—On the 10th June 1914, Allah Dad, a Biloch resident of the Leiah Tahsil, Muzaffargarh District, presented a complaint against Bhola Ram and Juman Ram Chawlas, residents of the same Tahsil, alleging offences committed by them with regard to his wife, Musammat Zainab, and praying for their punishment under sections 497, 498 and 109, Indian Penal Code. On the 16th of June, he presented a further complaint praying that action might be taken against his said wife under section 30 of the Frontier Crimes Regulation, 1901. The complaints were preferred to the Sub-Divisional Magistrate, who after a preliminary enquiry, submitted the record to the Deputy Commissioner with a view to the case being referred to a *jirga* under section 11 of the Regulation. The Deputy Commissioner accepted the suggestion, by order dated the 18th August, and authorised the Sub-Divisional Magistrate to make the reference and nominate the members. The reference was accordingly made and after enquiry and trial the *jirga* reported against all accused persons. The Deputy Commissioner considered the report and by his order, dated 21st October, acquitted Juman Ram and convicted Bhola Ram under section 497 and sentenced him to three years' rigorous imprisonment and to pay a fine of Rs. 100.

He also convicted Musammat Zainab under section 30 of the Regulation and sentenced her to rigorous imprisonment for one year.

Bhola Ram, through his Pleader Mr. Govind Das, has applied for revision of the Deputy Commissioner's order on the following three grounds:—

(a) Regulation III of 1901 was no longer in force in the Leiah Tahsil, which now forms part of the Muzaffargarh District.

(b) The said Regulation does not apply to Hindus, but only to Biloches and Pathans.

(c) The Leiah Tahsil having never been severed for the purposes of the said Regulation from the Dera Ismail Khan District to which it belonged at the time of coming in force of the Regulation, the only Deputy Commissioner who had jurisdiction to hear the case was the Deputy Commissioner of Dera Ismail Khan.

Game Shah v. Emperor (1) is sufficient authority to justify my entertaining this petition, and it is also authority for overruling ground (a) as above set forth. It is a Division Bench ruling and as such binding on me.

As regards the second objection, Mr. Petman has referred me to Punjab Government Notifications Nos. 720-A, dated the 9th of July 1887, and 1156, dated the 15th of November 1887, both issued under the provisions of the Frontier Crimes Regulation of 1887. By the first of these notifications, the provisions of the Regulation of 1887 were (with certain irrelevant exceptions) extended to the Banna, Dera Ismail Khan and Dera Ghazi Khan Districts, and by the second, the provisions of the Regulation as a whole were extended to all persons, not being European British subjects, born or ordinarily residents in those districts. Regulation IV of 1887 has been repealed by Regulation III of 1901, and though no new notification has been issued under section 1 (4) of the latter Regulation, the notifications issued under Regulation IV of 1887 must be deemed to be still in force by virtue of section 24 of the General Clauses Act, 1897. Mr. Govind Das very properly admitted that his second objection failed and could not be supported.

The third objection, like the first, is covered by the decision of the Division Bench in *Game Shah v. Emperor* (1).

(1) 8 P. R. 1903 Cr.; 102 P. L. R. 1903.

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I appreciate the force of Mr. Govind Das's argument that if the Regulation be held to be still in force in the Leiah Tahsil, as if it had never been severed from the Dera Ismail Khan District, the logical inference is the Deputy Commissioner of that district and not the Deputy Commissioner of Muzaffargarh District had jurisdiction to refer this case to the *jirga*. This contention is, however, opposed to the ruling cited and I must, therefore, overrule it.

The result is that the petition fails and is rejected.

Revision rejected.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 700 OF 1915.
October 30, 1915.

Present:—Mr. Justice Piggott.

SHEONANDAN AND ANOTHER—APPLICANTS
versus

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 380, 201, 511—
Theft—Causing disappearance of document, attempt of.*

The accused brought a civil suit in the Court of the Subordinate Judge of Monghyr on the basis of a forged promissory note. The file of the case was sent for and kept in the Court of the Additional Munsif of Jaunpur being required in connection with a suit pending in that Court and it somehow found its way to the house of an official of the Court. The accused got into the inner verandah of the house and removed the forged promissory note from the file. From that place, on being pursued, they tore it to pieces:

Held, that they were guilty of an offence under section 380, Indian Penal Code. [p. 649, col. 1.]

Held, further, that they were also guilty under section 201/511 of the Penal Code. [p. 649, col. 2.]

Criminal revision against an order of the Sessions Judge of Jaunpur.

Mr. Hamilton, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—The two appellants, Sheo Nandan and Babu Nandan, were committed for trial on charges alleging against both of them, the commission of offences punishable under sections 380 and 201, Indian Penal Code. The charges were amended by the Sessions Judge, although under the circumstances, it does not seem to me that there is any clear reason why he should not have been content to proceed with the charges as originally framed, unless indeed, as I shall have occasion to remark presently, he was prepared to add a further charge against Sheo Nandan alone. However, in the result

both the accused were convicted on the charge under section 380, Indian Penal Code and sentenced to rigorous imprisonment for three years each. Babu Nandan alone was convicted on the charge under section 201, Indian Penal Code, and sentenced to a further period of rigorous imprisonment for three years. The essential facts put forward by the prosecution in this case, may be stated thus. There was in the Court of the Subordinate Judge of Monghyr the record of a certain suit filed on the basis of a promissory note. That promissory note was forged and the accused Sheo Nandan, who instituted the said suit, had been guilty in so doing of an offence punishable under section 471, Indian Penal Code, namely, using as genuine a document which he knew to be a forged document, and possibly also of the substantive offence of forging the said document, punishable under section 467, Indian Penal Code, inasmuch as the promissory note in question purported to be a valuable security. Under circumstances which need not be set forth in detail, the record in question was sent from the Court of the Subordinate Judge of Monghyr to Jaunpur, where it was eventually placed in the custody of the Additional Munsif of Jaunpur being required as an Exhibit in connection with a suit pending in that Court. On the 3rd of May 1915 the file received from Monghyr Court, somehow found its way to a certain house in the city of Jaunpur which was jointly inhabited by two officials belonging to the Court of the Additional Munsif, namely, Babu Lal, suits clerk, and Sheo Dyal, decree-writer. The accused Sheo Nandan and Babu Nandan are alleged to have gone to the said house, to have obtained access to the Monghyr file and to have removed from it two papers, namely, the forged promissory note and the list of documents along with which the pro-note had been filed in the Monghyr Court. They ran away from the house with these two papers in their possession. Being pursued, they endeavoured to destroy the same by tearing them. They were, however, captured, and the two papers were recovered. In the Sessions Court, the case was tried at length on the facts, the accused persons denying practically all the allegations against them and producing evidence in support of an *alibi*. The only admission of any conse-

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quence made by either of the accused, was that Sheo Nandan did finally admit the promissory note before the Court to be the one which he had produced in the Court of the Subordinate Judge at Monghyr in support of the claim made by him in that Court. On the evidence before him, the Sessions Judge came to the conclusion that both the accused had been guilty of theft of these two papers and had committed this offence in a building used as a human dwelling, namely, the house occupied by the witnesses Babu Lal and Sheo Dyal. He held on the strength of various reported decisions of this Court that Sheo Nandan, being proved by the evidence to have committed the offence of forgery or of using as genuine a forged document in connection with which the charge under section 201, Indian Penal Code, was framed, could not himself be tried or convicted of causing evidence to disappear under the provisions of the latter section. He held this offence to be proved against Babu Nandan, convicted him on the charge under section 201, Indian Penal Code, and sentenced him to a further period of rigorous imprisonment for 3 years. In support of the appeal filed in this Court, I have not been asked to examine in full detail the evidence with regard to most of the questions of fact which were contested in the Court below. I accept the finding of the learned Sessions Judge that the *alibi* evidence produced by the accused in his Court is unworthy of credit. I hold it to be proved by overwhelming evidence that, on the date set forth in the charge, the accused Sheo Nandan and Babu Nandan were seen running away from the house already referred to with the witnesses Babu Lal and Sheo Dyal in pursuit of them. They were captured and the two papers set forth in the charge, namely, the forged promissory note and the list of documents were recovered from the possession of one or other of them. With reference to the charge under section 201, Indian Penal Code, I have further examined the evidence on the strength of which the learned Sessions Judge has come to the conclusion that the offence of forgery, and, therefore, also the offence of using as genuine a forged document, had been committed in respect of the promissory note in question, and I concur in the finding arrived at by the Court below on this point. It remains for me, however, to consider a

number of arguments which have been addressed to me with regard to the propriety of the convictions affirmed by the Court below, and with a view mainly to obtaining a substantial reduction of sentence by reducing the offence of which the appellants have been convicted either to one of simple theft under section 379, Indian Penal Code, or possibly to one of simple mischief under section 426, Indian Penal Code. In this connection it has been necessary to examine with care the evidence given by the witnesses Babu Lal and Sheo Dyal. These men were in a difficult position, undoubtedly the record in question, namely, the file of the suit received from the Monghyr Court ought not to have been in the place where it was at the time referred to in the charge. Neither Babu Lal nor Sheo Dyal had any business to remove that record from the safe custody of the Court of the Additional Munsif, and one or the other of them was guilty of misconduct and liable to departmental punishment for having so removed it. It is not to be wondered at under the circumstances that each of these men endeavoured in his evidence to throw the blame upon the other, and that the statements of neither of them as to the precise circumstances under which that record came to be at their house, or I may add, to the precise circumstances under which the accused Sheo Nandan and Babu Nandan put in their appearance, can be accepted as reliable. After allowing all due weight to these considerations, I am nevertheless fully satisfied that the offence of theft in respect of these two papers was committed by the appellants Sheo Nandan and Babu Nandan acting in concert, and was so committed that it is not material for the Court, in view of the provisions of section 34, Indian Penal Code, to determine with certainty which of the accused actually removed either or both of the documents. There is clear and satisfactory evidence, apart from the statements of Babu Lal and Sheo Dyal, that the two accused ran out of the house with the aforesaid witnesses in pursuit, that they were captured at no great distance of the said house and that the two papers which formed the subject-matter of the theft, were recovered from the possession of one or either of them in a damaged condition. I, therefore, regard the evidence

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as proving that the papers in question had been taken from the possession of Babu Lal, or of Sheo Dyal, or of both of them, without the consent of either of them; and taking the circumstances of the case as a whole, I have no doubt that they had been taken dishonestly. With regard to the applicability of section 380, Indian Penal Code, rather than section 379, Indian Penal Code, it does not appear to me that the cross-examination of the prosecution witnesses in the Court below was very specifically directed to the point which has been made before me in argument. So far as the evidence goes, it seems to me to show that the theft took place in a verandah of the house situated on the inner side of the main door, and obviously forming part of a building used as a human dwelling within the meaning of section 380, Indian Penal Code. A further question has been raised as to whether theft of property from the person of the complainant would be liable to enhanced punishment provided by section 380, Indian Penal Code, merely because the complainant in question happened at the time to be in some building. As a matter of fact, in the great majority of cases, such a question would be *otiose*, because if a Court felt any doubt about applying section 380, Indian Penal Code, it could feel no hesitation in convicting under section 451, Indian Penal Code. In the particular case now before me, I am content to say that, although the evidence of Babu Lal and Sheo Dyal as to the precise circumstances under which the accused succeeded in effecting the removal of these papers, is conflicting and unreliable, it is certain on the evidence as a whole that the papers were removed from the file while the file was in the verandah of the house, and cannot reasonably be said to have been removed from the person of Babu Lal or of Sheo Dyal. I am satisfied, therefore, that the conviction under section 380, Indian Penal Code, was right and proper. With regard to the conviction of Babu Nandan under section 201, Indian Penal Code, a number of questions have been raised. I think the Court below in trying this charge was bound to come to a finding as to whether an offence under section 467 or section 471, Indian Penal Code, had or had not been committed. As already stated, I concur in

the finding which the learned Sessions Judge has arrived at on this point. It is, however, clear to me that no offence punishable under section 201, Indian Penal Code, was actually completed. The evidence, the disappearance of which it was desired to cause, consisted of the two papers in respect of which the accused have been convicted of theft, and then the papers cannot be said to have disappeared within the meaning of section 201, Indian Penal Code. They were recovered in a damaged condition, but for evidential purposes, so far as concerns the alleged offences under sections 467 and 471, Indian Penal Code, they are complete and fully available for the purposes of justice.

I should not be prepared to say that in this case, there had been even a temporary disappearance, setting aside the further question of law whether a temporary disappearance would be sufficient to fulfill the requirements of the section. Babu Nandan, therefore, can only be convicted on this part of the case of having attempted to cause the disappearance of these papers, that is to say, of an offence punishable under sections 201/511, Indian Penal Code, and I am satisfied that the maximum punishment which could be inflicted upon him under these sections, would be one of rigorous imprisonment for a period of one and a half years. The question whether Sheo Nandan could or should at this trial have been further charged with offences under sections 471 or 467, Indian Penal Code, and of the legal effect of his not having been so charged or convicted, does not now arise; but I am satisfied that there had been misjoinder of persons or charges in the Court below so far as the trial actually went. The position is perhaps a little awkward, in view of the fact that Sheo Nandan could not be convicted of any offence under section 201, Indian Penal Code, while he was undoubtedly guilty of the offence under section 380, Indian Penal Code, jointly committed by himself and Babu Nandan in the course of the same transaction. At any rate there was nothing illegal about the joint trial as held. I shall have to interfere with the conviction and sentence in the case of Babu Nandan for the reasons already stated; and taking all the circumstances of the case into consideration, I am

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ot prepared to say that a severer punishment than rigorous imprisonment for a total period of three years seems to be required against this man in the interests of justice. The result is that I dismiss the appeal of Sheo Nandan. In the case of Babu Nandan, I affirm the conviction and sentence under section 380, Indian Penal Code. On the other charge I direct that the conviction be altered to one under sections 201/511, Indian Penal Code, and the sentence reduced to one of rigorous imprisonment for one year, and I further direct that this latter sentence shall run concurrently with the sentence of three years' rigorous imprisonment passed on the conviction under section 380, Indian Penal Code.

Convictions affirmed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 554 OF 1915.

CRIMINAL REVISION PETITION NO. 446
OF 1915.

November 8, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

BASAVANA GOWD—COMPLAINANT—
PETITIONER

versus

KRISHNA RAO NAIDU—ACCUSED—
RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 435, 439—Complaint dismissed by District Magistrate under s. 203, Criminal Procedure Code—No revision to Sessions Court—Revision to High Court direct, if competent.

It is not an inflexible rule that no revision lies to the High Court unless the party has first applied to the Sessions Court. [p. 651, col. 1]

The jurisdiction conferred by the Criminal Procedure Code on the High Court is wide and it ought not to be fettered by any hard and fast rule. [p. 651, col. 1.]

Shafaqatullah v. Wali Ahmad Khan, 30 A. 116; A. W. N. 1908) 25; 3 M. L. T. 124; 7 Cr. L. J. 48 and *Bhuyan Abdus Sobhan Khan, In re*, 2 Ind. Cas. 846; 36 C. 643; 13 C. W. N. 653; 10 Cr. L. J. 190, explained.

Queen-Empress v. Chagan Dayaram, 14 B. 331, not followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the District Magistrate of Bellary, in Calendar Case No. 3 of 1915.

FACTS of the case appear from the order.

Mr. S. Ranganatha Iyer, for the Accused, raised a preliminary objection that the revision was incompetent inasmuch as the Sessions Court was not moved and relied on *Shafaqatullah v. Wali Ahmad Khan* (1), *Bhuyan Abdus Sobhan Khan, In re* (2) and *Queen-Empress v. Chagan Dayaram* (3) and upon the practice of the Court. He also relied upon the fact that in section 498, where the same words occur, the High Court has held that the Sessions Court must first be approached before the High Court is moved.

The Hon'ble Mr. B. N. Sarma, for the Petitioner, contended there was nothing in the Code warranting such a procedure.

ORDER.—The petitioner, who is the Reddy of the village and a man of means, filed a complaint before the District Magistrate charging the Acting Tahsildar of Siruguppa with having beaten him with a slipper. The District Magistrate dismissed the complaint under section 203 of the Code of Criminal Procedure.

The sworn statement of the complainant and the deposition of the witnesses examined before the District Magistrate in the enquiry held by him under section 202, have been read and commented upon and I am of opinion that the evidence recorded certainly affords good grounds for further enquiry. I am unable to see any material discrepancy, or anything on the face of the record to warrant a summary dismissal of the complaint. There can be little doubt from the evidence that the Tahsildar wanted the Reddy to supply him with milk. The evidence of the Revenue Inspector is to the effect that "there was some trouble between the Tahsildar and the Reddy about the milk." He professes to have left the place just then. The petitioner speaks to the assault and two of his witnesses state that the Tahsildar beat the complainant with a shoe and the discrepancies do not affect their credibility in any material way. There has not been any long delay—at least no such delay as

(1) 30 A. 116; A. W. N. (1908) 25; 3 M. L. T. 124; 7 Cr. L. J. 48.

(2) 2 Ind. Cas. 846; 36 C. 643; 13 C. W. N. 653; 10 Cr. L. J. 190.

(3) 14 B. 331.

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would warrant the throwing out of the case *in limine*.

I am of opinion that this is a case that requires a full and thorough investigation. It is argued that no revision petition will lie to the High Court unless the party has first applied to the Sessions Court and reference has been made to *Shafaqatullah v. Wali Ahmad Khan* (1), *Bhuyan Abdus Sobhan Khan, In re* (2) and *Queen-Empress v. Chagan Dayaram* (3).

The jurisdiction conferred by the Criminal Procedure Code on the High Court is wide and I do not think it ought to be fettered by any hard and fast rule. All that is laid down in *Bhuyan Abdus Sobhan Khan, In re* (2) is that the High Court will not *ordinarily* interfere except on special grounds, when a party does not exhaust his remedy by applying to the Sessions Court. This decision was followed in *Shafaqatullah v. Wali Ahmad Khan* (1). I do not think the cases cited lay down any inflexible rule. Nor do I think it desirable that any such rule should be laid down. In the present case, the petition was admitted by Mr. Justice Ayling and the papers have all been printed. I see no grounds for refusing to act and to send the parties back to the Sessions Court to begin the whole proceedings *de novo*.

I set aside the order of the lower Court and direct that the case be proceeded with according to law. I direct that the complaint be transferred to the District Magistrate of Kurnool and disposed of by him. I do not suggest that the evidence of the witnesses referred to by me above, may not in the long run turn out to be not worthy of belief, either after they are cross-examined or when other witnesses are examined. All I wish to state is that at the present stage of the proceedings there is no reason to reject their evidence.

Petition allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 807 OF 1915.

November 12, 1915.

Present:—Mr. Justice Piggott.

SOHAN LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 235, 236, 239—Two separate charges—One trial—Mis-judged—Burden of proof—Penal Code (Act XLV of 1860), s. 403—To "appropriate", meaning of—"Mis-appropriate", meaning of.

Where an accused person is charged of having deceived a canal officer in obtaining certain papers from him and also of having misappropriated a certain sum of money, the prosecution is entitled to ask the Court to go into both the charges at a single trial, provided it takes upon itself the burden of proving that the facts alleged against the accused, are in fact so connected together as to form parts of the same transaction, or to be otherwise triable at a single trial under the provisions of section 235 and 236 of the Code of Criminal Procedure. [p. 652, col. 2.]

In connection with section 403, Indian Penal Code, the verb "to appropriate" means setting apart for or assigning to a particular person or use and to "misappropriate" means to set apart for or assign to the wrong person or a wrong use, and this act must be done dishonestly. [p. 653, col. 1.]

Criminal revision against an order of the Sessions Judge of Meerut.

Mr. P. L. Banerji, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision by one Sobhan Lal. The applicant was tried and convicted by a Magistrate on a composite charge purporting to be laid under sections 403/417, Indian Penal Code, and received concurrent sentences of imprisonment. On appeal, the learned Sessions Judge has maintained the convictions as recorded, but has set aside the sentences of imprisonment and imposed in lieu thereof cumulative sentences of fine aggregating Rs. 250. The essential facts may be stated as follows:—Sohan Lal was the servant of a landholder named Musammatt Sarvi Begam. There had been disputes between this lady and another co-sharer in her *mahal*, culminating in a partition which had finally been settled by the Revenue Courts and ordered to take effect from the month of July 1915. In order to avoid disputes between the parties in the interval before the partition was to take effect, the Collector had ex-

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exercised his powers under section 45 of the United Provinces Land Revenue Act, III of 1901, and appointed the other co-sharer, Mehar Chand, an additional *lambardar* for the *mahal* in which he and Musammât Sarvi Begam were both co-sharers, and of which Musammât Sarvi Begam had hitherto been the sole *lambardar*. The Magistrate who tried this case in the first instance thoroughly appreciated this point, but the learned Sessions Judge seems to have been under some misapprehension concerning it. There could not be a separate *lambardar* for the *mahal* known as "*Mahal Bindaban*," this being the name of the *mahal* assigned to Mehar Chand on partition, because no such *mahal* had yet come into existence. The intention of the Collector, no doubt, was that Mehar Chand should exercise all the powers, perform all the duties and enjoy all the rights of a *lambardar* in respect of that portion of *Mahal Sarvi Begam* which had been assigned to him under the partition. Under these circumstances, an employee of the Canal Department went to the village, bringing with him the *jamabandis* or statements of account, showing the arrears of canal dues requiring to be realised from cultivators belonging to *Mahal Sarvi Begam*. This work of realization is ordinarily performed by the *lambardars*, who are enabled, by the exercise of due diligence, to earn a small remuneration in the form of a percentage on the dues collected. In accordance with the Collector's order, the effect of which had been properly appreciated by the Revenue Authorities, two separate *jamabandis* or statements of account had been prepared, one for that portion of the *mahal* of which Sarvi Begam was *lambardar*, and another for that portion of the *mahal* of which Mehar Chand had been appointed additional *lambardar*. The official entrusted with the conveyances of these *jamabandis* handed them both over to Sohan Lal. The latter proceeded to make all the necessary collections for the entire *mahal* in the name of his mistress, Musammât Sarvi Begam. He paid the money so collected in at the Tahsil, received the percentage due to the *lambardar* for collections made with due diligence, and paid over the money so received to his mistress, Sarvi Begam. There is no suggestion that he made anything for himself out of the transaction.

He has been convicted of having deceived the canal official and thereby obtained possession of the *jamabandi* which was intended for Mehar Chand, and he has been further convicted of having criminally misappropriated that portion of the canal dues which was paid to him on account of collections made in Mehar Chand's division of the *mahal*. It is contended before me that both convictions are bad in law, and that in any case, the trial is bad, as the two alleged offences were not part of the same transaction and should not have been tried together. With regard to the alleged misjoinder of charges, my opinion is that the prosecution was entitled to ask the Court to go into the whole matter at a single trial, provided it took upon itself the burden of proving that all the facts alleged against the accused, were in fact so connected together as to form parts of the same transaction, or to be otherwise triable at a single trial under the provisions of sections 235 and 236 of the Code of Criminal Procedure. This involves the further condition that, if the prosecution failed to make this out, the joint trial would be defective in law. In the view which I take of the facts of this case, I need not labour on this point further. It seems to me that practically the prosecution assumed the burden of proving that the obtaining of a *jamabandi* for Mehar Chand's division of the *mahal*, was deliberately done by the accused Sohan Lal, in order to enable him to collect dues appertaining to the said division of the *mahal* and to deprive Mehar Chand of the opportunity of earning the *lambardar's* remuneration in respect of such dues. I do not think that anything of the sort is made out by the evidence on the record. The Magistrate who tried the case was inclined to doubt the evidence of Muhammad Sadiq, the peon who handed over the *jamabandis* to Sohan Lal. The learned Sessions Judge sees no reason to disbelieve the witness; but obviously his evidence does not prove anything regarding Sohan Lal's intentions at the time when he accepted delivery of the two *jamabandis*. When it is sought to establish the offence of cheating on the basis, not of any false representation with regard to past events or existing facts, but on the basis of a promise as to something to be done in the future, the prosecution is often faced with

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this difficulty, that it has to prove that the person making the promise had no intention at the time of performing it. Assuming Muhammad Sadiq's evidence to be true as it stands, it would not, in my opinion, be safe to infer from this evidence that Sohan Lal did not at the time intend to pass on one of the two *jamaban-lis* left with him, to Mehar Chand. As regards the charge of criminal misappropriation, I am not prepared to hold that there is on this record sufficient evidence of dishonest intention on the part of Sohan Lal to warrant his conviction. The question of the respective rights and duties of the original *lambardar* and the additional *lambardar* of Mahal Sarvi Begam is not in itself absolutely clear, and may well have seemed extremely doubtful to the persons principally concerned. Sohan Lal was, after all, a servant acting under the orders and in the interests of his mistress. I am not prepared to assume against him that he knew he was causing wrongful gain to his mistress, or wrongful loss to Mehar Chand, by collecting these canal dues and receiving the remuneration therefor. There is no question in the present case of dishonest conversion of money to his own use by the person accused. The charge is, therefore, based on the words "whoever dishonestly misappropriates". The verb "to appropriate" in this connection means setting apart for, or assigning to, a particular person or use; and to "misappropriate," no doubt means to set apart for or assign to the wrong person or a wrong use, and this act must be done dishonestly. The evidence on the record does not satisfy me that when Sohan Lal handed over to his mistress the money, which was after all only the due payment for work which he had himself performed, he was acting dishonestly within the meaning of that word as used in the Indian Penal Code. I, therefore, accept this application, set aside the conviction and sentence in this case and acquit Sohan Lal of the offence charged. The fine, if paid, must be refunded.

Application accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 925 AND 926
OF 1914.

October 12, 1915.

Present:—Mr. Justice Abdur Rahim and
Mr. Justice Spencer.

*In re KALLARU RAMALINGAM AND
ANOTHER*—PETITIONERS IN C. R. P. No. 925
*In re THUPILI SUBBRAMAYYA AND
ANOTHER*—PETITIONERS IN C. R. P. No. 926.

*Criminal Procedure Code (Act V of 1898), ss. 476,
195—Forgery, not by party to any judicial proceeding
—Proceedings, if maintainable.*

Section 476, Criminal Procedure Code, applies only where the offences mentioned in section 195, Criminal Procedure Code, are committed by the person or in the circumstances mentioned therein. [p. 654, col. 2; p. 655, col. 2.]

Therefore a Munsif has no jurisdiction to take action under section 476 against the executant and attesters of a document found to be forged who were not parties to any proceeding before the Court. [p. 655, cols. 1 & 2.]

Abdul Khadar v. Meera Sahib, 15 M. 224; 2 M. L. J. 148; 2 Weir 174, followed.

Akhil Chandra De v. Queen-Empress, 22 C. 1004; *Dharmadas Kaur v. Emperor*, 7 C. L. J. 373; 12 C. W. N. 575; 7 Cr. L. J. 340; *Jadusandan Singh v. Emperor*, 4 Ind. Cas. 710; 10 C. L. J. 564; 14 C. W. N. 330; 37 C. 250; 11 Cr. L. J. 37; *Aiyakannu Pillai v. Emperor*, 1 Ind. Cas. 597; 4 M. L. T. 404; 19 M. L. J. 42; 9 Cr. L. J. 41; 32 M. 49 at p. 57; *In re Terji* 18 B. 581; *In re Keshav Narayan*, 17 Ind. Cas. 720; 13 Cr. L. J. 848; 14 Bom. L. R. 968; *Giricar Prasad v. Emperor*, 1 Ind. Cas. 306; 9 Cr. L. J. 219; 6 A. L. J. 392, referred to.

Petition, under section 115 of Act V of 1908 and sections 15 of 24 and 25 Victoria, Chapter 104, praying the High Court to revise the order of the Court of the Principal District Munsif of Nellore, in his proceedings dated the 20th October 1914 in Extraordinary Appeal No 1281 of 1914, (Small Cause Suit No. 74 of 1902) sending the petitioners to nearest First Class Magistrate on offence punishable under section 467, Indian Penal Code.

Mr. T. V. Venkatarama Iyer, for the Petitioners.

Mr. C. Madhavan Nair, for the Government.

JUDGMENT.

ABDUR RAHIM, J.—These are applications to set aside an order under section 476, Criminal Procedure Code. The order was passed by the District Munsif in the course of a certain execution proceeding in his Court. It appears that the property attached in

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execution of the decree was alleged to have been sold by the judgment-debtor to a third person and the vendee put in a claim. The consideration for the deed of sale was two promissory notes which the learned District Munsif had reasons to suspect were forgeries. The claimant did not appear in support of his claim, but the District Munsif examined the executant of the promissory notes as well as an attester of one of the promissory notes and he then came to the conclusion that the petitioners, i.e., the executant of the notes and the attestors should be prosecuted, as he was of opinion that the notes were forged documents. The question before us is whether section 476 applies at all to this matter. The section says that any Civil, Criminal or Revenue Court may order prosecution with reference to any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding. The question we have to decide is whether the terms of that section are satisfied where, as here, one of the offences mentioned in section 195 of the Criminal Procedure Code has been committed but not by any party to any proceeding before the Court. The offences charged fall within clause (c) to section 195, which says "no Court shall take cognizance of any offence described in section 463 or punishable under sections 471, 475 or section 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding except with the previous sanction," etc. In this case, the offence of forgery, if one was committed, was not committed by any party to any proceeding before the Court executing the decree, and if that qualification is to be imported into section 476 the District Munsif had no jurisdiction to make the order in question. The decisions on the point are conflicting. In Calcutta, the opinion is divided. The view laid down in *Akhil Chandra De v. Queen-Empress* (1) is that section 476 must be construed as being entirely self-contained and that we are only to refer to the offences mentioned in section 195 without any of the restrictions or qualifications that are to be found there as to the circumstances in which the offence is committed. But apparently a

different view prevailed in the cases reported as *Dharmadas Kuwar v. Emperor* (2) and as *Jadunandan Singh v. Emperor* (3). I may mention that the case in 22 Calcutta was under section 478, Criminal Procedure Code, and not 476, Criminal Procedure Code; but so far as the question before us, is concerned, it does not appear that that would make any difference. The cases in 7 Calcutta Law Journal and 37 Calcutta are both under section 476 and the learned Judges in the latter case seem to have gone rather fully into the matter and considered the authorities on the point. In this Court, there is only one decision which is directly in point, viz., that reported as *Abdul Khadar v. Meera Sahib* (4) where the learned Judges expressly lay down that section 476 applies only to the offences mentioned in section 195 if they are committed by the person or in the circumstances mentioned therein. There is, however, a dictum of Sankaran Nair, J., in a Full Bench case in *Aiyakannu Pillai v. Emperor* (5). There the learned Judge observes that the operation of section 476 is not confined by the restrictions mentioned in section 195. That was a mere obiter dictum unnecessary for the decision of the question before the learned Judges. Two decisions of the Bombay High Court have been brought to our notice, viz., those reported as *In re Devji* (6) and as *In re Keshav Narayan* (7). Both support the view in favour of the wider interpretation of section 476. We have also been referred to a case in *Girwar Prasad v. Emperor* (8), but that case is not a clear authority in support of either the one or the other position. The question is certainly not free from difficulty, but we thought we could dispose of it at once as it was fully argued before us. On the whole, I am inclined to follow the view taken in 15 Madras. One circumstance which does not appear to have been noticed in any of the reported decisions, is that some guidance

(2) 7 C. L. J. 373; 12 C. W. N. 575; 7 Cr. L. J. 340.

(3) 4 Ind. Cas. 710; 37 C. 250; 10 C. L. J. 564; 14 C. W. N. 330; 11 Cr. L. J. 37.

(4) 15 M. 224; 2 M. L. J. 148; 2 Weir 174.

(5) 1 Ind. Cas. 597; 32 M. 49 at p. 57; 4 M. L. T. 404; 19 M. L. J. 42; 9 Cr. L. J. 41.

(6) 18 B. 581.

(7) 17 Ind. Cas. 720; 14 Bom. L. R. 968; 13 Cr. L. J. 848.

(8) 1 Ind. Cas. 306; 6 A. L. J. 392; 9 Cr. L. J. 219

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as to the scope of section 476 is afforded by the heading to Chapter XXXV, which shows the class of offences, which is intended to be dealt with in the chapter in which section 476 occurs. The heading of the Chapter is "proceedings in case of certain offences affecting the administration of justice." If the wider interpretation contended for on behalf of the Crown were to be adopted, then the section would apply to cases which have no relation whatever to the administration of justice. It might be, for instance, that a forgery was committed and brought to the notice of a Court and yet the forged document was not intended to be used and was never in fact used in connection with any proceeding. I may say that if the language of section 476 was clear, we would be bound to give effect to it apart from the heading of the chapter. But the language not being clear to show how much of section 195 is to be imported, I felt myself justified in deriving light from the description of the chapter which begins with section 476. I may observe that the learned Judges who decided the case of *Akhil Chandra De v. Queen-Empress* (1) remarked that if the narrower interpretation of section 478, Criminal Procedure Code, were upheld, no meaning could be given to the words of that section—the same words occur in section 476, Criminal Procedure Code, as well—"or brought under its notice in the course of a judicial proceeding." With all respect to them, it seems to me that they are under some misapprehension as to this. If an offence of the nature described, is committed by a party to a proceeding, the Court before whom the proceeding lay, can give sanction under section 195; but suppose that every matter is brought under the notice of another Court in the course of another judicial proceeding to which the offender is not a party, then the use of section 476 comes in and the Court under whose notice it is brought can make an order under that section.

I, therefore, hold that the order in both the cases must be set aside.

SPENCER, J.—The question is full of difficulty. In *In re Keshav Narayan* (7), Batchelor, J., observes "all that is required by section 476, is that such an offence as is there (i. e., in section 195) referred to,

should be either committed before the Court or brought under its notice in the course of a judicial proceeding." I think that as far as possible, we should give effect to the plain wording of the section and not introduce anything that is not there. But in this case if we give the fullest scope to the words "brought under its notice in the course of a judicial proceeding," it will have the effect of giving Courts a very wide power to arrest and send persons to trial even when the offences have no direct connection with any proceeding in Court, as for instance, where some statement is elicited in the cross-examination of a witness as to a previous act of forgery committed by him. In the Indian Penal Code, forgery comes under the class of offences relating to documents and not under the class of offences against public justice, which includes offences under sections 191 to 229. In this way, the powers of Courts will be enlarged beyond the scope of the heading of Chapter XXXV, Criminal Procedure Code, in which section 476 occurs. There is also considerable force in the observation in *Akhil Chandra De v. Queen-Empress* (1) that if section 476 is to be read as qualified by the circumstances referred to in section 195, then it is difficult to give any meaning to the words in sections 476 and 478 "or brought under the notice of any Civil, Criminal or Revenue Court in the course of a judicial proceeding". But the case of *Girwar Prasad v. Emperor* (8) is an instance of an offence which was brought to the notice of a Civil Court in the course of a judicial proceeding, and yet, without being an offence committed in relation to any proceedings in that Court, was an offence affecting the administration of justice.

It may also be observed that when, as here, a person who is not a party to any proceeding in any Court, is accused of committing forgery in respect of a document, no sanction is required before he is prosecuted.

I, therefore, agree in the absence of any conflicting decision of this Court, with my learned brother's decision, which finds support in *Abdul Khaliq v. Meera Saheb* (4), the only decision directly on the point in this Court.

Petition allowed; Order set aside.

In re DAMODARA NAIDU.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 479 OF 1915.

CRIMINAL REVISION PETITION NO. 381
OF 1915.

November 8, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re DAMODARA NAIDU AND ANOTHER—

ACCUSED—PETITIONERS.

Madras Abkari Act (I of 1886), s. 56 (b)—Licensee for sale of arrack 32 degrees under proof, sale in breach thereof—Adulteration—Allowance of 2 per cent. for wastage under r. 229, Standing Orders of the Board of Revenue how far defence—Standing Orders of Board of Revenue, r. 229, scope of—Abkari prosecution—Technicality of offence, whether can be considered by Court.

Rule 229 of the Standing Orders of the Board of Revenue, which directs Abkari officers to allow wastage in bottling up to 2 per cent. is only a departmental rule for the guidance of its subordinates, the margin of 2 per cent. being fixed as an allowance for evaporation in cases where there is reason to believe that the diminution in strength is due to natural causes. It cannot be construed to mean that licensees can adulterate arrack so long as they do not exceed 2 per cent. over the strength mentioned in the permit.

The rule not having been made under section 69 of the Madras Abkari Act, 1886, has not the force of law and cannot be read as part of the Act.

Under section 55 (b) of the Abkari Act, an offence is committed the moment a person sells arrack below the strength specified in the permit, no matter what the cause of the variation may be. The fact that the offence is only technical, is not a matter for the Court, but one for the officers instituting the prosecution.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Negapatam, in Criminal Appeal No. 25 of 1915, preferred against the judgment of the Court of the Stationary Second Class Magistrate of Negapatam, in Calendar Case No. 31 of 1915.

FACTS of the case appear from the judgment.

Dr. S. Swaminathan, for the Petitioners.—The conviction is not sustainable. Rule 229 of the Standing Orders of the Board of Revenue allows a wastage of 2 per cent. The offence is after all only technical.

Mr. P. R. Grant, for the Government.—The rule in question is a departmental rule for the guidance of officers. The 2 per cent. allowed by it, is for evaporation by natural causes and not for adulteration. Further, the rule not having been made under section 69, has not the force of law, nor is it a part

of the Act. Technicality of an offence is only for the consideration of officers instituting a prosecution, and not for the Court. The offence is complete the moment arrack below the strength specified in the permit is sold.

ORDER.—The terms of the license are specific and the privilege extends only to the sale of arrack 32 degrees under proof. Section 56, clause (b), of the Madras Abkari Act, 1886, renders any person who does any act in breach of the conditions of his license punishable with imprisonment which may extend to three months or with fine extending to Rs. 200 or with both.

The evidence in the case shows clearly that spirits over 32 degrees was sold and the only question is whether rule 229 of the Standing Orders of the Board of Revenue, which directs Abkari Officers to allow wastage in bottling up to 2 per cent., can be pleaded as a defence to a prosecution under section 56, clause (b).

I do not think the rule can be construed to mean that licensees can adulterate arrack so long as they do not exceed 2 per cent. over the strength mentioned in the permit. It is only a departmental rule for the guidance of its subordinates and fixes a 2 per cent. margin as an allowance for evaporation in cases where there is reason to believe that the diminution in strength is due to natural causes.

The rule was not made under section 69 of the Madras Abkari Act and is, therefore, not one having the force of law, or a rule to be read as part of the Act.

Under the Act, an offence is committed the moment a person sells arrack below the strength specified in the permit—no matter what the cause of the variation may be. It is true that the offence may be only technical, but this is a matter for the officers instituting the prosecution.

In the present case, both the Joint Magistrate and the Sub-Magistrate have believed the evidence of the Sub-Inspector and I do not think I ought in revision to go behind their findings of fact. The evidence of the Sub-Inspector shows that even the 2 per cent. margin was exceeded when he tested the arrack. I see no ground for interfering with the conviction or sentence and dismiss the petition.

Petition dismissed.

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MADRAS HIGH COURT.
CIVIL APPEAL No. 311 OF 1913.

October 18, 1915.

Present:—Mr. Justice Coutts-Trotter and
Mr. Justice Srinivasa Aiyangar.AKBAR HUSSAIN SAHIB AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

SHOUKHAH BEGAM SAHERA (DIED) AND
OTHERS—DEFENDANTS—RESPONDENTS.*Muhammadian Law—Muta marriage, distinctive features of—Co-habitation and repute, whether sufficient to raise presumption of legitimacy—Acknowledgment by father or family, necessity of.**'Muta' is the lowest form of marriage known to Muhammadian Law—so low as to be practically indistinguishable from concubinage. The two known features about it are, first, that there must be a definite period for the marriage to last either in this world or in the next or in both, and secondly, that a sum of money must be paid to the bride as her dower. [p. 657, col. 2.]*

None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father. [p. 658, col. 2.]

More continued cohabitation does not suffice to raise such a legal presumption of marriage as to legitimize the offspring, there must be, besides cohabitation and besides proof of parentage, something in the nature of acknowledgment, either expressed or by conduct, on the part of the reputed father or his family. [p. 659 col. 2; p. 660, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Original Suit No. 17 of 1911.

Mr. V. Ramesam 'with him Messrs. J. Junakiramayya and A. N. Sitarama Sastri), for the Appellants.

Messrs. T. Rangachariar and T. Ramahandra Rao, for the Respondents.

JUDGMENT.

COUTTS-TROTTER, J.—This is an appeal by two youths, who are the sons of a lady called Mahfil Nagir Bee. They bring this action against a number of relatives of the late Nawab of Masulipatam, as he was called by courtesy, to have it declared that they are the legitimate sons of the late Nawab and entitled to take part in the partition of his landed property.

The question that has to be determined can be put in two ways. In the first place, has it been affirmatively shown that Mahfil Nagir Bee was a wife of the late Nawab? Secondly, it may be put in another way—do the known circumstances of the relations of the Nawab and his family to Mahfil Nagir Bee lead to the presumption that a marriage must have

taken place, though no definite date can be assigned?

The first question, therefore, is one of fact—is it true or is it proved that a marriage actually took place between the Nawab and this lady? If she was married to the Nawab, it is not contended that she was married in any other form except the lowest form of marriage known to Muhammadian Law, viz., *muta* marriage, which is said by some to be so low a form of union as to be practically indistinguishable from concubinage. The two known features about it are:—first, there must be a definite period for the marriage to last either in this world or in the next or in both—which in this case is said to be 99 years—and secondly, a sum of money must be paid to the bride as her dower—and it is said in this case that a sum of Rs. 525 was paid to this girl. The history of Mahfil Nagir Bee is inevitably bound up with that of another lady, called Dildar Bee, who was a witness in this case. They were acquired from their parents, who were poor and unknown, by the senior wife of the Nawab, when they were little children six or seven years old. Their parentage seems to be very vaguely known to anybody, including themselves. There were apparently Hindus and *pariahs* by caste, and became converted to Muhammadianism after their introduction into the *zenana* of the Nawab. In the year 1887, the *shadi* wife of the Nawab was taken ill, and after a few weeks' illness, she died in child-birth. That we know to be on the 24th November 1887. The story told by the appellants is that shortly afterwards—a few weeks after the death of the *shadi* wife—the Nawab proceeded in turn to contract *muta* marriages with both Mahfil Nagir Bee and Dildar Bee; and it seems clear that more or less about the same time, he did no doubt contract a *muta* marriage with another young woman in the *zenana*, namely Fiza Bee. Several witnesses were called for the appellants to establish the alleged celebration in Madras of the *muta* marriage with Mahfil Nagir Bee. Most of the witnesses identified the occasion by reference to some other events. One of the events by which some of them tried to fix it, is by reference to the marriage of a lady, called Amthus Salam Begam, who is the 5th defendant in this case. They say Dildar Bee and Nagir Bee's

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marriages were a little before that of Amthus Salam. But, unfortunately, the marriage register has been produced and it turns out that that marriage was not celebrated till the year 1892; and, therefore, these witnesses must, at any rate, be entirely mistaken when they imagined themselves to be consistent in fixing the occasion of the marriage of Mahsil Nigar Bee with reference to that of Amthus Salam Begam. Another method of identifying, adopted by some other witnesses, was by reference to the marriage of Fiza Bee, and those of them who adopted this method are all agreed that, of the three girls, Fiza Bee was the one married last. A letter which was produced—Exhibit XXXII—a letter written by the Nawab to a friend, is dated 17th April 1887, and it specifically recites that on that date, he had just married Fiza Bee as *mula* wife. After that, it becomes impossible to place any reliance on these witnesses, as it is clear on their own showing that it was more than six months out by this last method, and five years out by the other method of fixing it by the marriage of Amthus Salam Begam.

But, apart from these special difficulties, the general tenor of the story bristles with improbabilities. Although this took place in Madras, where the Nawab had a house and he was apparently very well known in the society of his equals, every single witness that speaks to the marriage comes from Masulipatam having lived there all his and her life, as the case may be, and just happening by some happy coincidence to make a journey to Madras, in time to witness this ceremony. Not a single witness is called who was present on the occasion and who is a native of Madras. For this, the explanation is suggested that natives of Masulipatam would be the only persons whom the plaintiffs would probably be in a position to influence to invent the story of the marriage. The learned Judge has heard all the witnesses and weighed all the documents and he has come to the conclusion that this alleged marriage is not proved to have taken place, and from that conclusion, I do not dissent.

Next comes the much more important question, whether, although it has not been specifically proved as at a definite date, the circumstances in this case are such that the law will presume that a marriage between

these persons took place. I do not propose to deal with this matter at very great length; but we have had long and learned arguments about it; and out of respect to them, I will refer to some authorities that were cited. I refer to the authorities for the purpose of ascertaining on what conditions, what evidence and what proof rests the presumption which undoubtedly is to be found in Muhammadan Law with regard to legitimacy in certain cases. The first case is *Khaiah Hidayat Oollah v. Rai Jan Khanum* (1). In that case, there was cited in argument a passage from Macnaghten's Muhammadan Law, and that was emphasised in the judgment. That passage is to this effect:—"None but children who are in the strictest sense of the word spurious, are considered incapable of inheriting the estate of their putative father. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short, where by any possibility a marriage may be presumed, the law will rather do so than bastardize the issue, and whether a marriage be simply voidable or void *ab initio*, the offspring of it will be deemed legitimate." Having quoted this passage, their Lordships say on page 38: "The effect of that appears to be, that where a child has been born to a father, of a mother, where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan Law, the presumption is in favour of such marriage having taken place;" and on page 322, they summarise the state of facts, which they held in that case as sufficient to invoke the presumption of law, thus: "Now all the facts which are there stated, upon the principle of assumption, appear to us to be maintained by the evidence in this case; namely, that Musammatt Raijan did associate with Fyz Ali Khan; that she did remain with the females of the house of Fyz Ali Khan; that Saadat Ali Khan was born of her *ventre* and as to his being the offspring of Fyz Ali Khan, we think that is a circumstance necessarily to be inferred from the previous facts."

(1) 3 M. L. A. 295; 1 Ssr. P. C. J. 282; 18 E. R. 50.

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The next case of importance was decided in *Ashrufodd Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan* (2). In that case, their Lordships considered the earlier case and considerably modified the extent of the doctrine there laid down; and they cited a passage, which has been quoted at the Bar, from a certain book on Inheritance by Mr. Bailey as making the broad assumption that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This statement drops the important qualification "with acknowledgment." I should mention that the word 'questioning' in the report is a mistake for 'making.' Their Lordships go on: "No decision can be found there (that is, of the Privy Council) which supports so broad an assumption, or which, when rightly understood, is in conflict with the law as stated by the Priests in this case. The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child. But this presumption follows the bed, and is not antedated by relation" and so forth. Then they go on: "These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the ground of legitimacy by confounding concubinage and marriage." Then they quote a passage from another case cited before us, *Mahomed Banker Hoossain Khan Bahadoor v. Shurfoon Nissa Begum* 3¹, and then they explain the passage in *Khajah Hidayat Oollah v. Raigan Khanum* 1¹ which I have already referred to, and they say this:—"The cohabitation alluded to in that judgment was continual: it was proved to have preceded conception and to have been between a man and woman cohabiting together as man and wife, and having that repute before the conception commenced; and the case decided that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment, sufficed to prove legitimacy. The presumption throughout the whole judgment is treated as one of fact.

"It would be much to be regretted if any variance on this important matter

(2) 11 M. I. A. 94 at p. 113; 7 W. R. 1 (P. C.); 1 Suth. P. C. J. 459; 2 Sar. P. C. J. 223; 20 E. R. 37.

(3) 8 M. I. A. 136; 3 W. R. (P. C.) 37; 1 Suth. P. C. J. 400; 1 Sar. P. C. J. 728; 19 E. R. 481.

arose between the decisions of the Courts and the text of the Muhammadan Law of legitimacy, as understood and declared by the High Priest, connected as their law and religion are. Such a variance exists between the law as expounded in this case and the position contained in Mr. Campbell's judgment, that 'mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring;' and, therefore, they adhered to the stricter view of the law which they had understood to be endorsed by the Muhammadan Priests, namely, that besides cohabitation and besides proof of parentage, there must be something in the nature of acknowledgment, either expressly or by conduct, on the part of the reputed father, to raise the presumption of legitimacy. But, given these facts, then their Lordships are ready to apply the presumption.

The next case of importance is *Ranee Khujooroonissa v. Musammal R'ushu Jehan* (4). On page 311 they discuss the same question (under different circumstances) as is discussed in this case, whether a lady called Bibee Loodhan is a concubine or a wife. They say:—"It is an undisputed fact that Nuzeroodeen, the son of Bibee Loodhan, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasion recognised by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances, appear to have been laid down in *Khajah Hidayat Oollah v. Rai Jan Khanum* (1), and then they quote a passage from that judgment; and their Lordships observe, on page 312:—"It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of Nuzeroodeen raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted." Then they discuss the evidence as to that and come to the conclusion that they are not justified in holding the presumption

(4) 3 I. A. 291; 2 C. 184; 26 W. R. 36.

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rebutted. That is quite consistent with the judgment of the Privy Council in *Ashrafud Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hussein Khan* (2), because in that case, there was evidence of acknowledgment not only by many members of the family, but by the alleged husband and father himself.

Approaching the facts of this case in the light of these decisions, what do we find? The plaintiffs' evidence is almost silent as to what happened to Mahfil Nagir Bee after the year 1887. She must have passed herself, so far as anything is known about her, either as a wife or a concubine of the Nawab. Plaintiffs, I suppose, elected to rely upon their story of a definite and specific marriage. The defendants' witnesses, when they were talking about Mahfil Nagir Bee at all, were only occupied in trying to make out a charge of adultery against the Nawab; and with regard to what took place inside the palace house of the Nawab, with regard to his treatment of the lady, with regard to his and anybody else's treatment of the children, we are left in almost entire darkness. A few sentences are laboriously picked out from the evidence of the witnesses, but they really amount to almost nothing. There is a statement by the eldest *shahli* son, Hussain Ali, in his deposition:—"Mahfil Nagir Bee and Dildar Bee were living with us at Madras, till my father's death." That is all that the learned Vakil for the appellants can pick out of the evidence which directly bears on the relations between these ladies and the Nawab, with one exception, and that is the evidence of Dildar Bee, the other lady, who is in the same position as Mahfil Nagir Bee, whose children are threatened with bastardy—and of course she has the strongest possible motive for making out the position as favourable to the appellants; further, she herself brought a suit on behalf of her children for exactly the same purposes as the present appellants bring this suit. Undoubtedly she says that they were treated by the Nawab as the children of his wives; because that is the plain meaning of the answer given in the examination-in-chief. That is all there is for inferring what took place between, let us say, 1887 and 1892 when the Nawab died. But there are some documents in the case which undoubtedly

have a very material bearing on what conclusion we are to come to on this matter; because, although it may be difficult to act on the conduct of other members of the family without any evidence of recognition by the father, nevertheless, speaking for myself, if I find very strong and clear and consistent evidence of recognition by the other members of the family, I would be content to accept very slight evidence as to the father himself. It becomes necessary, therefore, to see how that matter stands. And the first document of importance, in my judgment, is the Government order of the 8th October 1900, which is Exhibit XI. What had happened was this. The family of the Nawab wished to have pensions allotted to them. He having himself actually got a Government political pension, his family were now anxious to get it; and claims were put in to the Collector by the various members of the family, and finally a pension list was drawn up showing what share each was to get. In that petition to the Collector, it was stated quite clearly that the late Nawab had a *muta* wife, called Fiza Bee, and two concubines and children. The two concubines can only mean and do mean Dildar Bee and Mahfil Nagir Bee; and in the schedule showing the amounts payable, they are, in terms, described as concubines and their children as children of concubines. It is not possible to say that Mahfil Nagir Bee must have so described herself and I do not think Mr. Rangachariar will go as far as that. But it is impossible for me to believe that the Collector would have written down a conclusion that there were two concubines, unless at any rate that was reflecting the view of the family generally. No doubt that certainly does not bind the children. I would even say that it is useless as indicating the ladies' own view of their position. But it indicates in the strongest way what must have been the general view of the family as a whole, so that we start with the very first document in the family endeavouring to explain her position and describing her as a concubine.

The next document of importance is Exhibit O, which is dated 23rd May 1902 and which is a power-of-attorney given to a trader for the purpose of getting him to manage some of the properties of the family; and that document is very much relied upon by the

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appellants, because they are there treated as members of the family and as heirs to the Nawab. At the same time it is just to observe that there is a distinction made in the document between children of *muta* wives and a word, which apparently is capable of many meanings, the word '*kavar*'. That word has been the subject of great discussion and considerable amount of research has been expended by the learned Counsel in trying to see what it really means. I am not sure I am very much the wiser, but no one can read the document without seeing this—that there is a distinction between daughters of the *muta* wife and the children of somebody else. Let the other word be what it will, the distinctions drawn between the child of a *muta* the *shadi* wife and the *nicka* wife have already been mentioned and then it goes on to distinguish between children of the *muta* wife and children of the *kavar*. It is very difficult to come to any other conclusion than that the last word must be intended to mean a woman who is not married at all; and that, at any rate, is a possible meaning of the word '*khowas*.'

The next document to which I would refer is Exhibit XXXIV, dated 27th May 1902. The family by this time were quarrelling, for the most part, with the eldest son, Hussain Ali, and approached the Governor with a view to get Hussain Ali out of the management of the family properties and place the management in the hands of somebody else on behalf of the family as a whole. The importance of that is that, in that document, although Akbar Hussain and Asghar Hussain are included as heirs or at any rate as claimants, they are described as being the minor sons, etc., by a concubine. Once more I do not for a moment suppose that that can, in any way, be brought home to the knowledge of Mahfil Nagir Bee. The probabilities are that she is not in any way responsible, but the second son is responsible for it. But what I once more think it important for is that it does show that at this time the family or the spokesman, for the time being, of the family seemed to take it as a matter of absolute common denomination that her position was not that of a wife, but only of a concubine. I have already mentioned the fact that about this time when the memorial was sent, there was a quarrel between Hussain Ali and the other

members of the family. There are some other documents on which great reliance is placed by the appellants. In the first place, a number of persons sued the descendants and representatives of the Nawab and added the present appellants as defendants along with the other members of the family; and it is said that not only was that done—which perhaps does not go for very much—but first the eldest son, Hussain Ali, and in later litigation, the senior daughter were guardians for these minors. That is a strong circumstance, so strong that, at one time, I was almost inclined on the faith of it to accept the appellants' case. But I think it loses a great deal of its force by reason of two circumstances. The first is that when these documents are read with the other documents to which I have referred, a quite different view appears to be taken by the same people, and the plaintiffs are treated as sons of a concubine and nothing else. Still more do I think it greatly modified by the fact that this attitude begins to be taken up for the first time only after the dissensions and quarrels have arisen in the family. There is no doubt that various members of the family were on very bad terms with one another, and that the daughter who supported the two ladies' cases was ready to grasp at any support she could get from any member of the late Nawab's household. On the whole, I do not think that the evidence of subsequent recognition of legitimacy by the other members of the family is strong enough to outweigh the complete mystery in which the lives of these people are wrapped up down to the end of the life of the Nawab; and I think it quite unsafe to give the rein to mere conjecture and come to the conclusion that there is enough material to find that they are legitimate sons. I think it is unfortunate in some ways that the plaintiffs were ill-advised enough to stick to this most improbable story—which, I have already said, cannot be accepted—of a definite ceremony at Madras in November 1887 or thereabouts and so neglected to call evidence of what Nagir Bee's position was from 1887 onwards. The one person who was qualified above all others to give such evidence, the one person in the world who had the strongest interest for setting up a story of what took place, was Mahfil Nagir Bee her-

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self and she was not called. I cannot really accept the suggestion thrown out regarding her being unable to give evidence from illness. No Judge would have wished to try this case in the absence of the evidence of Mahil Nagir Bee, if she and her side had only pressed for an adjournment. I am convinced that any Court would have adjourned the case to any reasonable extent to get that lady's evidence if she was suffering from sickness. There is nothing to show that any such application was made. In her absence, the appeal of the plaintiffs cannot succeed and the conclusion of the learned Judge must be upheld. The result is that this appeal is dismissed with costs.

SRINIVASA AIVANQAR, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION SUIT
No. 176 of 1910*

AND

SMALL CAUSE COURT TRANSFER SUIT No. 3
of 1910.

May 24, 1915.

Present:—Mr. Justice IMAM.SUKUMARI GHOSH AND ANOTHER—
PLAINTIFFS*versus*

GOPI MOHAN GOSWAMI—DEFENDANT.

Costs, discretion as to—Account, suit for, against manager—Costs against manager for default or dishonest conduct in accounting—Presidency Small Cause Courts Act (XV of 1882), s. 22.

A person who takes up the management of another's estate and collects and disburses moneys, has to be ready with his account. His failure to perform the obvious duty, necessitates a suit and he must pay the plaintiffs' costs. [p. 663, col. 1.]

Collyer v. Dudley, (1823) 2 L. J. Ch. 15; *Turn & R.* 421; 37 E. R. 1163 followed.

This is all the more so when he makes a dishonest defence, submits a false account and keeps back books of account or documents. [p. 663, col. 1.]

Harninath Rai v. Krishna Kumar Bakshi, 14 C. 147 at p. 159; 13 I. A. 123; 10 Ind. Jur. 475; 4 Sar. P. C. J. 751 referred to.

Where the manager of an estate sued the principal for arrears of salary in the Presidency Court of Small Causes and the principal sued the manager in the High Court for accounts and the two suits were heard together in the High Court and an amount less than Rs. 1,000 was found due from the manager to the principal, costs were awarded against the manager on High Court scale No. II having regard to the circumstances above stated. [p. 663, col. 2.]

*The report of this case has been taken from the Calcutta Weekly Notes with permission.—Ed.

FACTS of the case as also the arguments at the Bar are set out in the judgment. It need only be mentioned here that the contract of service was entered into between the proprietors and the manager in Calcutta in respect of properties in the *mofussil*.

Mr. H. D. Bose (with him Mr. B. K. Ghosh),
for the Plaintiffs.

Mr. S. R. Dass, for the Defendant.

JUDGMENT.—This matter comes up for further direction on the Assistant Referee's report. The principal question involved in it, is one of costs. The defendant had sued the plaintiffs for arrears of salary amounting to Rs. 1,886-12-6 in the Small Cause Court of Calcutta. The plaintiffs then instituted this suit in this Court for account against the defendant. The suit in the Small Cause Court was removed to this Court for trial with this suit. The plaintiffs represent the estate of the late Mr. Lal Mohan Ghose, and it is the common case of the parties that in 1908, the defendant was the manager of the Bairagadi Estate belonging to the deceased. In answer to the claim of the plaintiffs for account, the defendant in his written statements stated that he was not accountable to the plaintiffs nor had he been accountable to the late Mr. Ghose, inasmuch as he had fully explained to the latter all his dealings with the said estate and the management thereof. The plaintiffs admitted the defendant's claim to Rs. 1,886-12-6 as arrears of salary. A preliminary decree was passed for accounts, which were directed to be taken before the Assistant Referee. In the state of facts filed by the defendant, he showed Rs. 44 or thereabouts as balance due to him. The plaintiffs disputed the accuracy of that account and sought to surcharge and falsify the defendant's state of facts and alleged that he had not accounted for various sums received by him as manager, and that he had entered certain fictitious payments in his account. After a prolonged enquiry extending over 60 days or more, the Assistant Referee has reported that the defendant has failed to account for Rs. 716 out of the moneys collected by him as manager of the said Bairagadi Estate. From the report of the Assistant Referee, which stands confirmed

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by effluxion of time, it appears that the book most important for the enquiry, viz., the *talab-baki*, was suppressed by the defendant though he had been called upon to produce it. He has been guilty of suppression of other material documents also. Judging from the Assistant Referee's report, the defendant's conduct deserves the fullest condemnation. His motives have been described by the Assistant Referee as "not honest from the outset." The Court's discretion in the matter of costs, as was explained in *Sheo Dyal Tewaree v. Judoonath Tewaree* (1), is to be exercised with special reference to all the circumstances of the case, including the conduct of parties. A person who takes up the management of another estate and collects and disburses moneys, has to be ready with his account. His failure to perform the obvious duty, necessitates a suit, and he must pay the plaintiff's costs [*Collyer v. Dudley* (2)]. In the present suit, it is not merely an unreadiness to account that stands to the discredit of the defendant, but he sets up a deliberately false defence that he was not accountable at all, and, when decreed to render account, submitted a false account and suppressed important documents, thereby hampering and prejudicing the enquiry before the Assistant Referee. In view of the *bona fide* and honest character of the plaintiffs' suit and the reprehensible conduct of the defendant, I am clearly of opinion that the plaintiffs should be allowed full costs, including costs of and incidental to the enquiry. The case of *Ram Gopaul v. Bhojra Mohun* (3) is in point. There is also a higher authority in *Hurrinath Rai v. Krishna Kumar Bakshi* (4), in which their Lordships of the Privy Council ordered the defendant to pay the costs inasmuch as he had taken the untruthful course of denying his receipts, his fiduciary position and his accountability *in toto*.

Mr. S. R. Das, on behalf of the defendant, objects to costs being allowed to the plaintiffs on the ground that the suit for

account should have been filed in the Small Cause Court. He maintains that the Assistant Referee having found that only a sum of Rs. 716 had remained unaccounted for, the claim was well within the jurisdiction of the Small Cause Court, and the plaintiffs, having obtained a decree for less than Rs. 1,000 in this Court, are not entitled to any costs under the provisions of section 22, Presidency Small Cause Courts Act. I cannot accede to this contention, inasmuch as the plaintiffs could institute their suit in the Small Cause Court only if they were in a position to appraise its value within the pecuniary jurisdiction of that Court, which they could not do on the facts of this case. The sum ascertained by the Assistant Referee has been arrived at by an enquiry. I do not think that a suit for account without a claim to a specific sum within the competence of the Small Cause Court, can lie in that Court. But even if it were conceded that this suit was cognisable by the Small Cause Court, I would not hesitate to certify that it was fit to be brought in the High Court.

For these reasons, I allow full costs on scale No. 2 to the plaintiffs, including reserved costs, if any. The costs will include the enquiry before the Assistant Referee and the Commission at Dacca.

The defendant will get the costs of the Small Cause Court transferred suit on the Small Cause Court scale. To the defendant is decreed the sum of Rs. 1,370-9-7½ from the plaintiffs on account of salary. Out of the said sum, the sum of Rs. 1,17-12-6 will carry interest at 6 per cent. from the date of the Assistant Referee's report till the date it came to be filed.

The amount deposited by the plaintiffs in the Small Cause Court transferred suit, or any portion of it, will not be withdrawn by the defendant till the costs of both parties have been ascertained. The plaintiffs will get the costs of this application.

Mr. S. C. Mukerjee, Attorney, for the Plaintiffs.

Mr. H. N. Dutt, Attorney for the Defendant.

(1) 9 W. R. 61 at p. 63.

(2) (1823) 2 L. J. O. S. Ch. 15; Turn & R. 421; 37 E. R. 163.

(3) (1884) Coryton's Rep. 126.

(4) 14 O. 147 at p. 159 (P. C.); 12 I. A. 123; 10 Ind. Jur. 475; 4 Sar. P. O. J. 761.

ARUNACHALAM CHETTY v. RAMANATHAN CHETTY.

MOHIUDDIN v. PIRTHICHAND LAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 568 AND 569
OF 1907.

October 11, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.ARUNACHALAM CHETTY (DIED) AND
OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMANATHAN CHETTY AND OTHERS—
DEPENDANTS—RESPONDENTS.*Highway—Ownership of soil—Ad medium filæ doctrine, when applicable.*

The doctrine that where a public path is admitted to be the boundary between two estates, the presumption is that the soil up to half the breadth of the road belongs to each estate, must be confined to cases where it is clearly proved or both sides are agreed, that the limits of each village do not extend beyond the offside of the path.

Second appeals against the decrees of the Court of the Subordinate Judge of Madura (West), in Appeal Suits Nos. 423 and 424 of 1905, preferred against the decrees of the Court of the District Munsif of Sivaganga, in Original Suits Nos. 1-8 and 167 of 1903.

Mr. L. A. Govindaraghava Aiyar, for the Appellants.

Mr. S. Desikachari for Mr. S. Srinivasa Aiyangar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—After hearing the arguments of the appellants' learned Vakil, I am of opinion that no misconstruction of any documents or the ignoring of any material evidence by the lower Appellate Court has been established. Then, it was contended that the lower Appellate Court had failed to give effect to the doctrine that where a public path is admitted to be the boundary between two estates, the presumption is that the soil up to half the breadth of the road belongs to each estate. Assuming that that presumption is applicable in India, it must be confined to cases where it is clearly proved, or both sides are agreed, that the limits of each village do not extend beyond the offside of the path. In this case, the plaintiffs claimed in their plaint that besides the whole width of the path, something beyond to the west of that breadth belonged to their village and the defendants made a similar claim as regards some breadth east of the path and the Courts could not come to any conclusion on the point. The lower Appellate Court was, therefore, not wrong in refusing to raise

any such presumption in this case. This second appeal and the connected second appeal are, therefore, dismissed with costs.

NAPIER, J.—There is no evidence of the date of the origin of this so-called highway. It is a path it may be, a cart track—running between two villages. At one time it must have been within the area of one village or the other as the villages were contiguous. There should have been no difficulty in procuring evidence from the *zamin-dari* records of the true facts of the case, but no attempt has been made to do this. It is sought to apply the *ad medium filæ* doctrine in the absence of evidence. I decline to apply it, *first*, because there is no evidence of any defined limits of this so-called highway and *secondly*, because the pathway must have been there at the time that both villages were in the same owner and, therefore, the artificial presumption of a grant of half by contiguous land holders, has no application.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 170
OF 1911.

August 26, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.Syed MOHIUDDIN AND OTHERS—DEFENDANTS
1ST PARTY—APPELLANTS

versus

PIRTHICHAND LAL CHOUDHURY—
PLAINTIFF—RESPONDENT.

Public Demands Recovery Act (I of 1895), s. 9—Civil Procedure Code (Act V of 1908), s. 64, O. VI, rr 14, 15—Attachment of property, effect of Omission to frame issue, effect of—Remedy—Certificate sale—Certificate proceedings, irregular—Sale, validity of Statute, non-compliance with, effect of—Appellate Court, power of, to dismiss suit—Plaint not duly verified and signed—Procedure—Practice—Certificate, when invalid—Presumption—Official Act, regularity of—Service of notice, proof of.

An attachment creates no charge or lien upon the attached property, it merely prevents private alienation, but does not confer any title on the attaching creditor. [p. 646, col. 1.]

Where the parties have gone to trial knowing what the real question between them was, the evidence has been adduced and discussed and the Court has decided the point as if there was an issue framed on it, the decision will not be set aside in appeal simply on the ground that no issue was framed on the point, in other words, the mere omission to frame an issue is not fatal to the trial of the suit. [p. 663, col. 2.]

Where, however, the failure to frame the issue has led to an unfair trial or miscarriage of justice, the case will be remanded for re-trial. [p. 666, col. 2.]

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In a suit for a declaration that a certificate sale held under the provisions of the Public Demands Recovery Act was invalid and of no effect and that the defendants-purchasers had acquired no title to the property, the title of the defendants was expressly attached in the plaint but the issue as framed did not directly and specifically raise the question of the legality of the certificate proceedings. It appeared that the defendants were not taken by surprise in the Courts below but had adduced a considerable body of evidence in support of their title. In appeal, the defendants-appellants urged that the legality of the proceedings under the Public Demands Recovery Act was not raised in the issues framed in the suit and should not be investigated:

Held, that the defendants were not prejudiced in any way and that the objection, as it was neither taken in the Court below nor in the memorandum of appeal, was wholly unsubstantial. [p. 667, col. 1.]

A non-compliance with every requirement of a Statute does not universally make the proceedings a nullity. No hard and fast line can be drawn between a nullity and an irregularity, and when the provision of a Statute has been contravened if a question arises as to how far the proceedings are affected thereby, it must be determined with regard to the nature, scope and object of the particular provision violated. [p. 667, col. 2.]

An Appellate Court should not dismiss a suit on the ground only that the plaint was not duly signed and verified, such a defect does not affect the merits of the case or the jurisdiction of the Court. [p. 667, col. 2.]

Therefore, when a requisition under section 9 (1) of the Public Demands Recovery Act is not duly signed and verified under section 9 (2) of the Act, the certificate issued on the basis of such requisition is not void in law. [p. 668, col. 1.]

The obvious intention of section 9 (3) of the Public Demands Recovery Act is that a certificate officer shall use his discretion as to the issue of a certificate, to determine whether the case is a proper one for it, whether the money be due or not. [p. 670, col. 1.]

A certificate in which the amount was not specified and the space intended for the insertion of the figures was left blank and which the certificate officer appeared to have mechanically signed without personal and consideration, is not duly made under the provisions of the Act and a sale held under such a certificate is not valid. [p. 670, col. 2.]

The mere entry in the order sheet of the certificate case that notice has been served is no proof that service was effected. [p. 670, col. 2.]

When the circumstances of the case show that the certificate proceedings have been carried on in a careless or slovenly manner, the Court will be slow to apply the maxim *Omnia presumuntur rite et solemniter esse acta donec probetur in contrarium*. [p. 671, col. 1.]

Appeal from the judgment of the Subordinate Judge, Purneah, dated 26th January 1911.

Babus Dwarka Nath Chakravarti and Hemendra Nath Sen, for the Appellants.

Pabu Mohendra Nath Roy and Moulvi Muhammad Tahir, for the Respondent.

JUDGMENT.—This is an appeal by the first party defendants in a suit for declaration of title to immoveable property and for recovery of possession thereof. The lands in dispute originally belonged to one Syed Ashgar Reza, Khan Bahadur, and the plaintiff as also the first party defendants claim to have acquired his interest, the former by purchase at a sale in execution of a money-decree, the latter by purchase at a sale in execution of a certificate under the Public Demands Recovery Act, 1895. The history of the devolution of the interest of the original admitted owner, as alleged by each of the rival claimants, may be briefly stated. Pirthichand, the present plaintiff, in execution of a decree for money against Ashgar Reza made under section 90 of the Transfer of Property Act, attached the disputed lands on the 6th November 1905. At the execution sale, which followed in due course, he became the purchaser on the 5th February 1907; the sale was confirmed on the 11th May 1907 (Exhibit 5). Meanwhile, the manager of the Khagra Estate under the Court of Wards had, on the 10th October 1904, made a requisition to the Collector of Purneah, under section 9 (1) of the Public Demands Recovery Act, for a certificate with a view to recover from Ashgar Reza a sum of Rs. 4,723 on account of arrears of rent. The Certificate Officer made what purports to be a certificate on the 11th October 1904. Notice under section 10 was thereupon ordered to issue upon the defaulter, and, it is said, was served on him on the 28th October 1904. Before the lands could be sold, Ashgar Reza died, and, on the 16th June 1905, notice was directed to issue on his heirs, his brother and his widow, who are the second party defendants in this litigation. What was intended to be a notice to the heirs of the deceased defaulter but was framed as a notice of a fresh certificate issued against them, is said to have been duly served before the 1st July 1905. The lands were sold to the proprietors of the Khagra Estate for Rs. 800 on the 9th January 1906, and the sale was confirmed on the 12th March 1906. The purchasers are the first party defendants in this suit. It

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will be observed that the attachment under the decree held by the plaintiff as also the sale held in execution thereof were subsequent to the attachment and sale respectively under the certificate. But when the sale under the certificate was held, there was a valid subsisting attachment on the lands under the decree of the plaintiff. This, however, is of no assistance to the plaintiff, because the purchasers at the sale under the certificate, have not acquired the property subject to the right of the plaintiff, if any, under his attachment. It is well settled that the attachment creates no charge or lien upon the attached property; it merely prevents private alienation; it does not confer any title on the attaching creditor: *Idoti Lal v. Kurrabuddin* (1), *Raghunath Das v. Sunwar Das* (2), *Soolul Chunder v. Russick Lal* (3), *Mandalaswara Katari v. Prayag Dossji* (4). Consequently as the first party defendants purchased the property on the 9th January 1905, if the sale was validly held under the Public Demands Recovery Act, there was no interest subsisting in the judgment-debtor when the plaintiff purchased at the sale held in execution of his decree on the 5th February 1907. Thus the substantial question in controversy between the rival claimants is, whether the sale held on the 9th January 1905 was valid and operative under the Public Demands Recovery Act. The Subordinate Judge has answered this question against the defendants and has decreed the suit. On the present appeal the point for consideration is, whether the certificate sale, which is the root of the title of the defendants, is valid and operative in law. But before we examine this question, it is necessary to advert for a moment to a preliminary point urged by the appellants.

The appellants have contended that the question of the legality of the proceedings under the Public Demands Recovery Act was not raised in the issues framed in the suit and should not be investigated. It may be conceded that the issues as framed, do not directly and specifically raise the question of the legality of the certificate proceedings;

(1) 24 I. A. 170; 25 C. 179; 1 O. W. N. 639.

(2) 24 Ind. Cas. 304; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 18 C. W. N. 1058; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 72.

(3) 15 C. 202.

(4) 2 Ind. Cas. 18; 32 M. 429; 19 M. L. J. 401.

that fact, however, does not necessarily show that the point is not open for consideration. The principle applicable in these circumstances was formulated by Sir James Colville in *Musammam Mitua v. Fuzl Rub* (5). That principle is that where the parties have gone to trial knowing what the real question between them was, the evidence has been adduced and discussed, and the Court has decided the point as if there was an issue framed on it, the decision will not be set aside in appeal simply on the ground that no issue was framed on the point; in other words, as Selwyn, L. J., observed in *Katchekalyana v. Kachicayaya* (6), the mere omission to frame an issue is not fatal to the trial of the suit. On the other hand, as Lord Westbury held in *Baloo Revun Pershad v. Jankee Pershad* (7), where the failure to frame the issue has led to an unfair trial or miscarriage of justice the case will be remanded for re-trial. These principles have been repeatedly applied, as illustrated by the cases of *Soorjomonee v. Suddanund* (8), *Chandra Kunwar v. Narpal Singh* (9), *Perladh v. Bronghton* (10), *Muttayan v. Sangili* (11), *Mohomed Basiroollah v. Ahmed Ali* (12), *Sayad Muhammad v. Fatteh Muhammad* (13), *Secretary of State v. Dipchand* (14), *Balmakund v. Dalu* (15). Tested in the light of these principles, the objection urged by the appellants proves to be wholly groundless. The title of the defendants was expressly attached in the plaint, and the plaintiff specifically sought a declaration that the certificate sale was invalid and of no effect and that the defendants had acquired no title to the properties in suit. The course of the trial in the Court below gives ample indication that the parties have directed evidence to this point and the

(5) 13 M. I. A. 573; 15 W. R. P. C. 15; 6 B. L. R. 149; 2 Suth. P. C. J. 387; 2 Sar. P. C. J. 626; 20 E. R. 665.

(6) 12 M. I. A. 495; 11 W. R. P. C. 33; 2 B. L. R. 72; 2 Suth. P. C. J. 206; 2 Sar. P. C. J. 461; 20 E. R. 426.

(7) 1 M. I. A. 25; 2 Sar. P. C. J. 214; 20 E. R. 10.

(8) 20 W. R. 377; 12 B. L. R. 304; Sup. Vol. I A 212.

(9) 34 I. A. 27; 11 C. W. N. 321; 29 A. 184; 11 O. W. N. 321; 4 A. L. J. 102; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267 (P. C.).

(10) 24 W. R. 275.

(11) 12 C. L. R. 169; 6 M. 1; 9 I. A. 128; 4 Sar. P. C. J. 354; 6 Ind. Jur. 486; 5 Shome L. R. 57.

(12) 22 W. R. 448.

(13) 22 C. 324; 22 I. A. 4.

(14) 24 C. 306.

(15) 25 A. 498; A. W. N. (1903) 112.

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matter has been elaborately discussed by the Subordinate Judge. There is no trace of any objection taken by the defendants to the investigation of this question, and it is remarkable that the objection does not find a place in any of the twenty grounds taken in the memorandum of appeal presented to this Court. Consequently, under Order XLI, rule 2, of the Civil Procedure Code, the appellants are not entitled to urge this ground, except by leave of the Court. This Court might in its discretion have refused such leave, but the point was allowed to be argued as it was felt that if the defendants were really taken by surprise in the Court below, the case might be re-tried. On investigation, however, it appears that not only were they not taken by surprise, but they adduced a considerable body of evidence in support of their title. We hold accordingly that the defendants have not been prejudiced in any way, that the objection, neither taken in the Court below nor in the memorandum of appeal here, is wholly unsubstantial.

In the investigation of the question of the legality of the certificate proceedings, on which the title of the defendants rests, the successive stages may be usefully recapitulated. In the *first* place, a requisition for a certificate is made under section 9 (1). In the *second* place, a certificate is made by the Certificate Officer under section 9 (3). In the *third* place, a copy of the certificate and a notice in the prescribed form are required to be issued to the judgment-debtor under section 10 (1) and to be served upon him in the manner specified in section 31. In the *fourth* place, the certificate is enforced under section 19 (2) and executed in the manner provided by the Code of Civil Procedure for the enforcement of decrees for money. We shall now investigate what steps were taken to comply with the statutory requirements at each of these stages, and the legal effect of the omission, if any, to carry out strictly the directions given by the Legislature.

As regards the *first* step, it has been pointed out by the respondent that the requisition is not signed as required by section 9 (2), and it has also been contended that it was not verified by the manager of the Khagra Estate, though this latter assertion has not been made out. Section 9

(2) provides that every requisition mentioned in sub-section 1 shall be signed and verified by the officer in authority or manager making it in accordance with the provisions of Order VI, rules 14 and 15, of the Civil Procedure Code as to the verification of plaints. In the present case, the requisition is not signed by the manager, as is clear if Exhibit K is contrasted with Form No. 3 in the Schedule appended to the Public Demands Recovery Act. It has been argued that the requisition was neither signed nor verified by the manager or by any duly authorised person on his behalf and that consequently all subsequent proceedings on the basis of the requisition must be deemed a nullity, as the requisition takes the place of a plaint in a regular suit. We are not prepared to give effect to this contention. It was pointed out in the case of *Ashutosh Sikdar v. Behari Lal* (16) that it cannot be affirmed as a proposition of law of universal application that non-compliance with every requirement of a Statute makes the proceedings a nullity, and illustrations were given of cases where the violation of an express provision of a Statute may not nullify the proceedings as also of cases in which failure to comply with statutory directions may completely vitiate the proceedings. No hard and fast line can be drawn between a nullity and an irregularity, and when the provision of a Statute has been contravened, if a question arises as to how far the proceedings are affected thereby, it must be determined with regard to the nature, scope and object of the particular provision violated. Now in the case of a plaint which is required to be signed and verified, it has been held that if it has not been duly signed or verified, the plaintiff may be allowed to remedy the defect, if discovered, at any stage in the primary Court or in the Appellate Court, but the Appellate Court should not dismiss the suit on the ground of such defect; the reason is that the defect does not affect the merits of the case or the jurisdiction of the Court: *Mohini Mohun Das v. Bungsi Budhan Saha* (17), *Basdeo v. Smilt* (18) *Rajit Ram v. Atesar Nath* (19) and *Fateh*

(16) 11 C. W. N. 1911; 35 C. 61; 6 C. L. J. 320.

(17) 7 C. 80; 5 Sar. P. C. J. 414.

(18) 22 A. 55; A. W. N. (1899) 172.

(19) 18 A. 396; A. W. N. (1896) 102.

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Chand v. Mansab Rai (20). There is no good reason why a different principle should be applied to requisitions under section 9 (1). The provision in section 9 (3) that the Certificate Officer may take action "on receipt of such requisition," that is, a requisition duly signed and verified under section 9 (2), does not necessarily show that if he proceeds on the basis of a defective requisition, the certificate he makes is void in law. If the contrary view were adopted, it would follow by analogy that the decree in a suit instituted on a defective plaint is a nullity. We must consequently overrule the contention of the respondent that the defect in the requisition in this case affected the jurisdiction of the Certificate Officer and nullified all the proceedings taken by him. It cannot be disputed, however, that the defect in the requisition was but the initial step in a series of deviations from the requirements of the Statute.

As regards the *second* step, it has been argued that no valid certificate was made by the Certificate Officer in this case. Section 9 (3) provides that on receipt of the requisition the Certificate Officer, if satisfied that the demand mentioned therein is justly recoverable, may make, under his hand and in Form No. 2 in the Schedule annexed to the Act, a certificate of the amount of such demand remaining unpaid, together with the cost of any Court-fee paid in respect of the requisition under sub-section 2, and shall cause the same to be filed in his office. The form mentioned shows that the name and address of the debtor, the amount of the public demand for which the certificate is made, together with the particulars thereof and the name of the person deemed to be the decree-holder are to be set out in a tabular statement; then follows the actual certificate in these terms:—"I hereby certify that the above mentioned sum of Rs..... is due to the Secretary of State for India in Council, or to A B, a Ward of Court, or a minor or a lunatic by his next friend C D, or, as the case may be, from the above-named. Dated this..... day of..... 19. A. B, Certificate Officer (20) 20 A. 442; A. W. N. (1898) 110.

of....." It is plain³ that the space left blank for the insertion of the amount for which the certificate is to be made, must be filled up before the certificate is signed: the various alternatives given for the person from or to whom the amount is due, must also be struck out, except the one applicable to the circumstances of the particular case. In the case before us, the certificate was signed as given in the printed form as follows:—"I hereby certify that the amount specified above Rs..... is justly due to the Secretary of State for India in Council or manager of Estate Board *Adulat* or minor or lunatic or, as the case may be, from the above-named person." The certified copy of the certificate on the record does not specify the amount for which it is made nor the persons to whom it was due. The respondent has suggested that although the blank space left for the insertion of the amount was not filled up, the amount might, as a matter of fact, be ascertained from the information given in the tabular statement. On careful examination of the figures given in the fourth and fifth columns of the tabular statement, this turns out, however, to be impracticable. The fifth column shows that the total amount of arrears of rent and cess is Rs. 4,190-11-2, while the aggregate amount due for rent, cess, *dak*-cess and interest is Rs. 4,723-5-8½. This figure also appears at the top of the right hand portion of the fourth column, which is headed "Amount of the public demand for which this certificate is made." Then follow several entries on account of process-fee, stamp and Court-fee, which make up a total of Rs. 208-7-0. This, added to the figure brought from the fifth column, gives an aggregate of Rs. 4,931-12-8½. Then follow four other items on account of stamp and paper, which make up Rs. 61-1-3. This gives a total of Rs. 4,992-13-11½. It is impossible from the certified copy to say how many of these entries had been made before the certificate was signed by the Certificate Officer. There are also other entries in the fourth column, some of which at any rate must have been made after the certificate had been signed, for instance, items as to interest which had accrued due during the year 1905-07. It is

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consequently impossible to say to what precise figure in the tabular statement reference was intended to be made by the expression "the above-mentioned sum of Rs." in the certificate. It is remarkable, however, that none of the possible figures, namely, Rs. 4,190-11-2, Rs. 4,723-5-8 $\frac{1}{2}$, Rs. 4,931-12-8 $\frac{1}{2}$ and Rs. 4,992-13-11 $\frac{1}{2}$ agrees with what would be the correct figure according to the law. Under section 9 (3), the certificate is to be made for the amount of demand remaining unpaid together with the cost of Court-fee paid in respect of the requisition under section 9 (2). If it be assumed that the amount of demand unpaid was Rs. 4,723-5-8 $\frac{1}{2}$ as to which, however, we have no information, the amount for which the certificate could be validly made was Rs. 4,988-5-8 $\frac{1}{2}$, inasmuch as Rs. 265 was the Court-fee paid on the requisition. It is thus plain that from the certified copy of the certificate it is impossible to determine the precise amount for which the certificate was intended to be made. In these circumstances, we decided to send for the original certificate from the Collectorate with a view to ascertain the condition of the certificate when it was first made, by discriminating, if possible, the entries originally made from those subsequently added. The original certificate which has been received after considerable delay, is, however, of no assistance, for, as we shall presently explain, it bears indication of interpolations made very probably after the close of the arguments in this appeal. What is shown in the certified copy as blank space for insertion of the amount, has been filled up by the figures Rs. 4,623-5-9 $\frac{1}{2}$. There is little room for doubt that these figures were not in the certificate when first drawn up. In the first place, as already stated, the space is blank in the certified copy which was prepared on the 19th August 1909, compared with the original on the 17th March 1910 and certified to be a true copy on the 18th March 1910. The copy was filed by the plaintiff and was used as evidence on behalf of the defendants. They would never have relied on the certified copy as correct, if there had been a variation in such a material particular be-

tween the copy and the original. The judgment of the Subordinate Judge shows that before him the validity of the certificate was attacked on the ground that it did not specify the amount; the defendants would surely have asked the Court to send for the original if the latter did in fact specify the amount, or have procured a correct copy of it. In the second place, the amount as inserted in the certificate reads as Rs. 4,623-5-8 $\frac{1}{2}$ which does not agree with Rs. 4,723-5-8 $\frac{1}{2}$ shown in columns 4 and 5 of the tabular statement. If the figures in the certificate be read as Rs. 4,723 instead of Rs. 4,623, it is obvious that they could not have been written by the same person as made the entries in columns 4 and 5. The figure "7" occurs in several places in column 5, and is uniformly different in form from the second figure in the amount in the certificate. On the other hand, it has some similarity with "7" as written by the copyist who prepared the certified copy on the record. In the third place, the figures inserted in the certificate, if read as Rs. 4,623, not only do not agree with any of the totals mentioned in columns 4 and 5, they are different from what would be the correct sum due. We must consequently proceed on the assumption on which the case was tried in the Court below, namely, that as shown by the certified copy of the certificate, it did not specify the amount and left blank the space intended for the insertion of the figures; it is also impracticable to ascertain the original condition of the certificate. It is plain from the decision of the Judicial Committee in *Mahomed Abdul Hai v. Guiraj Sahai* (21), which affirms the decision in *Guiraj Sahai v. Secretary of State* (22), and *Bair Nath Sahai v. Ramgat Singh* (23), which affirms the decision in *Bair Nath Sahai v. Ramgat Singh* (24), that a certificate drawn up as the present one has been, cannot be made the foundation for valid proceedings against the property of the defaulter. Lord Davey, in the case last mentioned, after referring to the provisions of the Act and holding that if no certificate is given in accordance with the Statute, the whole basis of the proceedings for the sale is cut away, observed

(21) 20 I. A. 70; 20 C. 826.

(22) 17 C. 414.

(23) 23 I. A. 45; 23 C. 776.

(24) 5 C. L. J. 687.

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as follows :—"It is obvious that those are very stringent provisions. The proceeding in the first instance is apparently *ex parte*. The certificate is to be made by the Collector in a certain form and filed, and when the certificate is filed, it has the effect of a decree against the persons named as debtors in the certificate so far as regards the remedies for enforcing it, and when served, it also binds their immoveable property. It is unnecessary to point out the necessity there is, when power is given to a public officer to sell the property of any of Her Majesty's subjects, that the forms required by the Act, which are matters of substance, should be complied with, and that if the certificate is to have the extraordinary effect of a decree against the persons named in it as debtors and to have the effect of binding their immoveable property, at least it should be in a form, such as provided by the Act, which enables any person who reads it to see who the judgment-creditor is, what is the sum for which the judgment is given, and that those particulars should be certified by the hand of the proper officer appointed by the Act for the purpose. If no such certificate is given, then the whole basis of the proceeding is gone. There is no judgment, there is nothing corresponding to a judgment or decree for payment of the amount, and there is no foundation for the sale. The authority to proceed to the sale is based on the certificate which has the effect of a judgment or decree, and if no judgment or decree is given, and no certificate is filed having the force or effect of a judgment or decree, there can be no valid sale at all." It is further clear that the Certificate Officer must have, in the present case, mechanically signed the printed form without perusal and consideration. In this connection, the observations of Pigot, J., in *Bajinath Sahai v. Ramkut Sin h* (24) are relevant: "The sub-section does not require the Certificate Officer to issue the certificate, the word used is 'may'. The obvious intention is that he shall use his discretion as to the issue of a certificate, to determine whether the case is a proper one for it, whether the money be due or not." There is little doubt that in the present case, what Pigot, J., describes as the "chief safeguard of the Act, the personal care of the officer entrusted with this duty" had failed. It follows

that there was no valid sale, as there was no certificate duly made under the provisions of the Act. In this view, it is needless to examine in detail the other objections which have been taken to the regularity of the certificate proceedings, but a brief reference may be made to them to illustrate the carelessness which throughout characterises these proceedings.

As regards the *third* step, it is necessary to observe that after the certificate has been filed in the office of the Certificate Officer, he is required to issue to the judgment-debtor a copy of the certificate and a notice in Form No. 4 prescribed in the Schedule to the Act. The papers as to return of service in the certificate case have been destroyed in accordance with the rules for the destruction of Court records. The defendants have consequently been constrained to adduce oral evidence to prove that service was effected in the manner laid down in section 31. The defendants are bound to prove service of notice and copy of certificate, because the mere entry in the order-sheet of the certificate case that notice has been served is no proof that service was effected: *Mir Tapura v. Gopi Narayan* (25), *Radhay Koer v. Ajodhya Das* (26) and *Ananda Kishore v. Daiji Thakurain* (27). The Subordinate Judge has disbelieved the evidence of service of notice. We are not disposed to agree with him on this point. The witnesses pledge their oath that the notice was taken to Ashgar Reza, who directed it to be taken to his principal officer. There is no good reason why this testimony should be discredited. No weight can be attached to the circumstance that a claim was not put forward to the attached property by the wives of the judgment-debtor, in whose favour he had executed deeds in lieu of their dower. The story of service, as narrated by the witnesses, seems probable, and we are not prepared to reject it as mythical. Nor are we prepared to agree with the Subordinate Judge that personal service was not effected in accordance with section 31 on Ashgar Reza. What happened was that the notice was tendered to him by one of his servants to whom it had been made over by the Collectorate peon. He directed the notice to

(25) 7 C. L. J. 251.

(26) 7 C. L. J. 262.

(27) 1 Ind. Cas. 549; 36 C. 726; 10 C. L. J. 189.

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be taken to his officer, Nasiruddin. The notice was then handed over to Nasiruddin, who gave the usual receipt. This was clearly full compliance with the requirements of section 31, which provides that service shall be made by delivering or tendering a copy of the notice to the judgment-debtor; this was done in the present case. But it cannot be overlooked that there is no evidence that a copy of the certificate itself was, as required by section 10 (1), served upon the judgment-debtor. Even the entry in the order-sheet makes no mention of the issue of a copy of the certificate. The defendants have contended that a presumption should be made in favour of the regularity of the proceedings; but, as was pointed out by Pigot, J., in *Guiraj Sahai v. Secretary of State* (22) and by Lord Watson in *Mahomed Abdul Hai v. Guiraj Sahai* (21), when the circumstances of the case show that the proceedings have been carried on in a careless or slovenly manner, the Court will be slow to apply the maxim *omnia presumuntur rite et solemniter esse acta donec probetur in contrarium*. If the copy of the certificate was not served as required by section 10, there could be no valid sale: *Puran Chandra v. Dinabandhu* (28). The requirements of section 10 must be strictly carried out to give the Certificate Officer jurisdiction to sell the property of the defaulter, because it is only after they have been fulfilled that a sale can be held.

As regards the fourth step, it is plain that the notice issued upon the heirs of the judgment-debtor was irregular. Exhibit 22 purports to be a notice to the heirs of the judgment-debtor under section 10 and recites that a certificate for Rs. 5,345 had been made against them on the 16th June 1905. This was a mis-statement, for which there was no foundation whatever. There is no trace of a certificate made against the addressees on the 16th June 1905. Consequently, though it is recited in the notice that a copy of the certificate mentioned was annexed, none could have been sent. As Lord Davey said in the case already mentioned, notice that a certificate has been made, is not equivalent to a certificate having been made, and if there was no certificate, then notice to the proprietor (28) 11 C. W. N. 756; 34 C. 511; 5 C. L. J. 696; 2 M. L. T. 871.

that a certificate had been made and filed could not be a compliance with the Act. It is a matter for surprise that even long after the strong condemnation of irregularities in certificate proceedings by this Court and by the Judicial Committee in the cases mentioned, they should be characterised by carelessness as evidenced in the case before us.

We hold accordingly that there was no valid and operative certificate made in compliance with the statutory requirements and that the sale at which the defendants made their purchase did not affect the right, title and interest of the judgment debtors, which subsequently vested in the plaintiff. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 971 OF 1914.

November 2, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KOTA CHINA MELLAYYA—PLAINTIFF—

APPELLANT

versus

KANNEKANTI VEERIAH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1871), s. 92, proviso 1—Mutual mistake as to description of land in registered mortgage-deed, whether can be proved by oral evidence—Construction of deed Rights of bona fide purchasers for value.

Oral evidence is admissible under proviso 1 to section 92 of the Evidence Act to prove a mutual mistake made in the description of a piece of land in a registered mortgage-deed. [p. 672, col. 1.]

A Court can, on reception of such evidence, treat the instrument as rectified, and proceed on that assumption, though no suit for rectification of the instrument is brought under section 31 of the Specific Relief Act, provided that the rights of third persons acquired in good faith and for value, are not prejudiced thereby. [p. 672, col. 1.]

Mahadeva Aiyar v. Gopala Aiyar, 8 Ind. Cas. 390; 34 M. 51; 8 M. L. T. 289; (1911) 1 M. W. N. 36, followed.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Guntur, in Appeal Suit No. 408 of 1912, preferred against that of the Court of the District Munsif of

RAM CHUNDER BANKA V. RAWATMULL

Narasarowpet, in Original Suit No. 48 of 1911.

Mr. V. Ramadoss, for the Appellant.

Mr. T. Ramachandra Rao, for the Respondents.

JUDGMENT.—We are of opinion that a mutual mistake made in describing a piece of land in a registered mortgage-deed can be proved by oral evidence (section 92, proviso 1, of the Evidence Act) and that when such a mistake is so established, the deed can be construed by the Courts as if the mistake had been rectified, without the instrument having been actually ordered to be rectified in a suit brought for the purpose under section 31 of the Specific Relief Act, subject to the condition that the rights of third persons acquired in good faith and for value should not be prejudiced thereby. [See also *Mahadeva Aiyar v. Gopala Aiyar* (1).] We, therefore, uphold the learned Subordinate Judge's decision in establishing the rights of the 3rd and 4th defendants as mortgagees of D. No. 196 *seri* land. But he should not have released the entire interest in the land, and we modify his decree by giving a declaration to plaintiff that he is entitled to attach and sell it subject to the mortgage in favour of defendants Nos. 3 and 4. We shall make no order as to the costs of this appeal.

Appeal allowed.

(1) 8 Ind. Cas. 390, 34 M. 51; 8 M. L. T. 269; (1911) 1 M. W. N. 36.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION SUIT

No. 1145 of 1914.*

August 2, 1915.

Present:—Mr. Justice Chaudhuri.

RAM CHUNDER BANKA—PLAINTIFF

versus

RAWATMULL—DEFENDANT.

Waiver—Limitation Act (IX of 1908), Sch. I, Art. 75—Instalment bond, consent not to sue on failure to pay instalment, if would amount to waiver.

Waiver is consent to dispense with or forego something to which a person is entitled. [p. 674, col. 1.]

Where it was proved that demand was made in three successive years in respect of three instalments due upon an instalment bond, but the plaintiff con-

sented not to sue for the whole amount, as he was entitled to do under the bond, for default on the first two occasions but refused to consent on the third:

Held, that this amounted to a waiver of the payment of the two earlier instalments. [p. 674, col. 2.]

When the instalment bond was executed on the 6th of November 1908 and provided payment of Rs. 10,000 by annual instalments of Rs. 400, commencing from the 30th of September 1909, and further that in case of default the whole amount payable on the bond was to fall due, and the plaintiff waived the payment of the first two instalments as aforesaid and filed a suit for the recovery of the whole amount on the 12th of November 1914:

Held, that his suit was not barred by limitation and it was decreed for Rs. 9,200. [p. 674, col. 2.]

FACTS of the case and the arguments at the Bar are fully noticed in the judgment.

Mr. B. C. Mitter (with him Messrs. B. L. Mitter and H. C. Mazumdar), for the Plaintiff.

Mr. Rasul, for the Defendant.

JUDGMENT.—This is a suit on an unregistered instalment bond executed by the defendant on the 6th November 1908. It is for a sum of Rs. 10,000 payable in annual instalments of Rs. 400, commencing from the 30th September 1909 (not 1899 as appears by mistake in the bond), it being agreed between the parties that in case of default of payment of the instalments, there was to be "immediate payment of the sum of Rs. 10,000, or the unpaid part thereof or the unpaid instalment with interest from the date of default." After reciting the agreement aforesaid, the third clause of the bond runs thus: "In case the said yearly payments of principal shall from any cause whatever not be paid upon the day hereinbefore mentioned for such payment, the said Rawatmull, his heirs, executors, administrators or assigns shall forthwith pay to Golab Roy, Bhuramull and Ghanesham Dass, their heirs, executors, administrators or assigns the whole balance then remaining unpaid of the said sum of Rs. 10,000 or at the option of the said Golab Roy, Bhuramull and Ghanesham Dass, their heirs, executors, administrators or assigns the unpaid instalment with interest thereof at the rate of nine annas per cent. per annum."

The plaintiff states in the third paragraph of the the plaint that "the defendant failed and

* The report of this case has been taken from the Calcutta Weekly Notes with permission.—Ed.

RAM CHANDER BANERJEE P. RAWATMULL.

neglected to pay any of the said instalments. The plaintiff firm did not claim with the knowledge and consent of the defendant the whole of the said sum of Rs. 10,000 on failure to pay the first and second instalments in respect thereof, and they submit that they are entitled to recover the said sum of Rs. 10,000 with interest thereon at the rate aforesaid on the failure on the part of the defendant to pay the third instalment in respect thereof under this bond."

The defendant in his written statement denies the agreement, and says that he signed the bond "under mental and bodily distress and under the coercion or influence of the plaintiff firm without understanding its purport or contents." In answer to the third paragraph of the plaint, the defendant denies that he consented "that the plaintiff firm should not claim the whole of the sum of Rs. 10,000 on his failure to pay the first and second instalments." He alleges that no demand was ever made from him and submits that under the circumstances, the plaintiff's claim should be held barred by the Statute of Limitations. The only issue raised by him at the hearing was as regards limitation, the suit being filed on 12th November 1913 after the re-opening of the Court after the long vacation. It was argued on his behalf that under Article 75, Schedule I, of the Limitation Act, the period of three years ran from the date of the first default, namely, the 30th September 1909. It was argued that this was not a case of waiver at all as no payment of any overdue instalment had been alleged, and that according to the rulings of this Court in *Hurri Pershad Chowdhry v. Nasib Singh* (1) and *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty* (2), amongst others, there could be no waiver so as to affect limitation save by payment and acceptance of an overdue instalment. A large number of other cases was referred to. It is only necessary to refer to some of them. *Mon Mohun Roy v. Durga Churn Goose* (3), sums up the current of

decisions up to that date. Wilson, J., in discussing the case of *Cheni Bask Sha'a v. Kudum Mundel* (4) held "it was unnecessary and unprofitable to enquire how he might decide a question of the kind if it were a new question, as it was a question which had arisen many times in the course of a number of years; that it was all-important in a matter of this kind that the current of decisions should be uniform and consistent and should be strictly adhered to." Then he discussed various cases and held that under Article 179 of the old Limitation Act, limitation ran from the time when default in payment of the first instalment was made, in consequence of which, the whole amount became due basing his decision on the Full Bench ruling in *Hurronath Roy v. Mahesoolah Mollah* (5). The learned Judge further said "there has, however, been engrafted upon that general rule an exception in certain cases. That exception I understand to be this, that if the right to enforce payment of the whole sum due upon default being made in the payment of an instalment, has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other, then, the penalty having been waived, the parties are remitted to the same position as they would have been in if no default had occurred." The next case I shall deal with is that of *Girindra Mohun Roy Chowdhury v. Bocka Das* (6) which discusses all the earlier cases including the case above referred to. The learned Judges sum up the discussion in these words: "The preponderance of the authorities supported by the decision of the Full Bench quoted above, *Hurronath Roy v. Mahesoolah Mollah* (5), is to the effect, that in the case of instalment bonds with the stipulation of the whole debt becoming due on the failure of payment of a certain instalment, limitation would begin to run from the date of the non-payment of that instalment, unless there has been a waiver by the decree-holder by the acceptance of the overdue

(1) 21 C. 542.

(2) 81 C. 297.

(3) 15 C. 502.

(4) 5 C. 97; 4 Ind. Jur. 517.

(5) B. I. R. Sup. Vol. 618; 7 W. R. 21 (F. B.).

(6) 1 Ind. Cas. 49; 9 C. L. J. 226; 13 C. W. N. 1004; 36 C. 394.

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instalment. In view of the conflicting rulings on the subject of waiver, we feel bound to follow the decision of the Full Bench in *Hurronath Roy v. Maheroollah Mollah* (5)... We hold that mere abstinence on the part of the plaintiff in this case from bringing a suit for the recovery of the whole amount due on the failure of the payment of the first two instalments, did not amount to waiver." That sums up the state of the law on the subject to far as our Court is concerned. In *Hurri Pershad Chowdhry v. Nasib Singh* (1) and in *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty* (2) the learned Judges have, however, held that "there cannot be any waiver so as to affect limitation save by payment and acceptance of an overdue instalment." This seems to me to unduly restrict the meaning of the term "waiver." It is an expression of wide application and significance, therefore, difficult to define. It is quite clear, however, upon the authorities that mere abstinence from suing is not waiver; but that there may not be any other means of waiving, except by acceptance of an overdue instalment, I am not prepared to accept until there is such uniformity in the decisions on that point as to compel adherence. In dealing with the question of the waiver of a notice under a covenant in a mortgage-deed in *Selwyn v. Garfit* (7), Bowen, L. J., defined waiver in this way: "What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice." This may be paraphrased thus. Waiver is consent to dispense with or forego something to which a person is entitled. It seems to me that such consent may be by express agreement between the parties, or implied from the receipt of an overdue instalment. See also *Kankuchand Shir Chand v. Rustomji Hormusji* (8). In *Abinash Chandra Bose v. Bama Bewa* (9), Chitty and Carnduff, JJ., did not "concur in the opinion which had been expressed in one or two of the cases cited before them", referring to *Hurri Pershad Chowdhry v. Nasib Singh* (1) and *Jadab Chandra Bakshi v. Bhairab*

Chandra Chuckerbutty (2), "that waiver can be effected only by acceptance of subsequent instalments. Waiver of such condition may be effected in a variety of ways and may be inferred from various circumstances. It must, however, always depend on some definite act or forbearance on the plaintiff's part." I respectfully agree with that opinion. Here the plaintiff has examined three witnesses as to what happened when demand was made from the defendant on three occasions. The plaintiff firm consented to waive their benefit under the instalment bond, namely, consented not to sue for the whole sum on default on the part of the defendant of the first two instalments. They did so in two successive years, but that on the third occasion, the firm refused to consent any further. The defendant has sworn to the contrary, but I am unable to accept his evidence. Waiver of this character ought no doubt to be proved by satisfactory evidence. I hold that there is such satisfactory evidence in this case, but having regard to the fact that the payment of the first two instalments was waived, I give a decree in favour of the defendant for the sum of Rs. 9,200 with interest at 9 per cent. from 1st October 1911 to date of suit and with costs on scale No. II.

Messrs. Manuel, Agarwalla and Dey, Attorneys, for the Plaintiff.

Mr. B. L. Mukerjee, Attorney, for the Defendant.

Suit partly decreed.

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 47 OF 1913 AND 243 OF 1914.

October 25, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

IN A. S. No. 47 OF 1913

SUBBA REDDI—DEFENDANT No. 1—
APPELLANT

versus

ALAGAMMAL AND ANOTHER—PLAINTIFF AND
DEFENDANT No. 2—RESPONDENTS
IN A. S. No. 243 OF 1914

SUBBA REDDI—PLAINTIFF—APPELLANT

versus

VELLAYAMMAL *alias* RAMAKKAMMAL
AND ANOTHER—DEFENDANTS—RESPONDENTS.
Hindu Law—Partition—Partial partition, when

(7) (1888) 38 Ch. D. 273; 57 L. J. Ch. 609; 59 L. T. 233; 86 W. R. 513.

(8) 20 B. 109 at p. 113.

(9) 4 Ind. Cos. 17; 13 C. W. N. 1010.

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allowable—Deed of partition not mentioning certain properties, whether effects complete severance in status and interest—Intention.

Where a deed of partition, after reciting that the parties had hitherto lived as members of a joint family and that owing to differences among females it had become necessary to effect a partition, divided the joint family properties between the father and son, but left out certain outstanding debts and decrees:

Held, that the language of the document showed that the parties to it were no longer to remain joint but became divided in status and that the decrees and outstanding debts were not divided then simply because they had not been collected and it was not possible to make a division then, as it could not be foretold how much they would realise. [p. 675, col. 2; p. 676, col. 1; 677, col. 1.]

According to Hindu Law, partial partition of a joint family property can be effected only with the consent of co-parceners. [p. 676, col. 2.]

Appeals against the decrees of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Original Suits Nos. 76 and 151 of 1911 respectively.

Messrs. T. Rangachariar and K. V. Krishnaswami Aiyar, for the Appellant.

Messrs. S. Srinivasa Aiyangar and A. Krishnaswami Aiyar, for the Respondents.

JUDGMENT.

IN APPEAL NO. 47 OF 1913.

WALLIS, C. J.—The only question of any difficulty in this case is whether Exhibit VI is to be construed as effecting a division in status as well as a division of the specific properties with which it deals expressly. This appears to me to be mainly a question of the construction of the document. In *Vaidyanatha Aiyar v. Aiyasamy Aiyar* (1), where a partial partition of property was held to raise a presumption of division in status, there was no deed of partition and I do not think that case is an authority for holding that wherever the co-parceners execute a document dividing a particular item of property that raises a presumption that they intended to become divided in status. If such a presumption is to be raised, there must, in my opinion, be something else in the document to raise it. This was a case of partition between the 1st defendant and his father, the 1st defendant being the son by the second of the father's three wives, and the partition was brought about by the father who was ill and anxious to make provisions for his first and third wives, as he did immediately afterwards in the Will, Exhibit VII, which he

executed on the 3rd of September, the partition deed, Exhibit VI, having been executed on the 25th August. Whereas the partition deed appears to have included expressly all the joint family properties except the outstanding decrees and debts which were not mentioned and were considerable, the Will bequeathes to the two wives not only the moveable and immoveable properties taken by the testator under the partition deed, Exhibit VI, but also "all the moveable and immoveable properties, outstanding loans and properties belonging to me at present but not included in this Will and the moveable and immoveable properties and outstanding loans and properties which I may hereafter acquire." This shows, if proof were necessary, that at the time of Exhibit VI all parties must have been perfectly well aware of the existence of other joint family properties which were not included in the partition deed and the question, in my opinion, is whether from the terms of the deed we can gather that it was the intention of the parties to remain joint or become separate as to these items also. I do not think any strong presumption arises from the situation of the parties who were father and son. If the father was anxious to partition all the joint family properties with a view to leaving his share to his two wives, it is strange he did not do so expressly and it has been argued that such was not his intention and that he probably thought that the Rs. 20,000 he took under the deed, would be sufficient for these wives, and was willing that his son should take the rest by survivorship. As against this, there is the recital in the deed that there had been differences between the 1st defendant and his father as well as between the women of the family. On the whole, I do not think it is safe to draw any inference as to the motives actuating the parties. The partition deed, however, after providing for the division of the scheduled properties, goes on: "as we have effected partition in this manner," and provides that the 1st defendant's mother who had been living in his family, should be maintained by him and not by her husband. I have come to the conclusion, though not without hesitation, that these provisions are sufficient to enable us to raise a presumption that the parties intended to become divided in interest and that the decrees and outstanding debts were not

(1) 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49.

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divided then simply because they had not been collected and it was not possible to make a satisfactory division then, as it could not be foretold what they would realize. The appeal will be dismissed with costs.

IN APPEAL NO. 243 OF 1914.

This case follows my decision in Appeal No. 47 of 1913, and I dismiss this appeal with costs.

IN APPEAL NO. 47 OF 1913.

SESHAGIRI AIYAR, J.—I agree. Mr. Rangachariar frankly conceded that in the face of the overwhelming evidence there is regarding the consent of his client to the division, he is not prepared to argue that the partition was brought about by undue influence.

The only question remaining for consideration is whether the father and son were divided in status with reference to the outstandings not specifically mentioned in the deed of partition. In my opinion, the language of the document shows that the parties to it were no longer to remain joint. It says, (a) we have lived *hitherto* as members of a joint family; (b) that owing to differences among females, it has become necessary to effect a partition; (c) we shall effect a partition in respect of the undermentioned properties. The list of outstandings is not among the properties mentioned in the schedule. It has also to be mentioned, as pointed out by Mr. Rangachariar, that the usual clause "that from this day forward there shall not be property relationship, but only blood relationship" is not to be found in this document. Nonetheless, I am of opinion that the intention of the parties was to get separated from each other; the reason for the necessity is given in the document. The 1st defendant is the son by one of the wives who was not living with her husband, and the pleadings and the evidence in this case show that the father effected the partition with a view to devise his share of the properties to his other two wives. I am unable to see that the father had any object in allowing particular portions of the property to continue as joint property. The explanation suggested by Mr. Srinivasa Aiyangar for their omission from the schedule is the most natural one. There

were debts and decrees. It was apparently thought that the moneys should be apportioned as they were recovered. Some may have been or proved to be bad debts and it was not thought expedient to divide the debts at that time.

On principle, I am clear that the father and son became divided in status. It is pointed out by Mr. Ghose in his Hindu Law that there is nothing in the Smritis to encourage a partial partition. The practice has grown up in recent years. Mr. Mitra in his Tagore Lectures dealing with this special question quotes from the Smritis and commentaries to show that partial partition was unknown to Hindu Law. I do not think it necessary to quote excerpts from the texts to substantiate this position (see Mitra on the Law of Partition, pages 330 and 331).

As regards the decided cases Sir Richard Garth in *Radha Churn Das v. Kripa Sindhu Das* (2) says: "It seems indeed very doubtful whether by the Hindu Law any partial partition of the family property can take place *except by arrangement*." The decisions in *Satya Kumar Banerjee v. Satya Kirpal Banerjee* (3), *Bhowani Prosad Shaha v. Jagannath Shaha* (4) and *Ajodhya Pershad v. Mahadeo Pershad* (5) prove that with the consent of the co-parceners a partial partition is possible. The decisions in *Timmie Reddy v. Achamma* (6) and *Kandasami v. Doraisami Aiyar* (7) only say that there can be a partial partition. On the other hand in *Vaidyanatha Aiyar v. Aiyasami Aiyar* (1), it was clearly laid down that when once a partition was made, the presumption is that it effected a complete severance of interests. This was followed in *Sundaramma v. Kamakotiah* (8). In *Anandibai v. Hari Suba Pai* (9), Chandavarkar, J., says: "If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property."

(2) 5 C. 474; 4 C. L. R. 428.

(3) 3 Ind. Cas. 247; 10 C. L. J. 503.

(4) 3 Ind. Cas. 241; 13 C. W. N. 309; 9 C. L. J. 133.

(5) 3 Ind. Cas. 9; 14 C. W. N. 221.

(6) 2 M. H. C. R. 325.

(7) 2 M. 317 at p. 324; 5 Ind. Jur. 352.

(8) 26 Ind. Cas. 514.

(9) 10 Ind. Cas. 511; 35 B. 293; 13 Bom. L. R. 227.

BISWA NATH SINHA v. BIDHUMUKHI DAS.

The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or, if the partition was intended to extend to the interest of all individually, there must be proof that some of them re-united." I entirely agree. The recent decision of the Judicial Committee in *Suraj Narain v. Iqbal Narain* (10) indicates that when one member intimates his willingness to get separated from the others, that would effect a division in status. In the present case, there was an agreement to become divided in consequence of misunderstandings among the female members of the family. I am unable to hold that the status of co-parcenary was intended to be continued with regard to the properties not specifically dealt with in the partition deed. It is conceded that apart from the language of the document there is no evidence to prove that the parties intended to remain joint with reference to the properties not specifically mentioned. I would dismiss the appeal with costs.

IN APPEAL NO. 243 OF 1914.

I agree that this appeal also should be dismissed with costs.

Appeals dismissed.

(10) 18 Ind. Cas. 30; 35 A. 80; 13 M. L. T. 194; 17 O. W. N. 333; 11 A. L. J. 172; (1913 M. W. N. 157; 17 C. L. J. 284; 24 M. L. J. 347; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 138 OF 1915.

RULES NOS. 394 AND 495 OF 1915.

May 26, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

BISWA NATH SINHA—PLAINTIFF—
APPELLANT

versus

BIDHUMUKHI DAS—DEFENDANT—
RESPONDENT.

Land Acquisition Act (I of 1894), ss. 54, 31—Order by District Judge allowing Hindu widow to take out compensation money deposited by Collector—Appeal, if maintainable.

No appeal lies under section 54 of the Land Acquisition Act from an order made by the District Judge allowing a Hindu widow to take out compensation money deposited in the District Judge's Court by the Collector under section 31 of the Act. [p. 677, col. 2.]

Appeal against the decree of the District Judge, Nadia, dated the 1st February 1915.

Babus Brojo Lal Chuckerbutty, Gurudas Sinha and Harish Chandra Roy, for the Appellant.

Babu Brojendra Nath Chatterji, for the Respondent.

JUDGMENT.—A dwelling house belonging to a Hindu widow was acquired under the Land Acquisition Act. The compensation money amounting to Rs. 5,800 odd was sent by the Collector to the District Judge under section 31 of the Land Acquisition Act. Upon the lady making the application for taking out that money for the purpose of building a house to live in, there was an objection at first on behalf of the reversioner; but ultimately, the reversioner gave his consent to the money in deposit being invested by the Court under section 32 (a) of the Land Acquisition Act for the construction of a suitable building. This consent was given upon an application of the lady for paying out the money to her. The order No. 14 shows that "the Pleader for the opposite party intimated that he had no objection to the permission being granted to the petitioner to withdraw the money in deposit for the construction of a suitable building for the petitioner." After this order was made to pay out the money, there was an application for review by the opposite party, but that was disallowed, and ultimately the money was paid out upon taking a surety bond from a third person and from the lady. Against this order allowing the lady to take out the money in this way, there was an appeal to this Court and also an application for revision. A preliminary objection was taken on the ground that an appeal was incompetent, and we think the preliminary objection is sound because under section 54 of the Act no appeal lies from an order of this nature made by the District Judge. Dealing with the case, however, under section 115 of the Code of Civil Procedure, we think that there have been some just reasons for complaint in the proceedings of the Court below. Although a

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large amount of money has been paid out for the purpose of a building, no plan or estimate has been taken and the surety bond that has been taken is worded so indefinitely that in case of loss there may be no chance of recovering any amount that may be lost. As the reversioner consented to the money being paid out, we are not inclined to alter the order that has been passed for paying the money.

We must, however, arrange for a safeguard against the misapplication of the money. We, therefore, direct that the learned Judge will enquire into the title in respect of the land that has been acquired by the lady for building a house in the presence of the reversioner. Then the lady will put in a plan and an estimate which will be passed by the learned Judge in the presence of the reversioner. Then a new surety bond will have to be filed within a time fixed by the Court, and the sufficiency of the security is to be tested in the presence of the reversioner; and the surety will be made liable for the misappropriation of the money and for the construction of the building according to the plan and estimate to be filed within a time to be fixed by the Court. When the house is completed, the lady should report the completion of the building to the Court and also file the accounts; and if there is any objection as to the plan not being properly carried out in accordance with the estimate, the Judge will hear the objection, decide the same and pass proper orders. If there is any money left, it will be deposited in Court for being dealt with in accordance with law.

In view of the results of the two proceedings, we make no order as to costs.

The appeal is dismissed and the rules are disposed of as stated above.

Appeal dismissed; Rules made partly absolute.

MADRAS HIGH COURT.

2ND CIVIL APPEAL NO. 591 OF 1914.

October 12, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.

THOTAKURA GOVINDU—PLAINTIFF—
APPELLANT

versus

PEPAKAYALA MALLAYYA *alias*
TATABBAYI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Evidence Act (I of 1872), s. 92 Oral sale in discharge of mortgage-debt whether admissible in suit for redemption—Nature of possession by mortgagee—Prescription.

The plaintiff sued for redemption of a mortgage and for accounts from the defendants as mortgagees in possession. The defendants set up an oral sale by the mortgagor in discharge of the mortgage-debt, and adverse possession for more than the statutory period. The plaintiff's suit having been dismissed, he appealed on the grounds that the plea of oral sale was *res judicata* by reason of the decision in a previous suit and that oral evidence of the alleged sale was inadmissible.

Held, (1) that the existence of the oral sale not being directly and substantially in issue and not having been finally decided in the previous suit, the question was not *res judicata*; [p. 680, col. 1; p. 682, col. 2.]

(2) (*Spencer, J.*, dissenting) that the oral agreement was sought to be proved not as modifying the mortgage, but in order to prove the nature of possession taken by the mortgagee and oral evidence, therefore, was admissible; [p. 68, col. 2.]

(3) that the defendants' possession had been all along adverse as against the mortgagor and that they had acquired a title by prescription. [p. 681, col. 2.]

Kane Goundan v. Lala Naicken, 12 M. L. J. 387; *Venkataramayudu v. Subbamma*, 13 M. L. J. 302, referred to.

Per Phillips, J.—Oral evidence of a sale by the mortgagor to the mortgagee in discharge of the mortgage-debt is admissible under section 92 of the Evidence Act to prove discharge, although the sale itself is invalid and does not effect any legal transfer of the property, even though it is accompanied by delivery of possession. [p. 680, col. 2.]

Ram Anatar v. Tulsi Prasad Singh, 11 Ind. Cas. 713; 16 C. W. N. 137; 14 C. L. J. 507; *Kattika Bapanamma v. Kattika Kristamma*, 10 M. 231; 17 M. L. J. 30; *Karampalli Unni Kurup v. Thekka Muthurakuthi*, 26 M. 195; *Goseti Subba Row v. Varigonda Narasimham*, 27 M. 368, followed.

Ariyaputhi Padayachi v. Muthukumaraswamy, 15 Ind. Cas. 343; (1912) M. W. N. 84; 12 M. L. J. 425; 37 M. 423; 23 M. L. J. 339, distinguished.

Although an oral sale cannot in itself operate as an extinguishment of the mortgage, yet the proof of the payment of a mortgage-debt thereby is sufficient to prove the nature of possession by the mortgagee. [p. 681, col. 2.]

Usman Khan v. Nagalla Dasanna, 16 Ind. Cas. 694; 12 M. L. J. 330; 23 M. L. J. 360; (1912) M. W. N. 995; 37 M. 545, followed.

Peri Spencer, J.—A simple mortgagee who gets

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into possession of immoveable property of Rs. 100 in value cannot prove an oral sale as a starting point of adverse possession against his mortgagor so as to acquire a prescriptive title by remaining in possession for over the statutory period. [p. 682, col. 2.]

Ariyaputhira Padayachi v. Muthukumaraswamy, 15 Ind. Cas. 343; (1912) M. W. N. 854; 12 M. L. T. 425; 37 M. 423; 23 M. L. J. 339, followed.

A mortgagor's possession does not become adverse to the mortgagor merely by his styling himself as proprietor of the mortgaged property or by his denial of the mortgagor's right to redeem; there must be some act done by which the mortgagor may have reason to suppose that his rights have been invaded. [p. 683, cols. 1 & 2.]

Ali Muhammad v. Lalla Baksh, 1 A. 655; *Thopara Mussad v. Collector of Malabar*, 10 M. 189; *Usman Khan v. Nagalla Dasanna*, 16 Ind. Cas. 694; 12 M. L. T. 330; 23 M. L. J. 360; (1912) M. W. N. 995; 17 M. 545; *Itappan v. Manavikrama*, 21 M. 153; 8 M. L. J. 92; *Tarubai v. Venkatrao*, 27 B. 43; 4 Bom. L. R. 721; *Srinivasa Swami Aiyangar v. Athmarama Iyer*, 2 Ind. Cas. 612; 19 M. L. J. 280; 5 M. L. T. 84; 32 M. 281; *Magnudi Chetti v. Oliver*, 22 M. 261; 8 M. L. J. 196, followed.

Sales and mortgages of immoveable property are both transfers of intangible rights, but one is a transfer of ownership and the other is a transfer of an interest in the property concerned. The possession of a purchaser is of a full proprietary character, while the possession of a mortgagee in possession is of a limited nature. Both transactions are required to be registered, if the property is Rs. 100 in value or over. An extinguishment of a mortgage by the mortgagee's rights being merged in those of an owner, involves an alteration of the relationship of mortgagor and mortgagee into one of seller and purchaser. When each of these transactions requires a registered document to make it valid, the law does not permit the substitution of one for the other to be effected in a less formal manner. [p. 684, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Cocanada, in Appeal Suit No. 248 of 1912, preferred against that of the District Munsif of Peddapur, in Original Suit No. 800 of 1910.

Mr. G. S. Ramachandra Aiyar, for the Appellant.

Mr. P. Narayanamurthi, for the Respondents.

JUDGMENT.

PHILLIPS, J.—Plaintiff-appellant is the assignee of the equity of redemption in the plaintiff lands, which were mortgaged in 1882 to the grandmother of defendants-respondents. It is respondents' case that in 1884 four items of the mortgaged property were sold orally to the mortgagees in discharge of the mortgage-debt. This case has been found to be true by the lower Appellate Court. It is also found that the alleged

sale being oral is invalid, as the property is worth over Rs. 100, but as defendants and their grandmother have been in adverse possession from 1884 until date of suit in 1910, they have acquired a title by prescription. Plaintiff's suit for redemption and for accounts from defendants as mortgagees in possession has been dismissed. The appeal is pressed on three main grounds:—

(1) that the plea of oral sale has been negatived and that the matter is *res judicata* by reason of the decision in Original Suit No. 19 of 1890 in the Peddapur District Munsif's Court,

(2) that the possession obtained by defendants' grandmother in 1884 was that of a mortgagee, and cannot, therefore, be adverse to the mortgagor, and

(3) that oral evidence of the alleged sale in 1884 is inadmissible under provision (4) of section 92 of the Evidence Act.

2. On the first point, I do not think that appellants' plea is sustainable. In 1890, plaintiff's predecessor-in-title sued to evict defendants' grandmother, Achamma, as a trespasser on four items of the land now in suit. Achamma in defence put forward the mortgage-deed of 1882, which it is now sought to redeem, and pleaded that as the mortgagor had made default in payment, he had given up these lands to her "as sold for the whole amount" of the mortgage-debt and Rs. 25 (twenty-five) paid by Achamma for Government dues. The mortgage-deed of 1882 contains a proviso that if the mortgagor makes default, he shall put the mortgagee in possession of the mortgaged property, and it is contended that issue No. 1 in Original Suit No. 19 of 1890, must be read in the light of the mortgage-deed. Issue No. 1 runs as follows:—

"Whether the plaintiff lands were wrongfully usurped by defendants from plaintiff's possession or were delivered over by plaintiff to first defendant in the terms of the registered mortgage-deed dated the 9th November 1882?" This issue was presumably framed on the pleadings and, therefore, "delivered over by plaintiff in the terms of the registered mortgage-deed" must refer to defendants' allegation that on default

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of payment of the mortgage amount by plaintiff, the lands were delivered to her "as sold," and the issue merely is as to whether plaintiff's or defendants' case is true. The plaintiff's second witness in that case admitted the existence of the mortgage and said that defendants got into possession under the mortgage and subsequently continued in possession in accordance with the decision of a *panchayat*. Acting upon this evidence, the District Munsif appears to have thought that defendants were in possession under the mortgage, and dismissed plaintiff's suit. The only finding on the point is that plaintiff delivered the plaint lands to defendants under "an" arrangement and that defendants did not wrongfully usurp the plaint lands. The District Munsif also adds: "It seems that plaintiff has no cause of action to recover until he settles the matter of the mortgage-deed"; but he does not find this as a fact. Plaintiff's suit was dismissed and defendants could not have appealed, but that does not affect the case here, for I am of opinion that the existence of the oral sale to defendants was not directly and substantially in issue and finally decided in that suit. There is certainly nothing in the judgment which amounts to a finding that the oral sale was untrue, and the suit was dismissed apparently because according to plaintiff's own evidence defendants were in possession, not as trespassers as alleged in the plaint, but under some arrangement under the mortgage-deed, the nature of the arrangement not being specified. The question is, therefore, not *res judicata*.

3. The second point raised is that Achamma's possession from 1884 was possession as a mortgagee and cannot, therefore, be adverse to the mortgagor. The finding of fact is that she did not get into possession as a mortgagee but as a purchaser in an invalid sale. This finding is impeached on two grounds, *firstly*, that the oral evidence of the sale on which it is based, is inadmissible in evidence, and *secondly*, that when a mortgagee gets into possession during the continuance of a mortgage, his possession cannot be adverse to the mortgagor. This latter argument pre-supposes that the mortgage was continuing when possession was obtained, whereas the oral

evidence is that the mortgage had been discharged. It will be better, therefore, to decide the *third* point, *i. e.*, whether the oral evidence of the sale is admissible in evidence, before dealing with the points that depend upon a decision of this question. No doubt the oral sale is invalid, and evidence is inadmissible to prove it as an agreement to contradict, vary, add to, or subtract from the terms of the mortgage. (Section 92 of the Evidence Act.) Similarly under proviso 4, the existence of a distinct subsequent oral agreement to rescind or modify its terms cannot be proved. Can the sale in this case be held to be an agreement contradicting, varying, adding to, or subtracting from the terms of the mortgage or as rescinding or modifying the mortgage? I think not. The effect of the agreement is to discharge the mortgage, *i. e.*, to put an end to the contract by fulfilment, and although the oral sale accompanied by delivery of possession does not effect any legal transfer of the property, yet there is nothing in section 92 to exclude evidence of the transaction as showing discharge of the mortgage debt. No doubt in *Ariyaputhira Padayachi v. Muthukumarsamy* (1) it was held by Sadasiva Aiyar, J., that oral evidence of discharge by an invalid transfer was inadmissible in evidence and he goes so far as to hold that oral evidence to prove a conveyance as equivalent to payment of money, could not be allowed. In that case, the facts were very similar to the present one, *i. e.*, the mortgagees alleged an oral sale of part of the mortgaged property in discharge of the whole mortgage; and the transaction sought to be relied upon had the effect of changing the possession of a mortgagee as such to possession as owner. But that case was a case of an usufructuary mortgage, and this I think is an important difference. Miller, J., does not discuss the admissibility of the evidence in any event in considering whether the transfer of property can be proved as showing the intention of the parties to discharge the mortgage and so, as showing change in the mortgagee's possession, to make it adverse to the mortgagor. He merely says that the intention to discharge the mortgage involves the intention to make certain transfers, and it

(1) 15 Ind. Cas 343; 23 M. L. J. 339; (1912) M. W. N. 854; 12 M. L. T. 425; 37 M. 423.

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is impossible to say that if those transfers failed, both parties nevertheless intended to discharge the mortgage. He does not hold that in no circumstance would oral evidence of the arrangement be inadmissible, and I think that in accordance with the views expressed in *Nam Awatar v. Tulsi Prosad Singh* (2), *Kattika Bapanamma v. Kattika Kristnamma* (3), *Karampalli Unni Kurup v. Thekku Vittel Muthorakutti* (4), *Goseti Subba Row v. Varigonda Narasimham* (5), such evidence is admissible for proving discharge although the sale by which the discharge was intended to be effected, is invalid. In *Ram Awatar v. Tulsi Prosad Singh* (2) an oral arrangement whereby a mortgagor was put in possession of part of the mortgaged property in discharge of the liability of the usufructuary mortgagee to pay him surplus profits, was allowed to be proved by oral evidence and this in effect was allowing oral evidence of an agreement varying the terms of the mortgage to be adduced for the purpose of showing payment of money due under the terms of a registered mortgage-deed. In *Kattika Bapanamma v. Kattika Kristnamma* (3), in a suit for arrears of maintenance defendant pleaded that, in discharge of his obligation to pay maintenance due under a registered deed, plaintiff had been put in possession of certain lands under an oral agreement. It was then held that the subsequent oral agreement being an agreement to rescind or modify the original registered agreement was not receivable in evidence, but that it was open to defendant to prove that the arrears claimed were actually discharged by the plaintiff taking possession, although the agreement to discharge cannot be proved. The other two cases, *Karampalli Unni Kurup v. Thekku Vittel Muthorakutti* (4) and *Goseti Subba Row v. Varigonda Narasimham* (5), are not so much in point, but there also evidence of an invalid oral agreement was allowed in order to prove discharge of the prior registered agreement. These rulings appear to me to be opposed to *Sadasiva*

Iyer J.'s opinion in *Ariyaputhira Padayachi v. Muthukumarasamy* (1), that oral evidence to prove a conveyance as equivalent to payment of money cannot be allowed. This opinion was not expressed by Miller, J., in the same case and is really an *obiter dictum*, and I prefer to follow the principle set forth in the other four cases above, which does not seem to me to be opposed to the provisions of section 92. In this case, then, the oral agreement is sought to be proved not as modifying the mortgage, but in order to prove the nature of possession taken by the mortgagee and I hold that the oral evidence is admissible, and on this evidence we have the finding of fact that the mortgage-debt was discharged and that defendants' predecessor got into possession of the mortgaged properties not as mortgagee, but as owner, and that the possession as owner was adverse to the mortgagor and recognized by him to be so. Although the oral sale cannot in itself operate as an extinguishment of the mortgage, yet the proof of the payment of the mortgage-debt thereby is sufficient to prove the nature of possession by the mortgagee. In this view, I would follow the ruling reported as *Usman Khan v. Nagalla Dasanna* (6), and hold that defendants' possession has been all along adverse as against the mortgagor, and they have now acquired a title by prescription. [Vide also *Kone Goundan v. Bola Narcken* (7) and *Venkataramudu v. Subbamma* (5).]

4. As regards the question of whether the possession from 1884 was that of Achamma or of her son-in-law Ammanna, it must be noted that defendants are sons of Ammanna and grandsons (daughter's sons) of Achamma. The learned Subordinate Judge seems to hold that Ammanna's possession was on behalf of Achamma, and although he does not record a definite finding on the point, his whole judgment proceeds on the assumption that the possession was that of Achamma. Defendants also claim under Achamma, and not from their father Ammanna. The question was only raised incidentally in second appeal and I must uphold what I take to

(2) 11 Ind. Cas. 713; 14 C. L. J. 507; 16 C. W. N. 137.

(3) 30 M. 231; 17 M. L. J. 30.

(4) 28 M. 195.

(5) 27 M. 368.

(6) 16 Ind. Cas. 694; 37 M. 545; 12 M. L. T. 330; 23 M. L. J. 360; (19-2) M. W. N. 995.

(7) 12 M. L. J. 387.

(8) 13 M. L. J. 302.

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be the Subordinate Judge's finding, i.e., that the possession was that of Achamma.

(5). Holding as I do on this question of adverse possession, it is unnecessary to discuss the further question as to whether a simple mortgagee who comes into possession of the mortgaged property during the continuance of the mortgage, can set up adverse possession notwithstanding the provisions of section 76 of the Transfer of Property Act, a question which was also strenuously argued in this appeal.

I would, therefore, dismiss the appeal with costs.

SPENCER, J.—On the first point, I consider that the appellant is not entitled to succeed by relying on the decision in Original Suit No. 19 of 1890 as being *res judicata* on the question of the alleged oral sale. In that suit, the appellant's predecessor-in-title set up a case of trespass in March or April 1883. Achamma, who was first defendant in that suit, and is respondents' predecessor-in-title, denied the trespass and set up a case of sale in February 1884. The District Munsif found against the trespass. This finding was sufficient for the dismissal of the plaintiff's suit for recovery of possession of immoveable property, and it was dismissed. He also found incidentally that defendants' possession was traceable to an arrangement whereby through the intervention of mediators, it was settled that the defendants should have possession under a term of the mortgage-deed which provided that, in default of the regular payment of the taxes to Government, the land should be put in possession of the mortgagee. This was nobody's case in the pleadings. It seems to have been a third version put forward for the first time at the settlement of issues and to have been established by the evidence of plaintiff's witness. As I read issue No. 1, it refers to the above-mentioned condition of the mortgage-deed, and not to first defendant's allegation that the lands were delivered to her as sold. The decretal portion of the judgment was entirely in defendants' favour, as it simply directed the dismissal of plaintiff's suit and the payment by him of the defendants' costs. There was no issue as to the alleged sale, nor was that transaction either directly

affirmed or negatived. The defendant thus had no ground for appealing against the decree. Under these circumstances, I do not think it can be said that the matter was directly and substantially in issue in that suit; and, therefore, it is not *res judicata*. [*vide Secretary of State v. Swaminatha Koundan* (9).]

The second question is whether a simple mortgagee who gets into possession of immoveable property of Rs. 100 (one hundred) in value can prove an oral sale as a starting point of adverse possession against his mortgagor, so as to acquire a prescriptive title by remaining in possession for over the statutory period. This question has been answered in the negative by Miller and Sadasiva Aiyar, JJ., in the case of a usufructuary mortgagee in *Ariyputhira Padayachi v. Muthukumarasawmy* (1), the reason being that section 92, clause (4), of the Evidence Act renders inadmissible oral evidence of any distinct subsequent oral agreement rescinding or modifying a contract or disposition of property embodied in a document which has been registered according to law. The plaintiff's mortgage-deed (Exhibit A) is such a document. I am of opinion that the same answer must be given in the case of a simple mortgagee who gets into possession of the mortgaged property during the continuance of his mortgage.

The law casts on him the same responsibility of managing the property with prudence, of protecting his mortgagor's interests in it against interference by strangers, and of paying the surplus of the receipts accruing from the mortgaged property to the mortgagor after deducting the interest on his mortgage-money together with a fair occupation rent and all necessary expenses. (Vide section 76 of the Transfer of Property Act). He cannot alter the legal character of his possession by his own act or assertion so as to convert possession as mortgagee into possession as absolute owner [*vide Usuman Khan v. Nagalla Dasanna* (6)]; Although, if there is a term in the original mortgage-deed providing in a certain event that the mortgagee will hold possession as absolute owner and if the

(9) 12 Ind. Cas. 167; 37 M. 25; 10 M. L. T. 291 (1911) 2 M. W. N. 303; 21 M. L. J. 647.

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parties subsequently by their mutual conduct and admissions show that they have acted on that provision in the deed, the character of the possession will, by agreement, be altered from that date. A mortgagee's possession does not become adverse to the mortgagor merely by his styling himself as proprietor of the mortgaged property [*vide Ali Muhammad v. Lalta Buksh* (10)], or by the mortgagee's denial of the mortgagor's right to redeem [*vide Thopara Mussaul v. Collector of Malabar* (11)].

It has been strenuously argued that, as a discharge of a mortgage is not a rescinding of the contract, evidence could be admitted to prove that the mortgage was discharged by the oral sale. But this was not the defendants' case in their written statement, nor will it help them towards a decision in their favour; for, if the encumbrance has been discharged, the owner of the equity of redemption is entitled to recover possession of his property free of encumbrance. Mere possession coupled with an oral agreement could not be pleaded in defence against one having a legal title to recover. [*Vide Kurri Veera Reddi v. Kurri Bapi Reddi* (12).] Mr. Narayanamurthi conceded that he did not want to prove extinguishment of the mortgage by oral evidence, but only that his client came into possession under an oral sale which had the effect of discharging the mortgage and creating a title by prescription.

Of the authorities cited by him, that of *Ram Awatar v. Tulsi Prosad Singh* (2) was a case in which the status of mortgagor and mortgagee between the parties was not put an end to by the transaction whereby the mortgagees came into possession. In *Karampalli Unni Kurup v. Thekka Vittil Muthorakutti* (4), the subsistence of the lease was expressly admitted by the defendants. In *Kattika Bapanamma v. Kattika Kristnumma* (3) it was held that an oral agreement under which plaintiff was given possession of certain lands in lieu of maintenance could not be proved as a variation of the original registered instrument, but it was admissible in proof of discharge of arrears of mainten-

ance. This only amounts to saying that the partial or complete discharge of a debt is not equivalent to a variation or rescinding of the deed by which the debt is secured. In *Gosai Subba Row v. Varigonda Narasimham* (5) it was laid down that the rescission or modification of a contract of usufructuary mortgage in a registered-deed, could only be proved by the production of an agreement of the like formality and not by an oral agreement, but it was held that some of several parties to the contract were not precluded from proving an oral agreement under section 44 of the Contract Act to release them from personal liability, while the original contract remained unimpaired against the other joint promisors.

In the present instance, the defendants can only succeed by proving that the encumbrance has been extinguished in the manner described in section 101 of the Transfer of Property Act, *viz.*, by their becoming absolutely entitled to the property.

But the possession of these mortgagees was obtained under circumstances which were not incompatible with the mortgagor's interests being kept alive in the property. Their possession was capable of being referred to other causes besides a transfer of ownership, such as a temporary occupation under a condition of the mortgage-bond for the purpose of recovering from the proceeds of the land the *kists* paid by the mortgagees to Government, or a conversion of a simple mortgage into a usufructuary mortgage for failure to pay the instalments of the debt as agreed upon by the parties, or a submission to arbitration as stated in the prior suit. When a lawful origin can be inferred, the Courts will not assume that possession originated in an arrangement which cannot legally be proved. The possession of the mortgagees does not become adverse unless the mortgagor has reason to suppose that his rights have been invaded. [*Vide Ittappan v. Manavikrama* (13) and *Tarubai v. Venkatrao* (14).] Proof of an oral agreement to consider the mortgage at an end is shut out by section 92, clause 4, of the Evidence Act. [*Vide Srinivasa Swami*

(10) 1 A. 655.

(11) 10 M. 189.

(12) 20 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.)

(13) 21 M. 153; 8 M. L. J. 92.

(14) 27 B. 43; 4 Bom. L. R. 721.

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Aiyangar v. Athmarama Iyer (15), which follows *Mayandi Chetti v. Oliver* (16).]

Sales and mortgages of immoveable property are both transfers of intangible rights, but one is a transfer of ownership and the other is a transfer of an interest in the property concerned. The possession of a purchaser is of a full proprietary character, while the possession of a mortgagee in possession is of a limited nature. Both transactions are required to be registered, if the property is Rs. 100 in value or over. An extinguishment of a mortgage by the mortgagee's rights being merged in those of an owner involves an alteration of the relationship of mortgagor and mortgagee into one of seller and purchaser. When each of these transactions requires a registered document to make it valid, the law does not permit the substitution of one for the other to be effected in a less formal manner.

I am, therefore, of opinion that this appeal should be allowed and the suit remanded for taking an account of the profits derived from the said lands and in respect of the mortgage-debt. The Subordinate Judge's finding as to the value of items Nos. 2 to 6, which defendants allege to have been sold, is only that a sale of them "without a registered-deed" might not be valid," the allegation in the written statement being that they were not worth more than Rs. 70-8. It is, however, unnecessary to call for a finding on this point as it is sufficient for the purpose of section 92, clause (4), of the Evidence Act that Exhibit A has been registered.

The Subordinate Judge has not decided the second issue which related to the possession of Ammanna, who was son-in-law of Achamma and 2nd defendant in Original Suit No. 19 of 1890, but he incidentally observes that Ammanna was managing the affairs of Achamma. The District Munsif found that the possession of Ammanna for over 12 years prior to suit was adverse to both parties and barred the suit. Ammanna is not a party to these proceedings. If his possession was adverse to both parties, the defendants clearly could

(15) 2 Ind. Cas. 6-2; 32 M. 281; 19 M. L. J. 280; 5 M. L. T. 84.

(16) 22 M. 261; 8 M. L. J. 196.

not take advantage of it and use it as a defence in a suit for redemption brought against them as mortgagees in possession.

As my learned brother considers that the lower Court's judgment should be confirmed, the appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF CANADA
April 20, 1915.

Present:—Lord Chancellor (Viscount Haldane), Lord Dunedin, Lord Parmoor, Sir George Farwell and Sir Arthur Channell.
THE GRAND TRUNK RAILWAY
COMPANY OF CANADA—DEFENDANTS—
APPELLANTS

versus

ALBERT NELSON ROBINSON—
PLAINTIFF RESPONDENT.

Carrier—Railway Company Negligence—Action for personal injuries—Condition relieving from liability—Special contract—Railway Act of Canada (Rev. Stat. 1906, c. 37), s. 340.

A carrier is liable for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. [p. 655, col. 2.]

Under section 340 of the Canada Railway Act, no contract restricting liability for carriage is to be valid unless it is of a kind approved by the Railway Board. [p. 685 col. 2.]

If a passenger has entered a train on a mere invitation or permission from a Railway Company without more, and he receives injury in an accident caused by the negligence of its servants, the Company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law and in the latter case as in form a tort. [p. 687, col. 1.]

But in either view, this general duty may, subject to such statutory restrictions as may be, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of Justice. The specific contract, with its incidents, either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and a party cannot by any device of form get more than the contract allows him. [p. 687, col. 2.]

If the contract is one which deprives the passenger of the benefit, of a duty of care which he is *prima facie* entitled to expect that the Railway Company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms

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imposed. This he may be shown to have done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorized antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such a case, it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to. [p. 687, col. 2.]

In such cases the Railway Company may infer his intention from his conduct. If he stands by under such circumstances that it will naturally conclude that he has left the negotiation to the person who is acting for him, and intends that the latter should arrange the terms on which he is to be conveyed, he will be precluded by so doing from afterwards alleging want of authority to make any such terms as the law allows. [p. 687, col. 2.]

Moreover, if the person acting on his behalf, has himself not taken the trouble to read the terms of the contract proposed by the Company in the ticket or pass offered, and yet know that there was something written or printed on it which might contain conditions, it is not the Company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by the Company, be bound and his principal will be bound through him. [p. 687, col. 2.]

Under these principles, the only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The Company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it, he cannot afterwards reprobate it by claiming a right inconsistent with it. [p. 688, col. 1.]

Where, therefore, a passenger who is to be carried upon special conditions at a reduced fare, has allowed terms to be made for him by an agent, the presumption is that the passenger was content to accept the risk without enquiring what the terms agreed upon by his agent were. [p. 688, col. 2.]

Appeal by special leave from a judgment of the Supreme Court of Canada, reversing the judgment of the Court of Appeal for Ontario and restoring the judgment of Latchford, J., at the trial.

Mr. D. L. McCarthy, K. C. (of the Canadian Bar) and Mr. E. F. Spence, for the Appellant.

Messrs. R. Younger, K. C., and T. H. Willes Chitty, for the Respondent.

JUDGMENT.

LORD CHANCELLOR (VISCOUNT HALDANE).—The question raised in this appeal relates to the right of the respondent, who was plaintiff in an action in the High Court of Justice for Ontario, to recover damages against the appellants for injuries suffered by him in an accident on the appellants' railway. He was travelling in charge of a horse consigned

under what is known as a "Live Stock Special Contract" in a form authorised by the Railway Commissioners for Canada. The terms of the contract purported to relieve the appellants from liability for injuries arising from accident, even where caused by negligence, to a person travelling with the live stock, in case he had been permitted to travel at less than full fare.

The course of the litigation disclosed much difference of judicial opinion. The Court of first instance decided in favour of the respondent. The Court of Appeal for Ontario by a majority (Mr. Justice Garrow, Mr. Justice MacLaren and Mr. Justice Meredith) reversed this decision, Mr. Justice Magee and Mr. Justice Lennox dissenting. There was an appeal to the Supreme Court of Canada, and in that Court, by a majority (Mr. Justice Davies, Mr. Justice Idington, Mr. Justice Duff and Mr. Justice Anglin; the Chief Justice dissenting), the judgment of the Court of Appeal for Ontario was reversed. On an application for special leave to appeal to the King in Council, this Board thought fit, in view of the importance of the question raised, to recommend that special leave should be given, but, in the circumstances only on the terms that the appellants should, whatever the result of the appeal might be, pay the whole costs of this appeal as between solicitor and client.

Before adverting to the facts out of which the litigation arose, it will be convenient to refer to certain provisions of the Railway Act of Canada. Apart from Statute, a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of his contract to carry, unless he has effectively stipulated that he shall be free from such liability. The freedom so to stipulate, has been restricted in Canada by the Railway Act. Under section 340, no contract restricting liability for carriage is to be valid unless it is of a kind approved by the Railway Board, which is empowered to determine the extent to which such liability may be impaired, restricted, or limited, and generally to prescribe by regulation the terms and conditions under which any traffic may be carried. Standard and special freight tariffs are to be filed with the Board and to be

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subject to its approval, and are to be published and made open to the inspection of the public at the Railway Companies' stations and offices. Under the Act, the Companies are, by section 284, put under a general obligation to carry and deliver with due care and diligence, and any one aggrieved by a breach of this duty is to have a right of action, from which the Companies are not to be relieved by any notice, condition, or declaration if the damage arises from negligence or omission. It is, however, to be observed that this right is expressed by the section to be given "subject to this Act." Their Lordships think that where, under section 340 and the other sections which deal with special tariffs, forms of stipulation limiting liability have been approved by the Board, and the conditions for making them binding have been duly complied with, the Companies are enabled in such cases to contract for complete freedom from liability for negligence.

In 1904, the Board approved a form of Live Stock Special Contract, and the order approving it was duly published. The appellants adopted this form, and, so far as appears, have complied with the conditions prescribed for its use. It is out of a contract in the approved form that the present question arises.

The facts of the case are shortly as follows: The respondent lives in the town of South River, in Ontario. He undertook to Dr. McCombe, who resides in that town, to go to Milverton and bring back a horse by rail from there. Dr. McCombe had arranged with Dr. Parker, of Milverton, to buy the horse for him. When the respondent arrived at Milverton, he went with Dr. Parker to see the horse, and it was thereafter brought to the appellants' siding to be put on one of their cars under arrangements made by Dr. Parker with their local agent. The respondent and Dr. Parker placed the horse in the car. Dr. Parker had originally been under the impression that the horse could travel without any one accompanying it, but he had been informed by the agent that, for a long journey, it must be accompanied by some one. Arrangements had, therefore, to be made between Dr. McCombe, Dr. Parker and the respondent

that the latter should travel with the horse. After putting it on the train, Dr. Parker went with the respondent to the agent's office, and Dr. Parker and the agent signed a contract in the presence of the respondent. Dr. Parker folded it up and said that he should send it to Dr. McCombe by mail, but the agent told him in the respondent's hearing to give it to the latter to carry with him as it showed that he was travelling with the horse. The document was accepted by Dr. Parker, but he did not think it necessary to take the trouble of reading it through. The respondent himself did not read it, but simply put it in his pocket, where it remained till some time after the accident when he gave it to Dr. McCombe. The officials on the train appear to have recognised the respondent, who looked after the horse, as the person travelling with it. He was not asked for any ticket or fare. In the course of the journey, there was a collision due to the negligence of the appellants' servants and the respondent was injured.

The case was heard before Mr. Justice Latchford and a Jury. There was no dispute as to the negligence, and the only question left to the Jury was the amount of the damages. These, the verdict assessed at 3,000 dollars. The learned Judge afterwards gave judgment for the respondent. In order to appreciate the significance of what he decided, it is necessary to turn to the terms of the special contract. This, as has already been stated, was substantially in the form prescribed by the Railway Board. It was expressed to be made between the appellants and Dr. Parker. It acknowledged the receipt from him of a horse, which the appellants undertook to transport to South River on the terms that their liability in respect of the horse should be restricted to a specified amount, in consideration of a rate lower than the full rate being agreed on. It went on to provide, as one of the stipulations on its face, that in case the appellants should grant to the shipper, or any nominee of the shipper, a pass or privilege at less than full fare to ride in the train on which the horse was being carried, for the purpose of taking care of it while in transit and at the owner's risk as before mentioned, then as to every person so travelling on such pass

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or reduced fare, the appellants were to be entirely free from liability in respect of his death, injury, or damage, whether it was caused by the negligence of the appellants, or their servants, employees, or otherwise howsoever. The contract concluded with a declaration, signed by Dr. Parker as shipper, that he fully understood its meaning. Across it was printed in red ink, "Read this special contract." On the margin was put, "Pass man in charge half fare." The document thus contained the authority to travel for the man as well as the horse. The practice was for the Railway Companies in such cases to obtain payment from the consignee on delivery, and Dr. McCombe some days subsequently paid the appellants the amount of the freight, including the half fare for the respondent.

These being the material facts, the learned Judge held that the respondent was not debarred from what he called his common law right. Any other view, he said, appeared to him to imply that, by a contract to which he was not a party and of the terms of which he had no knowledge, his right to be carried without negligence was taken away. The Court of Appeal for Ontario by a majority reversed this judgment, on the ground that a contract excluding liability even for negligence had been made and was binding on the respondent. Their judgment was, however, overruled by a majority in the Supreme Court of Canada, who held that although the language of the contract purported to exempt the appellants from their liability, it did not contain the real terms on which the respondent travelled in the train which met with the accident.

It is obvious that the question on which this appeal turns, is one as to the terms on which the respondent was accepted by the appellants as a passenger.

There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a Railway Company without more, and he receives injury in an accident caused by the negligence of its servants, the Company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in

the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of Justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him.

A second proposition is that if the contract is one which deprives the passenger of the benefit of a duty of care which he is *prima facie* entitled to expect that the Company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may be shown to have done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorised, antecedently or by way of ratification, the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such a case, it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to.

The Company may infer his intention from his conduct. If he stands by under such circumstances that it will naturally conclude that he has left the negotiation to the person who is acting for him, and intends that the latter should arrange the terms on which he is to be conveyed, he will be precluded by so doing from alleging afterwards want of authority to make any such terms as the law allows. Moreover, if the person acting on his behalf has himself not taken the trouble to read the terms of the contract proposed by the Company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the Company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by the Company, be bound, and his principal will be bound through him. To hold otherwise would be to depart from the general principles of necessity recognised in other business

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transactions, and to render it impracticable for Railway Companies to make arrangements for travellers and consignors without delay and inconvenience to those who deal with them.

In a case to which these principles apply, it cannot be accurate to speak, as did the learned Judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The Company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it, he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger, is simply that which the contract has defined.

Applying these principles to the facts of the present case, what is the construction to be put upon them by a Court of Justice? It may well be that the respondent did not actually know the latitude allowed by the law of Canada to Railway Companies. It is highly probable that he did not think of any such question as has arisen. But he must have known that he required to obtain permission from the Company in order to travel with the horse, and for the rest the law imputes to him the duty of knowing its principles. He had taken a single ticket only when he came to Milverton.

The proper inference appears to be that when he and Dr. Parker had put the horse into the train, he went with Dr. Parker to the agent's office with the intention that Dr. Parker should make, as regards both the horse and himself, the whole of the necessary arrangements at the office. If Dr. Parker had been acting for himself, there can be no doubt that he would have been bound by the terms of the document he received from the agent and by his signature expressly told the Company that he understood. Can the respondent be in a better position? On the evidence, can he say that the Company's agent was not led by him to believe that Dr. Parker, by whose side he stood while the contract was being made, was making it with his assent? "I was standing right there," he says in his cross-examination, "alongside Dr. Parker."

Q. "What did Dr. Parker say after he had signed the contract?"—A. "He folded the contract up and said he would send that to Dr. McCombe by mail, and 'it will be there before you will be there,' and he says: 'No, you must give it to this man; he must carry it with him; and it shows that he is travelling with this car.' They just handed it to me, and I put it in my pocket."

Under such circumstances, the true inference is that the respondent accepted the document knowing that it contained the contract obtained by Dr. Parker for his journey, and in accepting it, accepted all the terms which were set out on the face of the document, and which he would have seen had he taken the trouble to look at what was handed to him. It does not appear possible to say in this case, that he was misled in any way, or that the agent need have done more than he did when he handed over a document which set out the terms offered for acceptance with great distinctness in the form which the Railway Board had directed.

Such view is not inconsistent with any finding of fact by the Jury, or even by the learned Judge who tried the case. It is based on the legal consequences which flow from facts about which there is no controversy. The majority in the Court of Appeal for Ontario appear to have interpreted these consequences in the only way which the law warrants.

Having regard to the conclusions at which their Lordships have thus arrived, they will humbly advise His Majesty that the appeal should be allowed, and the action dismissed with costs in all the Courts below. The appellants must, however, under the terms on which special leave to appeal was given, pay the whole of the costs of the appeal to the King in Council as between solicitor and client.

Solicitors for the Appellants: Messrs. *Batten, Proffitt and Scott.*

Solicitors for the Respondent: Messrs. *Blake and Reidden.*

Appeal allowed.

SRI RAM V. CHHABBU LAL.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 761 OF 1911.

November 6, 1915.

Present:—Mr. Justice Chevis and
Mr. Justice LeRossignol.

SRI RAM—DEFENDANT—APPELLANT

versus

CHHABBU LAL AND OTHERS—PLAINTIFFS

—RESPONDENTS.

*Contract Act (IX of 1872), s. 123—Sale by auction—
Puffers, employment of—Commission for sale, outrage-
ously high—Sale, whether voidable.*

If, at an auction sale, puffers are employed by the auctioneer, who charges an outrageously high commission for the sale, the transaction is voidable at the instance of the buyer under section 123, Contract Act. [p. 690, col. 2.]

First appeal from the decree of the District Judge, Delhi, dated the 16th March 1911, decreeing plaintiffs' claim.

Messrs. B. Bevan Petman and Madan Gopal, for the Appellant.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Respondents.

JUDGMENT.—This suit relates to the auction of a house in Delhi. According to the plaintiff, the house was first auctioned on 25th and 26th February 1909 and knocked down to the defendant for Rs. 22,600. As defendant refused to stand by his bid, the house was re sold on 6th June 1909, when it only fetched Rs. 17,800.

Plaintiff claims:—

	Rs.	A.	P.
Difference in price ...	4,800	0	0
Commission on re-sale ...	890	0	0
Advertising expenses ...	40	0	0
Interest ...	785	12	0
Postage ...		10	6
TOTAL ...	6,516	6	6

The defendant's main pleas are—

(1) that he never made a completed or unconditional bid, and that his conditions were not complied with, and

(2) that the sale is voidable at his instance, as the price was raised by fictitious bids.

The lower Court decided both points against him and gave a decree for Rs. 5,864 and costs and future interest. The defendant appeals.

Into the question whether defendant's bid was absolute, or was subject to certain conditions which were not complied with, we do

not propose to enter at length in this appeal; it is sufficient for us to say that the defendant's account, as given in the pleadings, of the circumstances in which his bid was made and of the facts which followed after the auction was completed, seems to us very unsatisfactory. Especially do we regard with suspicion that part of the affair which relates to the writing of a cheque for Rs. 1,500. If the defendant had really bought the property, he should have paid up the full 10 per cent. without demur immediately after the auction; if he had not really bought the property, he should have repudiated the bid point-blank from the beginning, instead of shilly-shallying and wanting to be assured that he had made a good bargain in all respects.

We think the plea as to the sale being voidable by reason of puffers having been employed (see section 123 of the Contract Act) is a good one, and that the suit should have been dismissed on this ground.

We will take the bidders as they stand in the auction list (*vide* page 7 of paper-book A) and examine them one by one. We here remark that it seems a most slipshod way for a respectable firm of auctioneers to keep no list of bids at a sale of this description, except a memorandum jotted down at the back of one of the sale notices. For purposes of this appeal, we will, however, assume that the list produced is the actual list of bids made at the auction. The bidding opens with a bid of Rs. 20,000 in the name of Lala Gobind Parshad, cousin of the mother of the auctioneers (*vide* A. 47). This man made one bid only. At the re-sale in June we note that he bid up to Rs. 17,600. We note also that he is now tenant of the house in dispute under Rattan Lal, who purchased the house at the second sale. But it must also be noted that on a former occasion when there had been an auction by these same auctioneers of a house belonging to Musamat Mahtabi, mother-in-law of one of the two auctioneers, the house was knocked down for Rs. 1,800, the genuineness of the sale was challenged just as in the present case, and the result was a re-sale resulting in the house being knocked down for Rs. 1,125 only to this same Gobind Parshad (for evidence of Niadar Mal recorded in the civil suit which followed, see B, pages 2-4).

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Next comes a bid of Rs. 20,500 in the name of Lala Sham Lal. This man was not in Delhi at the time, and the bid was made by his *munim*, Ganga Parshad, who is brother of Bhola Nath, servant of the auctioneers. Ganga Parshad holds no power-of-attorney from Lala Sham Lal, has never purchased property for Lala Sham Lal before, and received no instructions from him to bid for this particular house.

The next bid is one of Rs. 21,000 in the name of Lala Raghu Mal who is also a son-in-law of *Musammatt* Mahtabi, he and Rang Lal (one of the auctioneers) having married sisters. Raghu Mal's wife is dead no doubt, but his interest in her family has not ceased, as we learn he was acting for *Musammatt* Mahtabi in the former case (*vide* B, page 4, line 3) which occurred in 1903.

Then comes a bid of Rs. 22,000 in the name of Lala Dharm Das, who is clerk to Lala Badri Kishen, who figures as plaintiff's Pleader in the present case. It is urged that Dharm Das was bidding on behalf of Lala Ganga Saran Das, and a letter is produced purporting to come from Lala Ganga Saran Das, but this letter is not proved. The auctioneer Niadar Mal, no doubt, produced it when giving evidence, but this does not in the least prove by whom or when this letter was written. The auctioneer, Niadar Mal, also says in his evidence (*vide* A, page 48, line 11) that Dharm Das was himself responsible for the bid. He further admits that Dharm Das gave evidence for him in a former case.

Then comes a bid of Rs. 22,500 in the name of Lala Manak Chand. Lala Manak Chand died some years ago, and Lala Murli Dhar is now head of the firm. He professes to buy houses for investment, but owns he has bought none for the last 10 years. He was absent from Delhi at the time of the sale, but says he told his agent, Gauri Shankar, to bid for the house. He admits that his own house is mortgaged for Rs. 18,000 and has been so for the last eight years. Yet instead of redeeming his own house, he wants to buy other houses. Gauri Shankar is a cousin of Ram Kishor, who is brother-in-law of plaintiff. His anxiety to purchase the house for his master, cannot have been very great as he went away to Agra, and did not take the trouble to turn up at the second day of the

sale (so he says, *vide* page 72), but the auctioneer says he was present on the second day (*vide* page 48). It will be noted that each bidder makes one bid, and one bid only, and so the price goes up to Rs. 22,500. Then the sale is postponed till the following day. Then comes a solitary bid of Rs. 22,600 by the defendant, and this closes the bidding. If any of the former bids were genuine, why did not a single one of the bidders turn up and bid on the second day? Plaintiff's Counsel urges that they did not wish to compete against a gentleman of defendant's wealth and standing. But did any of them even take the trouble to turn up the second day to see if the defendant was going to bid? And why should they all pay so much deference to the defendant? He may be a rich man, but according to the plaintiff, the bidders also are all men of means.

At the re-sale, we find none of these bidders bidding with the exception of Lala Gobind Parshad. There is one bid of Rs. 13,500 only in the name of Lala Ganga Saran Das, but it has not been proved that any bid authorized by him was made at the first sale. In any case, if he would bid up to Rs. 22,000 in February, why would he only bid up to Rs. 13,500 in June? The conclusion at which we arrive is that the proceedings on the first day of the sale were all bogus, and that not a single genuine bid had been made till defendant was foolish enough to take an interest in the affair, and to make a bid. Then as was to be anticipated, no further bids were forthcoming, and the house was knocked down to the defendant.

The whole proceedings we regard as shady in the extreme, and we note that the commission charged by the auctioneers, 5 per cent., seems to us outrageously high for a sale of house property.

We consider that section 123, Contract Act, has been fully proved to be applicable and that the sale is voidable at the instance of the defendant.

The claim must, therefore, be dismissed, but we shall not allow costs to the defendant as in addition to the remarks made at the commencement of this judgment, we think that, had his defence been true in all respects, the defendant would have done well to go into the witness-box to offer an explanation.

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tion regarding the cheque and certain other matters.

We accept the appeal and reversing the lower Court's decree we dismiss the suit, but leave the parties to bear their own costs in both Courts.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 27 OF 1914.

RULE NO. 109 OF 1915.

May 17, 1915.

Present:—Mr. Justice Holmwood and
Mr. Justice Walmsley.

TEKAIT GANESH NARAIN SAHI DEO
—PLAINTIFF—APPELLANT

versus

Maharaja PROTAP UDAI NATH SAHI
DEO—DEFENDANT—RESPONDENT.

Chota Nagpur Tenancy Act (VI of 1908), ss. 87, 258, 264 (viii)—Judicial Commissioner specially appointed to deal with revenue cases, if Revenue Officer—Decision of Judicial Commissioner—Res judicata—Civil Court, jurisdiction of—Civil Procedure Code (Act V of 1908), s. 11.

The Judicial Commissioner specially appointed under section 264 (viii) of the Chota Nagpur Tenancy Act to deal with the Revenue questions decided by the inferior Revenue Officers in appeal, is a Revenue Officer within the meaning of section 258. [p. 692, col. 2.]

Therefore, a decision of the Judicial Commissioner in appeal from a decision of a Revenue Officer in a suit or proceeding under section 87 of the Chota Nagpur Tenancy Act bars a subsequent suit for the same purpose in a Civil Court. [p. 692, col. 2.]

A party cannot by suit seek to vary or set aside an order of a Revenue Court made under section 87 of the Chota Nagpur Tenancy Act but if he is in possession, he can defend his title in a suit for resumption against him. [p. 693, col. 1.]

Appeal from the judgment of the Special Subordinate Judge at Ranchi, dated the 1st December 1913.

Dr. Dwarka Nath Mitter and Babu Bepin Chandra Mullick, for the Appellant.

Mr. Caspersz and Babu Jogesh Chandra Dey, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff to have it declared that the entire *Pargana* Barway is a hereditary impartible estate of the family of the plaintiff and that it is descendible generation after generation in

the male line of the original holder and that the right of the second plaintiff to hereditary succession be declared.

It appears that Barway is one of six *paranas* which, Cuthbertson in his report states, were incorporated with the Chota Nagpur Raj on the assumption of British rule. The Maharaja has the right to receive the Government revenue, but in other respects the so-called Raja for the time being is in the position of a *talukdar* subject to the custom of primogeniture and impartibility.

The question of resumability by the Maharaja on the failure of direct male heirs is not dealt with by Cuthbertson, but in the Revenue Settlement of 1908 the final publication of which as far as *Pargana* Barway is concerned took place on the 22nd April 1909, the plaintiff No. 1, who died after this case was decided in the lower Court, was entered in the Record of Rights as holding the *pargana* as *jagir* properties descendible to children generation after generation, and the Maharaja of Chota Nagpur filed a suit under section 87 of the Chota Nagpur Tenancy Act to have this record amended and altered to *life-jagir*, valuing his suit before the Revenue Officer at Rs. 10,000. The Revenue Officer dismissed his suit in August 1910, but on appeal to the Judicial Commissioner, acting under the special powers conferred upon him by section 264 (viii) of the Act, he decided that the tenure was not hereditary but resumable and that plaintiff's father had only obtained a life-grant from the Maharaja under a written *kabuliyat* and *patta*. This was because Lal Sahi Deo, father of the plaintiff No. 1 Raghubar Sahi, was a very distant collateral who could only succeed on the ordinary right of survivorship under Mitakshara Law, and the Judicial Commissioner held that the tenure was resumable by the Maharaja on failure of heirs male to the last Raja and that Lal Sahi had no title outside his life-grant. The matter was somewhat complicated by the intermediate holding of one Lachmi Nath Sahi Deo, who succeeded his half-brother Harnath Sahi Deo and died without issue. This Lachmi Nath has in subsequent litigation been held to be illegitimate and

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the impartible Raj governed by primogeniture is said to have become resumable on the death of Harnath who also left no heir male of his body. The late Maharaja, who was later on declared insane, neglected his estates and in litigation with the Ranis, the widows of Harnath and Lachmi Nath Sahi, wanted to resume the tenure and joined the then holder Lal Sahi Deo, to whom he had given a life-interest, as plaintiff. He appears to have admitted the legitimacy of Lachmi Nath for the purposes of that case, as the widows of Harnath had consented to eat with Lachmi Nath. But whether Lachmi Nath was legitimate or not, the direct male line came to an end at his death, and the question before the Judicial Commissioner was whether Lal Sahi Deo had an hereditary right to the tenure or whether it was a resumable tenure held under a life-grant.

Mr. Kingsford decided this question against Raghubar Sahi Deo, the son of Lal Sahi. On this suit brought by the plaintiffs, Raghubar and his son Ganesh Narain, plaintiff No. 2, the Subordinate Judge has held that section 253 is a bar and has dismissed the suit on that ground alone. He was asked also to hold that the decision of Mr. Kingsford operated as *res judicata* under section 11, Civil Procedure Code, but he refrained from expressing any opinion on that point. In appeal before us, it is contended that section 253 has no more effect than section 109 of the Bengal Tenancy Act had, that a suit to recover or to get confirmation of possession of property valued at Rs. 52,000, cannot be barred by any decision of a Revenue Court which was not competent to try such a suit. Further, it is contended that Mr. Kingsford sitting in appeal was not a Revenue Officer and, therefore, section 87 does not apply.

Thirdly, that plaintiff No. 2 being no party to the suit under section 87, is not bound by it.

The answer to the first contention is that this is not a suit for recovery or confirmation of possession, but a suit for a simple declaration of the nature of the tenure, which is fully within the competence of the Revenue Court. Moreover, the suit as laid was incompetent, as

plaintiff No. 2 had no right to any declaration in the life-time of his father and the suit was bad for misjoinder of causes of action. The plaintiff No. 2 has acquired his right to sue, if any, on the death of his father, but on the finding of the lower Court made in his father's life-time, he has no such right.

The second contention is based on what we must characterise as the defective drafting of the Act.

Section 87 provides for a suit before a Revenue Officer and for an appeal in the prescribed manner to the prescribed officer from decisions passed under sub-section (f), that is, decisions on any other matter not referred to in clauses (a) to (e).

The Revenue Officer has power to transfer any particular case or class of cases to the Civil Court.

The rules made by Government provide that suits under section 87 shall be tried in all respects as Civil suits between the parties.

Section 264 (viii) gives the Government power to prescribe the officer to hear appeals and the Judicial Commissioner is the prescribed officer under the rules. We are asked to hold that the Judicial Commissioner is not a Revenue Officer within the meaning of section 253, which says that no suit shall be entertained in any Court to vary, modify or set aside either directly or indirectly any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under section 87. The definition of a Revenue Officer in section 3 (zzv) is any officer whom the Local Government may appoint to discharge any of the functions of a Revenue Officer under any provision of the Act. Now the Judicial Commissioner is specially appointed under section 264 (viii) to deal with the Revenue questions decided by the inferior Revenue Officers in appeal and, therefore, comes within the definition. It would be a great anomaly to hold that the decision of the Court of Appeal was open to be assailed in a suit when the first Court's decisions could not be so assailed, and the only alternative would be to treat the decision of the Judicial Commissioner as that of a competent Civil Court which would have the effect of raising a bar of *res judicata* under section 11, Civil Procedure Code. We do not think

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that this could have been the intention of the Legislature. The provisions for appeal appear to have been overlooked in section 258, and we must hold that the special Appellate Court in Revenue cases is, in deciding a dispute under this Act, performing the functions of a Revenue Officer. We may further observe that the jurisdiction of the Judicial Commissioner to decide the question that is now sought to be agitated in this suit, was decided by a Bench of this Court in *Naghubir Sahi v. Protap Udoy Nath Sahi Deo* (1), the judgment in which appears on page 50 of the paper-book.

As regards the third contention, we think the Judge in the Court below is right. The plaintiff No. 2 had no co-parcenary right in the estate, which was fully represented by his father in the suit under section 87. The plaintiff No. 2 being in possession can defend his title in the suit for resumption, which is now being brought by the Maharaja of Chota Nagpur. But he cannot by suit seek to vary or set aside the order of the Revenue Courts made under section 87. No bar of *res judicata* has as yet been found against him under section 11, Civil Procedure Code, but his present suit is incompetent for more than one reason. We fix the hearing fee at Rs. 3 0.

The result is that this appeal is dismissed with costs and the Rule to stay further proceedings in the respondent's suit for resumption, is discharged with costs, two gold mohurs.

Appeal dismissed; Rule discharged.

(1) 13 Ind. Cas. 193; 16 C. W. N. 294; 15 C. L. J. 145; 39 C. 241.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 745 OF 1912.

November 22, 1915.

Present:—Mr. Justice Rattigan and

Mr. Justice Shadi Lal.

MIRAN BAKHSH—PLAINTIFF—APPELLANT

versus

Musammât MEHR BIBI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Will—Revocation by parol—Actual destruction,

whether necessary—Animus revocandi—Omission to make a subsequent Will, effect of—Custom—Intestate succession among Arains of Lahore Brothers and their sons, rights of, as against widow and daughter's sons.

In cases not governed by the English Law, the Indian Succession Act or any other Statute specifying a particular method of revocation, actual destruction or a formal revocation is not essential to constitute the revocation of a Will. [p. 694, col. 2.]

Venkayyamma Garu v. Venkataramanayyamma Bahadur Garu, 25 M. 678; 29 I. A. 156 (P. C.); 7 C. W. N. 1; 12 M. L. J. 299; *Maharajah Pertab Narain Singh v. Maharajah Subhoo Kaur*, 4 I. A. 228 at p. 245; 1 C. L. R. 113; 3 C. 626; 3 Sar. P. C. J. 740; 3 Suth. P. C. J. 458; *Rafique and Jackson's P. C.* No. 46; 1 Ind. Jur. 679, referred to.

Under the Muhammadan Law, a bequest may be revoked by express declaration, oral or written. [p. 694, col. 2.]

Where, therefore, a testator expressed in a Court of Justice his intention of revoking a Will previously made:

Held, that this was a case of the revocation of Will by parol and that the mere fact that the testator failed to destroy the existing Will or omitted to make a subsequent one, could not have the effect of reviving a Will which had been cancelled. [p. 694, col. 2.]

Among the Arains of Lahore brothers and their sons are not heirs *ab intestato* in the presence of the widow and the daughter's sons. [p. 694, col. 2.]

Chiragh Bibi v. Hassan, 19 P. R. 1906; 70 P. L. R. 1906, referred to.

First appeal from the decree of the Subordinate Judge, First Class, Lahore, dated the 7th February 1912, dismissing plaintiff's suit.

Mr. Gokal Chand Narang, for Rai Bahadur Pandit Sheo Narain, and Khwaja Zia-ud-din, for the Appellant.

The Hon'ble Mr. Muhammad Sahafi, K.B., and Chaudhri Nabi Bakhsh, for the Respondents.

JUDGMENT.—One Karim Bakhsh, an Arain of the town of Lahore, died on the 22nd of November 1905, leaving him surviving a widow, daughter's sons, brothers and a nephew. Before his death, he executed a Will on the 14th of April 1905 by which he devised his self-acquired and ancestral property to the above-mentioned persons; and the present action was brought by the nephew for possession of one-fourth of the ancestral landed property on the strength of the Will. The Subordinate Judge has dismissed the suit on the ground that the daughter's sons were, under the custom by which the deceased was governed, entitled to inherit the ancestral property to the exclusion of the male collaterals and that the Will, which altered the devolution of the property to the prejudice of the customary heirs, was invalid.

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The plaintiff has preferred a first appeal to this Court, and after hearing the learned Counsel on both sides, we are of opinion that the suit must fail on the short ground that the Will, upon which the claim rests, was revoked by the testator during his life-time. It is manifest that this plea was expressly raised by the defendants and it formed the subject-matter of the second issue. Both the parties adduced all the evidence on the various points in controversy between them; and though the learned Judge of the Court below has not recorded a finding on the above issue, it is obviously unnecessary to deal with the question of the validity of the bequest, when we find that the testament was validly revoked by the testator.

Now we observe that Karim Bakhsh, when examined as a witness in a case, made the following statement on the 26th July 1905, a few months after the date of the Will: "I made my last Will during my illness when I was not in full enjoyment of my right senses * * * * * I drew up my last Will personally. However, I have some doubt about it. In order to remove those doubts, I shall make another Will, according to Muhammadan Law and with the consent of my collaterals, so that all my daughter's sons and collaterals may get shares of my property. I wish that Muhammadan Law may be followed in place of custom." The Will referred to by Karim Bakhsh is undoubtedly the document in question, and his statement shows that he did not regard it as embodying his intention as to the disposal of the property after his death. In fact, he went so far as to say that he wished that Muhammadan Law might be followed in place of custom and it is obvious that the present Will is not in accordance with the principles of Muhammadan Law. It seems to us clear that the testator had *animus revocandi*, and his statement amounts to a declaration of intention on his part to revoke the Will dated the 14th of April 1905. This view receives support from the testimony of Khuda Bakhsh, a witness for the defendants, who deposes that before his death, Karim Bakhsh told him that the Will executed by him had been revoked by him in his evidence given in Court.

It appears that the document was in

possession of his collaterals, and it was probably for this reason that Karim Bakhsh did not destroy it. But neither this circumstance, nor his omission to make a subsequent Will, can have the effect of reviving a Will which was cancelled by the testator's intention expressed in a Court of Justice. In cases not governed by the English Law, the Indian Succession Act or any other Statute specifying a particular method of revocation, actual destruction or a formal revocation in writing is not essential to constitute the revocation of a Will; *vide*, *Venkayyamma Garu v. Venkataramanayyamma Badur Garu* (1) and *Maharajah Periah Narain Singh v. Manavane Subhao Koner* (2). Under the Muhammadan Law a bequest may be revoked by express declaration, oral or written (see paragraph 291 of Wilson's Digest of the Anglo-Muhammadan Law).

We are satisfied that this is a case of the revocation of Will by parol, and that the plaintiff cannot invoke the aid of a document which must be treated as non-existent. It is proved that according to the custom, which supplies the rule of decision, as to succession to ancestral land among the *Araims* of the Lahore District, brothers and their sons are not heirs *ab intestato* in the presence of the widow and the daughter's sons. Indeed, the finding of the lower Court on this point has not been seriously challenged, and it is fully supported by the entry in the *riwaj-i-am*, judicial instances on the present record, and by the decision of this Court in *Chiragh Bibi v. Hassan* (3). There is no foundation for the contention that the daughter's sons, whose mother predeceased her father, were in a worse position than those whose mother survived him. In fact, the learned Counsel for the appellant admits that he is unable to cite any authority on which the alleged distinction could be supported; and the general principle of Customary Law, which favours the succession of daughter and daughter's sons, certainly does not contemplate any such rule.

The appellant has, therefore, no *locus standi* to inherit the property of the deceased
(1) 25 M. 678; 29 J. A. 156 (P. C.); 7 C. W. N. 1; 12 M. L. J. 299.
(2) 4 L. A. 228 at p. 245; 1 C. L. R. 113; 3 C. 626 (P. C.); 3 Sar. P. C. J. 740; 3 Suth. P. C. J. 458; *Rafique* and Jackson's P. C. No. 46; 1 Ind. Jur. 679.
(3) 19 P. R. 1906; 70 P. L. R. 1906.

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Karim Bakhsh, and we accordingly uphold the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1932 OF 1911.

March 11, 1915.

Present:—Mr. Justice N. R. Chatterjea and
Mr. Justice Mullick.

NABENDRA KISHORE ROY AND
OTHERS—PLAINTIFFS—APPELLANTS
versus

Srimati RAHIMA BANU AND ANOTHER—

DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Chittas—Evidence—Observations of High Court as to probative values of chittas in another case, have far to be followed by lower Courts—Chittas, when private and public documents.

A Subordinate Court ought not to rely upon the observations of a High Court as to the probative value of *chittas* made in another case, the evidence in which was different from that adduced in the case before it. [p. 696, col. 1.]

Where the *chittas* are prepared for a public purpose such as the distribution of revenue on the shares, or assessment and settlement of revenue on the share belonging to the Government, they are public documents, but where they are prepared with the object of ascertaining the lands belonging to the Government without prejudice to the rights of the owners of the *bahali* shares they cannot be called public documents even though they might have been availed of subsequently for assessment of Government revenue. [p. 696, cols. 1 & 2.]

Second appeal from the judgment of the Subordinate Judge of Noakhali, dated the 9th March 1911, reversing that of the Munsif of Feni, dated the 15th July 1910.

Babus Akshoy Kumar Banerjee and Romesh Chandra Sen, for the Appellants.

Babs Ram Dayal De, for the Respondents.

JUDGMENT.—The plaintiffs-appellants as purchasers of an entire estate at a sale for arrears of Government revenue, known as the 4-annas *bahali hissyas* *pargana* Darra, sued to recover possession of the lands in dispute as appertaining to the said estate. The defence was that the lands did not belong to the estate purchased by the plaintiffs, but to another *hissya* (the 3-annas 1-kurant *hissya*) in that *pargana*, and was part of a *taluk* which was existing from before the Permanent Settlement. The

Commissioner who was appointed to make a local investigation found that, according to the *thak* map, some of the lands formed part of the estate purchased by the plaintiffs, but that according to certain *chittas* of the year 1844, the lands appertained to 3-annas and odd *gandas-zamindari*. The Court of first instance preferred the *thak* map to the *chittas*, on the ground that the *chittas* were prepared by the Government in its capacity as the fractional *zamindar* of the *pargana* in order to ascertain the lands belonging to it, without prejudice to the rights of the rival *bahali* *maliks*, and its evidentiary value is hardly better than that of one prepared by any other private proprietor. That Court accordingly decreed the suit with respect to a portion of the lands. On appeal, the learned Subordinate Judge held that the *chittas* prevailed over the *thak*, and dismissed the suit entirely. The plaintiffs have appealed to this Court. Now both the *thak* map and the *chittas* are evidence, and it was for the lower Appellate Court to attach such value as it thought proper to each of them, and in second appeal, we cannot go into the weight to be attached to these documents respectively. The learned Subordinate Judge, however, referring to a decision of a Division Bench of this Court (Caasparz and Doss, JJ.) in a case [Nabendra Kishore Roy v. Durga Charan Choudhury (1)] relating to the very same estate in which a similar question was raised, observed: "As regards the probative force of the *chitta* of 1251, it has been decided by the Hon'ble High Court that the record thus prepared, is a document of a public nature and evidence of the state of affairs then existing."

The learned Judges in that case observed:—"The *chitta* was prepared at that time, as appears from the evidence, for the purpose of distributing in equal manner the public revenue on the separate *bahali hissyas* which was subsequently purchased by the plaintiffs. The record thus prepared is a document of a public nature and evidence of the state of affairs then existing."

We do not know what evidence there was in that case with reference to which those observations were made.

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On the other hand, in a later case relating to the same estate, which came up to this Court, another Division Bench (Carnduff and Chapman, JJ.,) referring to the same *chittas* observed as follows:—

"The *chittas* in question were prepared by the Government as *zemindar*: but in this case, a part of the *pargana* measured had escheated to the Government on account of the rebellion of the former owner, and it is suggested that the Government must, in these circumstances, be held to have measured it in its Sovereign capacity. We are unable to draw any distinction between the position of the Government as owner of land which has been escheated, and its position as owner of land acquired in any other way; and it is well settled that a *chitta* prepared by the Government when interested as a proprietor of the estate concerned, cannot be said to be a public document." See *Fazlar Rahim v. Nabendra Kishore Roy* (2).

It appears, therefore, that different views have been taken as to whether these *chittas* are or are not public documents and it seems that this difference is due to the fact that the evidence adduced in each case was not the same. We think the Subordinate Judge ought not to have relied upon the observations of the High Court as to the probative value of these *chittas* made in another case, the evidence in which was different from that adduced in the present.

In the present case, we have not been referred to any evidence to show that the *chittas* were prepared "for the purpose of distributing in equal manner the public revenue on the separate *bahai hissa* which was subsequently purchased by the plaintiffs" as was found in the case of *Nobendra Kishore Roy v. Durga Charan Chowdhury* (1).

If the *chittas* were prepared for a public purpose such as the distribution of revenue on the shares, or assessment and settlement of revenue on the share belonging to the Government, they would be public documents, but if they were prepared with the object of ascertaining the lands belonging to the Government without prejudice to the rights of the owners of the

bahai shares, as found by the Court of first instance, they cannot be called public documents, even though they might have been availed of subsequently for assessment of Government revenue. *Chittas* may be very valuable evidence for the purpose for which they are prepared; but they may not have the same value on any other question. We, however, cannot go into these questions, and it is for the lower Appellate Court to find upon the evidence on the record in the case for what purpose the *chittas* were prepared, and the determination of the question whether they are or are not public documents will depend upon the finding which may be arrived at.

It is contended, however, on behalf of the respondents that even if the *chittas* are not public documents, the judgment of the learned Subordinate Judge is not affected, because the Court is entitled to attach such weight as it likes to a private document. No doubt it was open to the lower Appellate Court to attach such weight as it thought proper to the *chittas* considered as private documents. But it is impossible for us to say to what extent the Court below was influenced by the idea that the *chittas* upon which the judgment is mainly based were public documents.

It is further contended on behalf of the respondents that the Subordinate Judge has not treated the *chittas* as public documents, but has referred to them as documents of a public nature. But he took that description from the judgment of Caspersz and Doss, JJ., in *Nobendra Kishore Roy v. Durga Charan Chowdhury* (1).

The words "a document of a public nature" could not have been used loosely in the sense of documents prepared by officers of Government. The learned Judges in that case were of opinion that the *chittas* were prepared for the purpose of distributing in equal manner the public revenue. That would be a public purpose, and it seems to us, therefore, that the words "a document of a public nature" must have been used in the sense of "public document."

The learned Subordinate Judge also refers to some other evidence, but there is no doubt that his judgment is based mainly upon the *chittas* considered as documents of

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a public nature and it is impossible for us to say what value he attached to them.

We are constrained, therefore, to remand the case for a re-hearing of the appeal to the lower Appellate Court. If the Court finds upon the evidence on the record that the *chittas* were prepared for a public purpose, the suit will be dismissed. If, however, it is found that the *chittas* were not prepared for a public purpose, they will be considered as private documents and that Court will decide the case upon the whole evidence, treating the *chittas* as private documents and attaching such value to them as it thinks proper. Costs will abide the result.

Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEALS NOS. 1864-1867
OF 1912.

October 27, 1915.

Present:—Sir Donald Johnstone, Kt., Chief
Judge, and Mr. Justice Chevis.

IN S. C. A. No. 1864 OF 1912

BHANI RAM—PLAINTIFF—APPELLANT

IN S. C. A. No. 1867 OF 1912.

THAKUR—PLAINTIFF—APPELLANT

versus

NARAIN SINGH AND OTHERS—DEFENDANTS

!—RESPONDENTS IN BOTH.

*Civil Procedure Code (Act V of 1908), O. XXII, r. 9
(2)—Application to set aside abatement of appeal—
Sufficient cause—Limitation Act (IX of 1908), Sch.
I, Art. 171.*

Where one of the necessary parties to an appeal was murdered on the 26th January 1914 and applications to substitute names were not made until the 15th April 1915, the excuse offered in the application being ignorance of the fact of the murder and it being further alleged on the hearing that both the plaintiffs-appellants were absent on pilgrimage at the time:

Held, (1) that the appeal having abated six months after the date of the murder, the application ought to have been made within 60 days after abatement;

(2) that the appellants had failed to show sufficient cause for delay in applying, seeing that they lived within 15 *kos* of the deceased's village, and that the excuse about absence on pilgrimage was not mentioned either in the applications or the affidavits.

Second appeals from the decree of the Divisional Judge, Ferozepore, dated the 8th October 1912, varying that of the

DAMODA COAL CO. LTD. v. HURMOOK MARWARI.

District Judge, Ferozepore, dated the 29th February 1912.

The Hon'ble Mr. Muhammad Shafi, K. B.,
for the Appellants.

Rai Bahadur Pandit Shri Narain and Mr.
Sera Ram Singh, for the Respondents.

JUDGMENT. Preliminary objections have been raised in this and in the connected Appeal No. 1867 of 1912 to the effect that the appeals have both abated for this reason that Kanda Singh, admittedly a necessary party, was murdered on 26th January 1914 and applications to substitute names were not made until 15th April 1915. Time allowed being six months, the appeals certainly abated six months after 26th January 1914, and it was not until some nine months after abatement that applications were made, though the period allowed for such applications under Order XXII, rule 9, Civil Procedure Code, is 60 days (Article 171, Limitation Act). The only excuse offered in applications is ignorance of fact of Kanda Singh's death. This is hardly believable under ordinary circumstances, seeing that plaintiffs live within 15 *kos* of Kanda Singh's village; but it is alleged before us, under Order XXII, rule 9, aforesaid that both plaintiffs were absent on pilgrimage at the time. This is not mentioned either in applications or affidavits.

We hold that plaintiffs-appellants have not shown sufficient cause for delay in applying, and we dismiss these appeals with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3290 OF 1912.

March 16, 1915.

Present:—Mr. Justice Fletcher and
Mr. Justice Teunon.

DAMODA COAL COMPANY, LIMITED
DEFENDANTS—APPELLANTS

versus

HURMOOK MARWARI—PLAINTIFF—
RESPONDENT.

*Transfer of Property Act (IV of 1882), ss. 108 (c),
106—Destruction of leasehold property by fire or
other irresistible force—Notice to avoid lease, operation
of—Time, if necessary.*

A notice avoiding a lease under section 108 (c) of the Transfer of Property Act does not require any length of time for its operation. The lease becomes *ipso facto* void when the lessee serves a notice

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under section 108 (c). Section 106 of the Transfer of Property Act does not apply where a lessee serves a notice on the lessor to avoid the lease on the ground of the destruction of the property by fire or other irresistible force.

Second appeal against the decree of the Subordinate Judge, Burdwan, dated the 17th August 1912, reversing that of the Munsif at Burdwan, dated the 15th June 1911.

Babus Mohendra Nath Ray and Mohini Mohan Chatterjee, for the Appellants.

JUDGMENT.—This is an appeal from a judgment of the learned Subordinate Judge of Burdwan, dated the 17th August 1912, reversing the decision of the Munsif. The suit was brought to recover rent due on a lease. The defence was that the lease had come to an end. The lease was a lease of a colliery and the defendants alleged that the property had been destroyed by fire or other irresistible force, and that they had by notice avoided the lease. The learned Judge of the lower Appellate Court made findings of fact that are in favour of the defendants. He, however, found that the notice purporting to avoid the lease did not satisfy the terms of section 106 of the Transfer of Property Act and that, therefore, the lease had not been validly determined.

The learned Judge was obviously in error in the view he took. The notice under section 106 has nothing to do with the notice to avoid a lease under section 108 (c) of the Transfer of Property Act. The notice avoiding a lease under section 108 (c) does not require any length of time for its operation. The lease becomes *ipso facto* void when the lessee serves the notice under section 108 (c), whereas fifteen days' notice is required under section 106. The learned Judge has fallen into an error by applying the provisions of section 106 to the notice in the present case. This notice did not require any time to take effect and it operated to avoid the lease immediately on its service. That being the case, the judgment of the learned Judge of the lower Appellate Court is wrong. We must, therefore, set aside his judgment and decree and restore the judgment and decree of the Munsif. The respondent must pay to the Appellants their costs, not only in this Court but also in the Courts below.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1449 OF 1913.

June 18, 1915.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Leslie-Jones.

MUHAMMAD ISHAQ KHAN—DEFENDANT
—APPELLANT

versus

MUHAMMAD ISLAM ULLAH KHAN AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20 (c)
—*Suit on promissory note executed outside jurisdiction of Court—Payment to be made within jurisdiction of that Court—Forum.*

When a pro-note in lieu of certain profits was executed outside the jurisdiction of a Court and the executant also resided out of the jurisdiction of that Court, but the pro-note was delivered to the payee within the jurisdiction of the Court and it was intended that the money should be paid within that jurisdiction:

Held, that the Court had jurisdiction to entertain a suit on the pro-note under section 20, clause (c), of the Civil Procedure Code, 1908. [p. 699, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 28th of April 1913, varying that of the District Judge of Delhi, dated the 10th January 1913.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellant.

Rai Sahib Lala Moti Sagar, for the Respondents.

JUDGMENT.—This is a suit for the recovery of money on the basis of a promissory note for Rs. 3,000 executed on the 6th of August 1906 by the defendant Nawab Muhammad Ishaq Khan at Fateh Garh in the United Provinces, and sent by him from that place to his brother's widow at Delhi. The money was due to her on account of her share of the income from the property owned by her husband in the United Provinces, and the pro-note was accepted by her in full settlement of her claim against the defendant in regard to the profits realised by him on her behalf. The Courts below have concurred in decreeing the claim and the only question, which has been argued before us and which requires determination in this second appeal, is whether the Delhi Court had or had not the jurisdiction to try the suit.

Now it is beyond dispute that the defendant resides, and the pro-note was executed, outside the local limits of the jurisdiction of

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the Court and it is, therefore, clear that neither the rule based upon the residence of the defendant nor the rule of *locus contractus* can be invoked for establishing the jurisdiction of the Delhi Court, and the sole ground, upon which the plaintiffs seek to sustain the jurisdiction, is that in performance of the contract, the money was payable at Delhi. This contention has been accepted by both the Courts below and it is manifest that if established, it brings the case within the purview of section 20, clause (c), of the Civil Procedure Code of 1908, which clause reproduces in a succinct form the principle contained in Explanation 3 to section 17 of the old Code.

We observe that the contract itself does not expressly prescribe any place for its performance, but we think that the circumstances of the case show that the parties intended that the contract should be fulfilled at Delhi. The document, it is to be noted, was delivered by post to the lady at Delhi and it was there that it was accepted in settlement of her claim. The judgment in *Ram Nopal Law v. Richard Blaquere* (1) cited by the learned Pleader for the respondents, is distinguishable on the ground that the pro-note in that case was executed within jurisdiction but the ruling, which is to some extent applicable to the present case, is that reported as *Winter v. Round* (2). As observed in that judgment, the making of a pro note is altogether the act of the maker and it requires delivery to the promisee to render it complete. It may, therefore, be said that the defendant by delivering the note at Delhi impliedly promised to pay the money at that place.

But this is not the only circumstance which lends support to the view that there was an implied undertaking on the part of the defendant to perform the contract within jurisdiction. The learned Divisional Judge has stated in his judgment that the widow, after the death of her husband, apparently left his house and came to Delhi to reside with her brother Khan Bahadur Muhammad Ikram Ullah Khan. It is true that there is no direct evidence in support of this statement, but the plaintiffs legitimately contend that this is a reason-

able inference to be deduced from all the letters on the record, more especially when the defendant has not adduced any evidence to negative that inference. At any rate, it is incontestable that she was living in 1906 at Delhi and that the pro-note was delivered to her there. Further, it was obviously from Delhi that she made demands upon the defendant for the payment of the debt due to her and it is significant that in one of the letters, namely, P-7, which is proved by the witness Muhammad Unis to be in the handwriting of the defendant, the latter distinctly stated that he could not get money to discharge the claim on the pro-note, otherwise he would have remitted to her Rs. 3,000 minus such sum as was due to him by her own account.

In these circumstances, the Courts below were justified in holding that there was sufficient *prima facie* evidence to prove an implied agreement that the defendant should send the money due on the pro-note to the promisee at Delhi. It is to be observed that both the widow and her brother Khan Bahadur Muhammad Ikram Ullah Khan are dead and the person, who is now in a position to give information on the matter, is the defendant, but he has not thought fit to go into the witness-box and give his version of the affair. Having regard to the place of the delivery of the pro-note and other considerations set out above, we are of opinion that the parties intended the payment to be made at Delhi. The Delhi Court, being the *forum loci solutionis*, had consequently jurisdiction to entertain and adjudicate upon the claim based upon the pro-note.

On this view, it is not necessary to consider whether there was "a consequent failure of justice" within the meaning of section 21, Civil Procedure Code of 1908, and whether the provisions of that section operate as a bar to the objection as to the territorial jurisdiction of the Delhi Court.

Our decision on the only point urged in this second appeal, is against the appellant and it, therefore, follows that this appeal must be dismissed with costs.

Appeal dismissed.

(1) B. L. R. (o. c.) 35.

(2) 1 M. H. C. R. 202.

BYOMKESH CHAKRABARTI v. HALADHAR MANDAL.

KANHIA LAL v. NARAIN SINGH.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 316 OF 1914.

May 3, 1915.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Chapman.BYOMKESH CHAKRABARTI—DECREE-
HOLDER—APPELLANT

versus

HALADHAR MANDAL AND OTHERS—

JUDGMENT-DEBTORS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) Sch. III, Art. 6
- Decree for share of rent by one co-sharer without
making other co-sharers parties—Execution—Limitation.An application for execution of a decree obtained
by a co-sharer landlord for his share of the rent
without making the other co-sharers parties, is
governed by Article 6 of Schedule III of the Bengal
Tenancy Act.Appeal against the order of the District
Judge, Jessore, dated the 20th March 1914,
affirming that of the Munsif of that place,
dated the 8th July 1913.Babu Surendra Madhub Mullick, for the
Appellant.Babus Narendra Kumar Bose and Bhudhar
Chandra Halder, for the Respondents.JUDGMENT.—This appeal arises from
a decision holding that an application for
execution of a decree obtained by a co-
sharer landlord for his share of the rent
without making the other co-sharers parties,
is governed by Article 6 of Schedule III
of the Bengal Tenancy Act. There is cer-
tainly one case which favours the contention
of the appellant. That is the case of *K.*
B. Dutt v. Gostha Behary Bhuiya (1).
That case, however, was not argued for the
respondent and the learned Judges said
that that was a suit to which provisions of
the Bengal Tenancy Act did not apply.
However, there has been a number of cases
both preceding and subsequent to that in
all of which, the Judges took a contrary
view. These cases are *Thakomoni Dasi v.*
Mohendra Nath (2), *Mriyunjyot v. Bhola Nath*
(3), *Kh-tra Mohan v. Mohim Chandra Das* (4)
and *Kedar Nath v. Artha Chunder Roy* (5). In
all of these cases, it has been held that theobject of the amendment of the Bengal
Tenancy Act I of 1907 was to introduce
words which, properly interpreted, would
make the Article applicable to the question
in controversy in this case. We are inclin-
ed to agree with this latter opinion and to
accept the grammatical construction of the
words as given in the Article after the
amendment. The contention, therefore, that
this Article does not apply, fails.It is next contended that this view of
the law is very hard upon the co-sharer
landlord, who is bound by the rule of
shorter limitation in this Article while he
is unable to avail himself of the provi-
sions of the Act for getting a complete
remedy against his tenant. That may be
so in a case of this kind, but after the
amendment, a co-sharer landlord has an
option of bringing a suit under section
148A, which would enable him to avail
himself of all the provisions of the Act
in favour of the entire body of landlords.The next contention is that this applica-
tion should be considered as a continuation
of the previous application. The previous
application is not before us and there are
no materials on the record upon which we
can say that this was ever intended to be
a continuation of the previous application.The result is that this application is
dismissed.As, however, at the time when the appli-
cation was made there was a decision in
favour of the appellant, we make no order as
to costs in this appeal.*Appeal dismissed.*

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION NO. 133 OF 1913.

October 27, 1915.

Present:—Justice Sir Donald Johnstone, Kt.
Chief Judge, and Mr. Justice Chevis.

KANHIA LAL—DEFENDANT—

PETITIONER

versus

NARAIN SINGH AND OTHERS—PLAINTIFFS,

MADAN LAL AND OTHERS—DEFENDANTS

—RESPONDENTS.

Arbitration—Award—Decree in accordance with(1) 17 Ind. Cas. 207; 16 C. L. J. 379; 16 C. W. N.
1006.

(2) 3 Ind. Cas. 389; 10 C. L. J. 463.

(3) 20 Ind. Cas. 833; 18 C. L. J. 81.

(4) 18 Ind. Cas. 595; 17 C. W. N. 515.

(5) 5 C. W. N. 763; 29 C. 54.

KANHIA LAL V. NARAIN SINGH.

award—Appeal—Revision, when maintainable—Award, nullity, effect of—Arbitrators, Court if can advise—Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 16.

An application for revision of a decree based on an award can be entertained on the ground of material irregularity committed by the Court when no appeal under the Civil Procedure Code is maintainable against that decree, but such jurisdiction will be used very sparingly. [p. 701, col. 1.]

Obiter dictum.—Where there is no legal appointment of arbitrators, the award is a nullity and an appeal against the decree is maintainable. [p. 702, col. 1.]

Nidamurthy Krishnamurthy v. Gargiparthilingam, 25 Ind. Cas. 583; (1914) M. W. N. 65, not followed.

There is nothing objectionable in the Court's helping the arbitrators with advice and orders when they come to it in a difficulty. [p. 702, col. 2.]

Petition, under section 70 of Act IV of 1912, for revision of the decree of the District Judge, Delhi, dated the 14th December 1912, decreeing the claim in part.

Mr. Nard Lal and Rai Sahib Lala Moti Sagar, for the Petitioner.

Mr. Dalip Singh, for the Hon'ble Mr. Shadi Lal, and Mehta Bahadur Chand and Bakhshi Tek Chand, for the Respondents.

JUDGMENT.—This revision and the Civil Appeal No. 562 of 1913 are connected in the following way. The parties (to put the thing in the briefest possible way) had a mutual contract for the supply of *bajri*. Disputes arose, each party accusing the other of breach of contract. On 7th October 1911, Sardar Narain Singh, plaintiff in the revision case, sued Seth Kanhia Lal for damages to the amount of Rs. 14,000. On 9th February 1912, Kanhia Lal sued Narain Singh, Labh Singh and Nazir Mal for Rs. 7,059-4-0, price of *bajri* supplied, plus Rs. 13,490 damages, total Rs. 20,549-4-0. Then in the former case the whole matter was referred to arbitration, and on 30th October 1912, the award was put in, giving Narain Singh Rs. 11,782-5-0 and costs. Objections were heard and considered—see orders of lower Court dated 22nd November and 14th December 1912—on which latter date a decree was passed in accordance with the award. Then on 24th December 1912 Kanhia Lal's suit for Rs. 20,549-4-0, which had by consent of Counsel been kept in abeyance pending the result of the other suit, was taken up and was dismissed with costs, on the ground that the issues in it were the same as those in the case decreed ten days earlier, that

those issues had been disposed of finally, and that, therefore, this suit could not proceed.

On 22nd January 1913, Kanhia Lal put in his revision application, but for one reason or another, it was not ripe for orders until 31st July 1914. Meantime Kanhia Lal had appealed in the other case (his own claim for Rs. 20,549-4-0), and that appeal had been admitted to a Division Bench on 21st April 1913. The revision petition, though plainly open to some objections, was allowed to be set down for regular hearing along with the appeal.

We have now heard both cases argued and have arrived at the conclusion that both the revision and the appeal should be rejected.

Mr. Tek Chand, for Narain Singh, urges that no revision lies. Mr. Moti Sagar, for Kanhia Lal, contests this and takes his stand upon each and every paragraph of his revision petition. Both sides have quoted authorities, which we will notice presently. In our opinion, it cannot be said absolutely that no revision lies. In our opinion the law is as follows. This decree (of 14th December 1912) is based, or purports to be based, on an award and is certainly in accordance with that award. Therefore, under the Civil Procedure Code, no appeal lies against it, except on the ground that it is not based on an award; that is, in effect, that the award is not a valid award but a nullity. Then, this Court can revise judgments or orders, against which no appeal lies, on the ground of material irregularity committed by the Court passing the order or judgment, e.g., suppose a Court passed a decree on an award without giving time for objections. But considering that the whole object of the law of arbitration is rapid finality, such a revisional jurisdiction will be used very sparingly. In arriving at the above propositions, we have studied the well-known rulings *Ghulam Khan v. Muhammad Hassan* (1), *Hans Raj v. Ganga Ram* (2), *Panna Lal v. Soman* (3), *Shankar Lal v. Nathu*

(1) 25 P. R. 1002 (P. C.); 12 M. L. J. 77; 4 Bom. L. R. 161; 6 C. W. N. 226; 29 C. 167; 9 I. A. 51.

(2) 88 P. R. 100 (F. B.); 119 P. L. R. 19-2.

(3) 89 P. R. 1902 (F. B.); 120 P. L. R. 1902.

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Mal (4), *Narpat Rai v. Devi Das* (5), *Balcha Sahib v. Abdul Ghany* (6) and others. It is not necessary to state at length the facts and *dicta* in these rulings here. As to certain other rulings quoted by Mr. Mori Sagar, we need only say that in *Thakur Das v. Ram Das* (7), (a Single Bench case) the Judge did not positively hold that revision lay, but preferred to reject the petition on the ground that it was bad on the merits, and that in *Gian Chand v. Behari Lal* (8) the Judge, dealing with a revision on the ground that all parties had not joined in the reference, should probably have refused to consider the revision, inasmuch as the question raised was one for appeal, but, overlooking this, considered the petition on the merits and dismissed it.

Mr. Tek Chand, on the other hand, cited a Madras Single Judge case [*Nidamurthy Krishnamurthy v. Gargiparthilingam* (9)] in which it was held that neither appeal nor revision lay on the ground that there was no proper order appointing arbitrators. We are not inclined to follow that ruling; if there was no legal appointment of arbitrators, the award was a nullity and appeal would lie.

We will now take up the revision petition clause by clause, and see to what extent, if any, it contains admissible grounds. Paragraph 1 in effect denounces the award as a nullity: being ground for appeal, we cannot hear it argued in revision. Paragraph 2 would probably be a good ground if correct in fact, but it is based on a misconception of fact, for there was a formal order passed extending time to 30th October 1912. Paragraph 3 takes up a matter fully considered and adjudicated upon by the lower Court in its order of 22nd November 1912. Therefore, in this connection, the lower Court was guilty of no irregularity whatever, and the paragraph is out of place in a revision

petition. Ground 4 is in argument utilised to urge that the lower Court should have remitted the award for reconsideration, because (a) Nazir Mal's interest in the contract was dealt with in it, though he did not join in the reference, (b) the arbitrators failed to consider that there had been an award already in the case by one Damodar Das and that, therefore, they should decline to adjudicate afresh. As to (a), all we need say is that the arbitrators were obliged to decide whether Nazir Mal had an interest, as it had been asserted that he had; and that they decided he had none. As to (b), it is difficult to see what right petitioner has, after joining in this arbitration and leaving the whole dispute to be decided by the arbitrators, to say that those very arbitrators should have declined to arbitrate.

Ground No. 5 was fully dealt with by the lower Court: no irregularity there. Grounds Nos. 6 (a) and (b) were not touched upon in argument before us: we see nothing in them. Ground No. 6 (c) would be technically good ground for revision, if it really disclosed an irregularity, for it is concerned with the action of the lower Court, but we can see nothing objectionable in the Court's helping the arbitrators with advice and orders when they came to it in a difficulty. Lastly, ground No. 7 is obviously not good ground for revision.

For these reasons, we dismiss this petition with costs.

Petition dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 110
OF 1913.

July 28, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

MOKASHADAYINI DASSI AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

KARNADHAR MANDAL—DEFENDANT—
RESPONDENT.

Probate and Administration Act (V of 1881), s. 60

(4) 1 P. R. 1903 (F. B.); 58 P. W. R. 1907.

(5) 9 Ind. Cas. 385; 12 P. W. R. 1911; 1 P. L. R. 1911.

(6) 21 Ind. Cas. 308; 38 M. 256; 14 M. L. T. 314; 25 M. L. J. 57; (1914) M. W. N. 142.

(7) 23 Ind. Cas. 950; 114 P. L. R. 1914; 13 P. W. R. 1914.

(8) 18 Ind. Cas. 71; 78 P. L. R. 1913.

(9) 25 Ind. Cas. 583; (1914) M. W. N. 865.

MOKASHADAYINI DASSI v. KARNADHAR MANDAL.

—Probate, revocation of, application for—Genuineness of Will, question of, if arises—Just cause for revocation, question of, determination of—Assignment of properties after testator's death—Assignee, right of, to apply for revocation—Revocation, ground for—Fraudulent concealment of transfer.

In a Probate Court, after a Probate of a Will has been granted, no question of the genuineness of the Will arises for consideration till the Court has decided that the Probate must be revoked on one or more of the grounds specified in section 50 of the Probate and Administration Act. [p. 703, col. 2.]

Where an application for revocation of a Probate is made, the only question for consideration is whether the appellants have made out a just cause for revocation and the application cannot be dismissed on the ground that the evidence adduced by the applicants for revocation, is not sufficient to throw doubt upon the genuineness of the Will. [p. 703, col. 2.]

A person interested by assignment in the estate of a deceased may, where a Will has been set up and proved at variance with his interests apply for revocation of the Probate of the Will so set up. [p. 703, col. 2.]

Therefore, if it is proved that a person has acquired by purchase an interest in the properties left by the deceased, he is entitled to be heard in the proceedings for grant of Probate. [p. 704, col. 1.]

Where a notice was served in a Probate proceeding upon a person who, a week before the service of the notice, had transferred his interest in the properties and where the fact of the transfer was known also to the applicant:

Held, revoking the Probate, that the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case. [p. 704, col. 1.]

Appeal against the order of the District Judge, 24-Parganas, dated the 27th February 1913.

Babu Bepin Chandra Mullick, for the Appellants.

Babu Trailokya Nath Ghosh for Mr. J. W. Chippendale, for the Respondent.

JUDGMENT.—This appeal is directed against an order of dismissal of an application for revocation of Probate. The respondent Karnadhar Mandal applied for Probate of a Will alleged to have been executed on the 1st March 1885 by Gobinda Chandra Mandal, a cousin of his father Lukshmi Narain Mandal. The effect of the Will is to give a life-interest to the daughter of the testator Brojeswari who was a childless widow when her father died in 1886. After the termination of the life-interest in favour of the daughter, the estate was to vest in Karnadhar Mandal and his paternal uncle Dakhiram Mandal. Brojeswari died in 1907. Notice of the present application

for Probate, which was not made till the 21st September 1912, was served upon Lukshmi Narain Mandal and Dakhiram Mandal. There was no opposition and the District Delegate granted Probate on the 27th November 1912. On the 21st December 1912 the appellants applied for revocation of the Probate on the allegation that they had acquired an interest in the property left by the deceased by purchase from Lukshmi Narain Mandal on the 11th September 1912, that is, a week before the application for Probate. The District Judge has dismissed the application on the ground that the evidence adduced by the applicants for revocation is not sufficient to throw doubt upon the genuineness of the Will. It is plain that this order cannot be sustained. No question of the genuineness of the Will arises for consideration till the Court has decided that the Probate must be revoked on one or more of the grounds specified in section 50 of the Probate and Administration Act. The only matter for consideration at this stage is, whether the appellants have made out a just cause for revocation of the Probate which was granted without notice to them: *Brindaban Chunder Shaha v. Sureshwar Shaha* (1). The question of genuineness cannot be considered till a case for revocation is made out: *Durgaguti v. Saurabini* (2).

It was ruled by this Court in the case of *Komolochun Dutt v. Nilratan Mundle* (3) that a person interested by assignment in the estate of the deceased may, where a Will has been set up and proved at variance with his interests, apply for revocation of the Probate of the Will so set up. This view was followed in the cases of *Muldui Mohun Sircar v. Kali Churn Dey* (4), *Lalit Mohan v. Navalip Chandra* (5), *Sheikh Azim v. Chandra Nath* (6), *Digambar Keshav v. Narayan Vithal* (7) and *Ramchandra v. Ramrao* (8). This is in accord with the principle

(1) 3 Ind. Cas. 178; 10 C. L. J. 203.

(2) 33 C. 1001; 10 C. W. N. 955.

(3) 4 C. 36; 4 C. L. R. 175.

(4) 10 C. 37.

(5) 28 C. 547.

(6) 8 C. W. N. 748.

(7) 9 Ind. Cas. 354; 13 Bom. L. R. 37.

(8) (1896) Bom. P. J. 40.

VENKATARAMA AIYAR v. RAJAGOPALA IYER.

adopted in the case of *Lindsay v. Lindsay* (9) where it was ruled that the person entitled to intervene in a proceeding for revocation of Letters of Administration or Probate need not show that he had an interest in the estate of the deceased at the time of his death; an interest acquired subsequently by purchase of a part of the estate is sufficient. Consequently, if it is established that the appellants have acquired by purchase an interest in the properties left by the deceased, they were entitled to be heard in the proceedings for grant of Probate. There is thus "just cause" for revocation of the Probate within the meaning of section 50 of the Probate and Administration Act. If the case is not covered by the first clause in the definition of the expression "just cause", namely, that the proceedings to obtain the grant were defective in substance, it is undoubtedly covered by the second clause, namely, that the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case. Notice was served in the Probate proceedings upon Lukshmi Narain Mandal. It was his duty to apprise the Court that he had no subsisting interest in the estate so as to justify an opposition on his part to the grant of Probate; he should have intimated to the Court that he had transferred what he claimed as his share of the estate left by Gobinda Mandal to the present appellants. It is further difficult to imagine that the applicant for Probate was unaware that his father had, a week before, conveyed away to the appellants what he claimed as his share of the estate; it was thus equally his duty to intimate this fact to the Court. If this had been done, the Court would undoubtedly have issued notices upon the present appellants.

The result is that this appeal is allowed, and the order of the District Judge set aside. The case will be remanded to him in order that he may investigate whether the appellants have in reality the interest which they allege in the estate left by Gobinda Chandra Mandal. If their purchase is proved, the Probate will stand

cancelled and the applicant for Probate will be called upon to prove the Will in solemn form. If, on the other hand, the appellants fail to establish their alleged purchase, they must be deemed persons not entitled to intervene in the Probate proceedings and their application for revocation will stand dismissed. There will be no order for costs in this appeal.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 400 OF 1913.

September 16, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Coutts-Trotter.

S. M. VENKATARAMA AIYAR —
PLAINTIFF—APPELLANT

versus

RAJA GOPALA IYER AND OTHERS—

DEPENDANTS—RESPONDENTS.

Pleadings—Suit, when can be dismissed on pleadings alone—Distinction between actionable and non-actionable claim—Proper procedure.

The practice of non-suiting plaintiffs in other than absolutely plain cases, is to be deprecated. [p. 705, col. 1.]

Where, therefore, the plaintiff's suit for contribution was dismissed merely on the pleading without taking any evidence in the case as to the correctness or otherwise of the contentions on each side:

Held, that, as the distinction between an actionable and a non-actionable claim was a fine one, the only proper course in the case was to hear the evidence and examine the documents, and that, therefore, the case must be tried *de novo*. [p. 705, col. 1.]

Second appeal against the decree and judgment of the District Court of Tanjore, in Appeal Suit No. 39 of 1910, dated 7th of October 1912, preferred against the decree of the Subordinate Judge of Kumbakonam, in Original Suit No. 68 of 1909.

Mr. N. Rajagopalachariar, for the Appellant.

Mr. T. R. Ramachandra Aiyar, for the Respondents.

JUDGMENT.—The learned District Judge professed to decide this case after consideration of the terms of the partition-deed. No such deed is even alleged ever to have existed. The plaint discloses a possible cause of action under either section 69 or section 43 of the Contract Act.

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The practice of non-suiting plaintiffs in other than absolutely plain cases is to be deprecated. The art of pleading in this country has not reached the point at which it is safe to assume that the Pleader gives the exact effect of the contract pleaded and where the line of distinction between the actionable and the non-actionable was a fine one, as in this case, the only proper course was to hear the evidence and examine the documents. This is doubly important where the pleading is applying the vernacular to complex legal conceptions and relations. It is most regrettable that the Subordinate Judge should have suggested that the plaintiff was officious in depriving the defendants of an opportunity of evading the payment of their legal and just debts.

The judgments below must be set aside, and the case sent back for trial *de novo*.

Costs in all three Courts will abide the result of the new trial.

Appeal accepted; Case remanded.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1287 OF 1914.

April 30, 1915.

Present:—Mr. Justice Holmwood and
Mr. Justice Walmsley.

SUDHAKAR RAUT AND OTHERS—
PLAINTIFFS—PETITIONERS

versus

SADASIV JHATAP SINGH AND OTHERS
— DEFENDANTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 5—Appeal after failure of application for review—Time spent in review, if bona fide prosecution of civil litigation—Exclusion of time—Discretion, exercise of—Laches.

Where an appeal is filed after an application for review has failed and where the grounds for review are the only grounds of appeal, the time taken in prosecuting the application for review will not be excluded for making the appeal within time on the ground of *bona fide* prosecution of civil proceedings [p. 705 col 2; p. 706, col. 1.]

A mere routine order registering an application for review does not constitute a *bona fide* prosecution of a civil litigation. [p. 706, col. 1.]

The discretion to admit out of time appeals ought not to be crystallised into definite rules to fetter other Judges in the exercise of the discretion which the Legislature has permitted to them. What is sufficient cause and what is reasonable time for filing

an appeal, must depend upon all the circumstances of each particular case. [p. 706, col. 1.]

The appellants were minors residing in an out of the way village and their father died during the hearing of appeal before the lower Appellate Court. They applied for a review of the judgment of the lower Appellate Court, which was against them, but the application was rejected. They applied 23 days after for the copy of the order and on receipt of the copy filed an appeal. The appeal was filed beyond time.

Held, that in the circumstances of the case the appeal should be registered. [p. 706, col. 2.]

Babus Maumotha Nath Mukerjee and Probodh Chandra Chatterjee, for the Petitioner.

Babus Girish Chandra Pal and Nobin Chandra Pal, for the Opposite Party.

JUDGMENT.

HOLMWOOD, J.—This was a Rule calling on the opposite party to show cause why the second appeal should not be admitted out of time and registered on the ground that the time taken in the infructuous proceedings in the review matter is *bona fide* litigation which would save limitation.

It appears that the father of the minor applicant died during the hearing of the appeal before the lower Appellate Court. The lower Appellate Court's judgment was passed on the 11th August 1914. The decree was passed on the 15th August 1914. There was an application for review on the 10th September 1914. The learned Subordinate Judge admitted the application, issued notice and fixed the 7th November 1914 for hearing. In the meantime, he was transferred, and on the 7th November 1914 the District Judge heard the parties in the review matter and wrote a considered judgment rejecting the review. The applicants then applied for copy of the lower Court's judgment and decree on the 30th November 1914. They obtained their copy on the 7th December. It is stated that the appeal was ready on the 12th December and it was filed on the 14th December.

In showing cause, the learned Vakil has relied upon the finding of the District Judge that all the grounds taken in the petition for review were grounds of appeal and the ruling in *Ashanulla v. Collector of Dacca* (1) has been relied upon. We entirely agree with that ruling, and if the grounds for review were only grounds of

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appeal we should certainly hold that the applicants can claim no exclusion of time on the ground of *bona fide* prosecution of civil proceedings. But here the fourth ground taken in the petition of review is obviously a good ground for review, and the learned Subordinate Judge must be taken in admitting the review and fixing a date of hearing to have held that there was such a ground. We have been referred to the case of *Gobinda Lal Das v. Shiba Das Chatterjee* (2) for the proposition that a mere routine order registering an application for review does not constitute the *bona fide* prosecution of a civil litigation. That also we are prepared to concede. But the facts of that case were totally different from the facts of the present case. There the application for review was ordered to be registered by the Judge who dismissed the suit, and the Judge who succeeded him when he was on leave refused to hear the review and a great delay took place in passing the order dismissing the review.

It is further contended that laches after the dismissal of the review in not immediately filing the appeal, would also deprive the applicants of the benefit of section 14 of the Limitation Act and certain remarks of Mr. Justice Mookerjee in the case we have just referred to, are relied on. But those remarks being considered, as they must be, as a whole, do not support the contention. The learned Judge recalls the words of an eminent English Judge where he says, "for myself I say emphatically that this discretion ought not to be crystallised, as it would become in course of time by one Judge attempting to prescribe definite rules with a view to fetter other Judges in the exercise of the discretion which the Legislature has permitted to them. What is sufficient cause and what is reasonable time for filing an appeal must depend upon all the circumstances of each particular case—circumstances which must necessarily vary greatly in different cases."

Now the laches which is here complained of is that the minor applicants did not apply for copies necessary for their appeal until 23 days after the review had

(2) 10 C. W. N. 986; 3 C. L. J. 545; 33 C. 1323.]

been rejected, and the circumstances which we have to take into consideration are that their father had died in July or August when they were minors, their only guardian being a lady, Gouribari Bewa, and they resided in an out of the way village named Bara Khandu in the Kendrapara Sub-Division of District Cuttack, and we cannot say that 23 days was at all an unreasonable time for them to procure some gentlemen of their own neighbourhood to proceed on the long and troublesome journey to Cuttack and consult Pleaders, then come back and raise the necessary funds for the copies and do all the other necessary work that had to be done before the copies could be obtained.

We think that this is eminently a case where our discretion should be exercised in favour of the applicants, and we, therefore, make the Rule absolute and direct that the appeal be registered and put on the board for hearing under Order XLl, rule 2, Civil Procedure Code. This being an indulgence we do not allow any costs to the applicants.

WALMSLEY, J.—I agree.

Rule made absolute.

ALLAHABAD HIGH COURT. I

SECOND CIVIL APPEAL No. 1291 OF 1915.

November 1, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rattray.

MUNSHI LAL—PLAINTIFF—APPELLANT
versus

MANGAT RAI—DEFENDANT—RESPONDENT.

Mortgage suit—Mortgage not proved to be duly executed—Simple money-decree, if can be given—Cause of action.

In a suit on a mortgage for sale of the mortgaged property against the son of the executant of the mortgage, the mortgage was not proved to have been duly executed.

Held, that under the circumstances no simple money-decree could be given inasmuch as it would entirely change the cause of action. [p. 707 col. 1.]

Second appeal from the decision of the Additional District Judge of Saharanpur, dated the 4th May 1915.

The Hon'ble Mr. Gokul Prasad, for the Appellant.

10 MANIRUDDIN v. JNANENDRA NATH.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage. The mortgage was executed by Govind and others. The suit is a suit (for sale of the mortgaged property) against the sons of Govind, who is now deceased. Both Courts below have dismissed the suit, first, upon the ground that the mortgage was not proved to have been executed according to the provisions of the Transfer of Property Act and, secondly, on the ground that no legal necessity was proved. As to the first point, it is contended that the plaintiff should have had a further opportunity of proving the due execution of the bond. The Court below has dealt with this point and, in our opinion, the plaintiff ought to have come prepared to prove his case. We have looked into the record and we see that it never was suggested that the witness who was produced to prove the bond went back on his previous evidence or had committed perjury. He proved the plaintiff's case *prima facie*, but when he was cross-examined as to the particular mode in which he had witnessed the bond, the fact was disclosed that he had not seen the executants actually sign. The finding that there was no legal necessity, is a finding of fact and is equally fatal to the plaintiff's suit as against the sons of Govind. It is contended that we ought to grant at least a simple money-decree. There are several objections to this. In the first place, the suit was a suit for sale of mortgaged property. In order to give a simple money-decree, we should either amend the plaint or treat the plaint as amended. It is not a suit for money. In the next place it is sought now to get a simple money-decree (not against the original executant) but against his sons. This would be an entirely new cause of action in which there might be entirely different defence. In our opinion, the findings of fact conclude the appeal. It is accordingly dismissed.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 239 of 1911.

May 15, 1914.

Presents—Justice Sir Asutosh Mukherjee Kt.,
and Mr. Justice Beauchcroft

Sued MANIRUDDIN—DEFENDENT No. 1—

PETITIONER

versus

JNANENDRA NATH BASU—PLAINTIFF—
OPPOSITE PARTY.

Partnership—Partners, suit by, to recover damages for use and occupation of partnership property, & in other matters, if maintainable.

An owner of a mill entered into a partnership agreement with two other persons in respect of the mill business. The mill was to be used by the firm thus constituted; cash was to be supplied by one of the partners and the profits were to be distributed in certain proportions. A suit was instituted for dissolution of the partnership, for accounts and for incidental reliefs. During the pendency of this litigation the plaintiff purchased from the owner of the mill his right, title and interest in the mill in question and sued the members of the firm for recovery of damages for use and occupation of the mill.

Held, that the suit as brought was not maintainable either if the mill became part of the partnership property or continued to be the private property of the owner. [p. 708, cols. 1 & 2.]

Rule granted on the 20th February 1914 against the judgment of the Small Cause Court Judge of Sealdah, dated the 23rd January 1914.

Bahns Biraj Mohan Majumdar and Harihar Prashad Sinha, for the Petitioner.

Babu Monmutha Nath Roy, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside a decree made by a Small Cause Court Judge in a suit for damages for use and occupation of a *soorkay* mill. The second defendant, Gopal Chandra Ghosh, was the owner of the mill. On the 5th February 1910 he entered into a partnership agreement with two other persons in respect of the mill business. It is not necessary for our present purpose to set out at length the terms of this agreement. It is sufficient to state that the mill was to be used by the firm thus constituted; cash was to be supplied by one of the partners and the profits were to be distributed in certain proportions. On the 7th June 1912, a suit was instituted for dissolution of the partnership, for accounts and for incidental reliefs. During the pendency of this litigation, on the 17th January 1913 the present

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plaintiff purchased the right, title and interest of Gopal Chandra Ghosh in the mill in question. He subsequently instituted this suit against the members of the partnership firm for recovery of damages for use and occupation of the mill. The Small Cause Court Judge has decreed the suit. In our opinion, the suit as framed is not maintainable and the plaintiff is not entitled to the reliefs he seeks.

One of the matters in controversy between the parties is, whether the mill became part of the partnership assets by the deed of the 5th February 1910. On behalf of the plaintiff the position has been maintained that although the firm became entitled to use the mill, it continued to be the private and separate property of Gopal Chandra Ghosh. It is not necessary to dispute the position that property used by all the members of a partnership for partnership purposes, is not necessarily partnership property. Two illustrations of mills used by partnership firms may be mentioned: *Robinson v. Ashton* (1) and *Pilling v. Pilling* (2). In the first of these cases, the owner of the mill and its machinery admitted two persons as partners. A question subsequently arose, whether the mill and the machinery had become part of the partnership assets. It was proved that the value of the property was entered in the partnership books as the amount of the capital of the owner, and all additions and improvements during the partnership were made at the expense of the firm. Sir George Jessel, M. R., held that the property had been proved to have become part of the assets of the firm [see also *Hills v. Parker* (3)]. In the present case, the question whether the mill had become part of the assets of the firm, has not been investigated; but it is immaterial, because in either view the suit must fail. If the mill were constituted a part of the partnership assets, namely, as contribution of capital by Gopal Chandra Ghosh, one of the partners in the business, the plaintiff, as purchaser of his right, title and interest, has not acquired such a title as would enable

him to maintain a suit for damages for use and occupation against the other partners of the firm. If, on the other hand, the view be adopted, as has been sought to be maintained on behalf of the plaintiff in this Court, that the mill continued to be the private property of Gopal Chandra Ghosh, the position of the plaintiff is clearly hopeless. He, as purchaser of the right, title and interest of Gopal, cannot take up a position with respect to the property purchased by him which could not have been taken up by Gopal. Now from the partnership deed it is plain that Gopal placed the property at the disposal of the firm, which thereupon became entitled to use the mill for the purposes of this business. There cannot be any dispute that there was ample consideration for this agreement. Gopal could not have turned round at any moment and claimed damages from the members of the firm for use of the mill which he had placed at their disposal. The plaintiff stands in no better position. He is accordingly not entitled to maintain this suit.

The result is that the Rule is made absolute, the decree of the Small Cause Court Judge set aside and the suit dismissed with costs of both Courts. We assess the hearing fee in this Court at three gold mohurs.

Rule made abso ute.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 209
OF 1914.

July 10, 1915.

Present:—Mr. Justice Beaman.

LADKABAI—PLAINTIFF

versus

NAVIVAHU—DEFENDANT.

Trusts Act (II of 1882), s. 6 Trust, declaration of—Terms—Misrepresentation of fact—Contract executed under misrepresentation of fact—Liability of party misrepresenting—Misrepresentation of future intention—Registration Act (XVI of 1908), s. 17—Document promising to do some act in future, if requires registration.

Where a person set apart a sum of Rs 20,000 for the benefit of his nephew and the nephew's wife and provided that they were to enjoy the interest until his death or until having attained years of discretion they elect to separate from him and where he retained possession and control of the fund, subject only to the interests of his *cestui que trust* in it:

(1) (1875) 20 Eq. 25; 44 L. J. Ch. 542; 33 L. T. 88; 23 W. R. 674.

(2) 1865) 3 DeG. J. & Sm. 162; 46 E. R. 599; 142 R. R. 46.

(3) 7 Jur. (N. s.) 838; 4 L. T. 746.

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Held, that there was a clear and sufficient declaration of trust within the meaning of section 6 of the Trusts Act and that there was no need of transferring possession inasmuch as the author of the trust was himself the trustee and the property was specified, the intended beneficiaries were specified, and the purposes of the trust were specified. [p. 712, col. 1.]

Where there was a misrepresentation of fact, the relations of the parties in law would have to be determined by assuming that the fact was as it was represented to be. [p. 712, col. 1.]

In entering into a contract or inducing another person to act, if one should misrepresent a fact, the contract between him and the person so deceived shall be based in law upon the ground that the fact so misrepresented must be made good by the party misrepresenting it. Whereas if it is merely a representation of future intention, it is then only a contract and can only be proved as a contract. [p. 713, col. 1.]

Where, therefore, there was a representation by one H that one L was the adopted son of H and it was upon the faith of that representation that the plaintiff married L and where L died after H and L's widow sued for the property of H:

Held, that the representation should be made good and that, therefore, L's widow was entitled to the property. [p. 714, col. 1.]

A document which is simply a promise to do a certain act in the future or is an offer to be completed when a certain marriage takes place, does not require registration. [p. 714, col. 2.]

Messrs. *Walia, Kanga and Taraporevala*, for the Plaintiff.

Messrs. *Mirza and Desai*, for the Defendant.

JUDGMENT.—In this suit the plaintiff, Ladkabai, widow of the deceased Lalji Valji, sues Navivahu, widow of the deceased Haridas Dharamsey, to recover from her (1) the entire estate of the said deceased Haridas Dharamsey; (2) specific sums of money; (3) ornaments.

The plaintiff's allegation put shortly is that her husband Lalji survived the deceased Haridas Dharamsey, and upon certain grounds, which I shall have to give more in detail, was in law his sole heir; that she, therefore, the plaintiff Ladkabai, on the death of her husband Lalji is entitled to a widow's estate in the whole property. Further, she contends that by a writing of the 31st of October 1905, Haridas Dharamsey declared a trust of Rs. 20,000 in favour of herself and her husband, to which in any event she is now entitled. As to the specific sum of Rs. 5,000 and the ornaments, the former is admitted; and about the latter I need say nothing in this judgment.

Should it be necessary to go into that point, it would be more properly inquired into by the Commissioner than in the main part of this trial.

In order to understand the position occupied by the plaintiff and the defendant for the purposes of this litigation, it is necessary to say that there were five brothers Valji, Meghji, Canji, Haridas and Narsey, sons of one Dharamsey Nandji. It is common ground that these brothers separated. All the brothers are now dead except Narsey. Lalji was at the time of his marriage the sole surviving son of Valji. He married the plaintiff, then a minor, in the year 1906. As the plaint is framed, it will be seen that the plaintiff has contended that her husband's father Valji reunited with Haridas and that Haridas had adopted her husband Lalji. Treating these as mere questions of fact, it is sufficient to say that no evidence worth considering has been laid before the Court to substantiate either of them and that the plaintiff, long before the trial had concluded, abandoned both the contentions.

Haridas died on the 23rd of March 1912 and Lalji, the husband of the plaintiff, on the 11th of July 1913. Haridas had married four wives in all and had got into considerable trouble with his caste over his third marriage. There can be no doubt that he would have found much difficulty in procuring a bride for his nephew Lalji, the husband of the plaintiff; and I think it is proved, were it necessary to prove anything of the kind, that Haridas was on the best of terms with Valji, the father of Lalji, and had long regarded Lalji himself with great affection. It is not suggested that the sentiments entertained by Haridas towards Lalji had changed in any way before the death of Haridas. Such considerations only become material in dealing with the question of the probability or otherwise of the promises alleged to have been made by Haridas to the mother of the plaintiff in consideration of the marriage then in contemplation between the minor plaintiff and the minor Lalji.

The substantial point is whether any of these representations or promises, as alleged by the plaintiff, were in fact made, and, if so, whether they are now binding upon

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the maker or his heirs and representatives. The negotiations for the marriage of Ladkabai with Lalji took place early in the year 1905 and the betrothal was finally brought about, in connection with which Exhibit B was admittedly passed by Haridas to Ratanbai, the mother of Ladkabai. Herein Haridas engages to give ornaments of unspecified value to the bride and in addition the sum of Rs. 5,000, the interest upon which was apparently intended to be spent in procuring further ornaments for the bride should the marriage be postponed. On the 31st of October 1905, Exhibit C was passed by Haridas to Ratanbai, and that is the document which has given rise to the greater part of the discussion in the present suit. There are rival theories laid before the Court concerning this document. It is alleged on behalf of the defendant Navivahu that it was no more than a penalty bond exacted by Ratanbai from Haridas because he had failed to act up to the promises contained in Exhibit B. It is in a measure common ground that Haridas had taken a sum of some Rs. 2,000 from Ratanbai and that this sum as well as certain ornaments, which he appears also to have removed, had to be made good to her. But there is nothing in Exhibit C which gives the least colour to the suggestion that it is a penalty bond. It begins by declaring a trust of Rs. 20,000 in favour of the young married couple. They were not, of course, actually married at the time, but in the caste betrothal is regarded as virtually equivalent to marriage. The latter part of the document is, on the face of it, in the nature of a Will. It appoints Lalji the sole heir of Haridas in the event of Haridas having no natural son of his own, and it states that in the event of Lalji so becoming the sole heir, he is to take the entire estate of Haridas after the death of the *dhani dhani*. Whether this is an accidental repetition or whether the second *dhani* really stands for *dhani* and denotes the defendant Navivahu is a very debatable question. In the event of Haridas having a natural son born to him of this Navivahu, the defendant in this suit, then a like provision of Rs. 20,000 is to be made for that son and the entire estate is thereafter to be divided equally between him and the plaintiff's

husband, Lalji. The defendant's contention is that this document being merely a penalty bond was afterwards cancelled by a writing (Exhibit 9 in this case) of the 17th of December 1905. The plaintiff, on the other hand, contends that Exhibit 9 is a forgery and that Exhibit C never was, and never was intended to be, cancelled. On the 18th of May 1906, shortly before the marriage, Exhibit F was passed by Haridas to Ratanbai. Herein Haridas declares that Lalji, the bridegroom-elect, was his adopted son. Thereafter it provides for the payment of Rs. 5,000 referred to in Exhibit B. The latter part of the document appears to me comparatively unimportant. As to whether Exhibit C was cancelled or not by the writing (Exhibit 9), much might be said on either side. Exhibit C itself cancels Exhibit B and makes much more liberal provision for the bride and bridegroom than is made in either Exhibit B or Exhibit F. I think it would be absurd to argue that Exhibit C could possibly be, in any true sense, a penalty bond. It is, however, legitimately arguable, I think, that it was cancelled in view of the later document (Exhibit F). For if the statement with which that document opens be true, then it will be tantamount to saying that the bridegroom Lalji was in law entitled to the entire estate of Haridas Dharamsey, subject only, of course, to the possibility of another son or sons being born to Haridas. Except then for the trust of Rs. 20,000 declared in Exhibit B, all the remainder of Haridas' intention, therein more elaborately expressed, would be equally brought about by the mere statement that Lalji was his adopted, and at the time his only, son. That, then, would leave in dispute no more than a sum of Rs. 5,000 as mentioned in Exhibit B. So that it is not inconsistent with reason, in my opinion, to contend that having regard to Exhibit F, it is quite possible that Ratanbai might have consented to cancel Exhibit C. It is, however, an extremely doubtful point whether in fact she did so or not. First it is to be borne in mind that this cancellation is supposed to have been made as early as the 17th of December, that is, nearly six months before the execution of Exhibit F; and it certainly seems to me extremely unlikely that a mother, who

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was so keen and zealous for her minor daughter's interest as Ratanbai is proved to have been, would have given up so valuable a paper as Exhibit C merely upon the chance of Haridas executing at a much later date such a paper as Exhibit F. Now, when we turn to Exhibit 9 itself, there are many circumstances of suspicion attending it. Ratanbai herself positively swears that she never signed it and that it is a forgery. It appears to have been preceded the day before by the draft Exhibit 10 in this case. That draft is altogether of a different tenor and much less comprehensive than Exhibit 9. Exhibits 9 and 10 are written on two different pages of a book, a large part of which is blank and between them comes Exhibit M, a memorandum of receipts of betrothal presents by Haridas Dharamsey. Of the genuineness of that paper, there can be no doubt and it must have been made some eight or nine months before the impugned Exhibits 9 and 10. It is difficult to understand, therefore, how it comes to be sandwiched in between them if those documents are genuine. The only guarantee we have of their genuineness, is the testimony of Chhotalal, who is engineering the whole case for the defendant. It will be a waste of time to particularise portions of his evidence which warrant the sweeping conclusion that he is utterly unworthy of credit. He is a man who, whether through self-interest or through any other motive, is evidently thoroughly untruthful and prepared to make any statements which occur to him as likely to support the case he is interested in making good. I certainly should not care to decide a single contentious point merely upon the evidence of such a man. Now there is plenty of Haridas' own writing on the record, and though we have no expert testimony here, it was stated by Counsel and not contradicted that that handwriting is, to say no more, an averagely good vernacular script. Whereas the writing of Exhibit 9 which is declared to be Haridas' writing is so bad that the highest skill of the Court interpreters had to be spent upon it. No less than three of them had to take it in hand, not to mention the attempts made by

my own interpreter, Mr. Kanga, to settle the words in it. In the circumstances, I think any Court would hesitate long before trusting to such a document as proof of a fact so favourable to the interests of the defendant and so damaging to the interests of the plaintiff in this case. According to Exhibit 9, Haridas is made to appear to have satisfied Ratanbai in respect of the money and ornaments which she was demanding back from him. Thereupon she is made to declare that the writing of the 31st of October is of no avail and torn up; but in point of fact, the writing has never been torn up and has evidently been very carefully kept by Ratanbai and is now before the Court. In view of that fact, it is a little difficult to understand the need of making Exhibit 12. Possibly, however, the explanation offered by plaintiff's Counsel is true that the operation of that paper was meant to be confined to the sum of Rs. 5,000 now represented by the shares of the Sirdar's Carbolic Acid Gas Co., Limited. There is no dispute about this. The defendant is ready and willing to hand them over to the plaintiff.

We have, then, three papers every one of which contains representations partly of fact and partly of intention clearly made in contemplation of marriage, and the principal question the Court has to answer is: what is the effect of any or all of these papers upon the legal rights of the parties? In describing Exhibit B, I said that the first part of it contained a declaration of trust. It has, however, strenuously been contended, mainly on the authority of a judgment of my own in the case of the Narielwalla's trust [*Mauchershaw v. Ardeshtir* (1)], that this is no declaration of trust, nor yet a gift, and is, in the eye of the law, a nullity. I think, however, that there are broad and patent distinctions between the facts disclosed in the case of the Narielwalla's trust and the facts here. Reading Exhibit C, I cannot doubt that there is a sufficient declaration of trust within the meaning of section 6 of the Trusts Act. It was very different in the *Narielwalla's* case. Here Haridas Dharamsey sets apart a sum of Rs. 20,000 for the benefit of the young marri-

(1) 10 Bom. L. R. 1209.

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ed couple. But the language he uses, precludes all idea of any intention to make a present gift for, although he opens a *khata* in favour of these two young persons to the amount of Rs. 20,000, he immediately adds that they are only to enjoy the interest until his death, or until having attained years of discretion they elect to separate from him. In the meantime, he retains possession and control of the fund, subject only to the interests of his *cestui que trust* in it. This is, in my opinion, a clear and sufficient declaration of trust: the property being specified, the intended beneficiaries being specified, the purposes of the trust being specified; and the author of the trust being himself the trustee, there is no need of transferring possession.

Reverting, for a moment, to the much contested point of the subsequent cancellation of Exhibit C, it is here apparent that, if I am right in holding that this is a valid declaration of trust of Rs. 20,000, it was not open to the settlor, Haridas Dharamsey to cancel it. Even then, should the story told by the defendant be true in every respect touching the making of Exhibits 9 and 10 in this case, the legal position in regard to this trust would, in my opinion, remain entirely unaffected. So that in any event, the plaintiff would be entitled to recover from the estate of the late Haridas Dharamsey the sum of Rs. 20,000.

The remainder of the document would, no doubt, give rise to very considerable difficulty. Before I deal with that, I may pass on to what appears to me the simplest ground upon which the case, as a whole, might be decided. In Exhibit F, there is a very clear representation of fact, namely, that Lalji is the adopted son of Haridas Dharamsey; and there can be no doubt that that representation of fact was made in contemplation of the marriage of the plaintiff with the said Lalji. The marriage duly took place, and upon a principle common to every case, I have yet found in the English Law books, it would necessarily follow that if this were a misrepresentation of fact, the relations of the parties in law would have to be determined by assuming that the fact was as it was represented to be. A great number of English cases have been relied upon in the course of the able and interesting arguments of

learned Counsel on both sides; and if I were dealing with Exhibit C, and Exhibit C alone, I should have to go very much more closely into an analysis of the reasoning of all the eminent English Judges responsible for those decisions than I need do upon the plain and relatively narrow ground of misrepresentation of fact contained in Exhibit F. Where the law in England has in appearance given rise to most doubt and difficulty is on the point of difference between representations of fact and representations of intention. Thus, in the series of cases relied on by the plaintiff, we have expressions of intention or promises to perform certain acts *in futuro* in contemplation of marriage, such cases as *Laver v. Fielder* (2), *Synge v. Synge* (3), *Hammersley v. Baron De Biel* (4) and *Coverdale v. Eastwood* (5), to which many more might be added. In the case of *Luffus v. Maw* (6), Stuart, V. C., appeared to think that there was a direct conflict of authority between the decision of the House of Lords in *Jorden v. Money* (7) and the decision in *Hammersley v. Baron De Biel* (4). In the case of *Jorden v. Money* (7), however, the question with which Lord Cranworth was probably concerned, was the distinction to be drawn in law between representations of fact and representations of intention, and he insisted upon the well-known doctrine that there can be no fraud *in futuro*. In the case before him the defendant, Mrs. Jorden, before her marriage had promised Mr. Money that she would never sue him on a bond which she held and on the faith of that promise, Money married. Mrs. Jorden presently married herself and sued upon the bond. The question, which the House of Lords had to answer, was whether Money was entitled in equity or in law to any relief and the decision of the majority (Lord St. Leonards dissenting) was that he was not. Misrepresentation *per se*

(2) (1861) 32 Beav. 1; 32 L. J. Ch. 365; 9 Jur. (N. S.) 190; 7 L. T. 602; 11 W. R. 245; 1 N. R. 188; 56 E. R. 1; 134 R. R. 780.

(3) (1894) 1 Q. B. 466; 63 L. J. Q. B. 202; 70 L. T. 221; 42 W. R. 309; 5 R. 165; 58 J. P. 96.

(4) (1845) 12 C. & F. 45; 8 E. R. 1312; 69 R. R. 18.

(5) (1872) 15 Eq. 121; 42 L. J. Ch. 118; 27 L. T. 646; 21 W. R. 216.

(6) (1862) 3 Giff. 592; 8 Jur. (N. S.) 607; 6 L. T. 346; 10 W. R. 613; 56 E. R. 544; 123 R. R. 193.

(7) (1854) 5 H. L. C. 186; 23 L. J. Ch. 666; 10 E. R. 66; 101 R. R. 116.

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as a ground of relief was, in the opinion of Lord Cranworth and the majority of the Judges, confined to misrepresentation of fact. Misrepresentation as to future intention could, at best, be no more than an inchoate contract, or perhaps even a contract of which there might be a breach, but it would only go the length of the legal doctrine laid down with customary terseness and lucidity by Lord Mansfield in the case of *Mon effiori v. Montefiori* (8). Lord Cranworth, in arguing the question in the House of Lords, said that the substantial point for consideration was the difference between representations of intention and representations of fact, and he added that a representation of fact is a contract, while a representation of intention is not. That is a very compendious form of expression, but what the very learned Lord meant doubtless was that he who misrepresents a fact in any transaction, must be taken, for the purposes of adjusting the subsequent legal relations of the parties, to be bound in law to make the fact good as he misrepresented it to be. In other words, that in entering into a contract or inducing another person to act, if one should misrepresent a fact, then the contract between him and the person so deceived, shall be based in law upon the ground that the fact so misrepresented must be made good by the party misrepresenting it. Whereas if it is merely a representation of future intention, then at best it is only a contract and can only be proved as a contract. The difficulty in this case doubtless was that the contract between Mrs. Jorden and Money did not satisfy the requirements of the fourth section of the Statute of Frauds and, therefore, could not be proved as a contract. In all the cases I first enumerated, there was a good contract under the Statute of Frauds, and, therefore, the question the Courts had to answer was much simpler and a totally different question. In the case of *Hammersley v. Baron De Biel* (4), for instance, there was a writing which the Court held to satisfy the requirements of the Statute of Frauds, and in that writing there was a promise, which being made in contemplation of marriage and

the marriage thereon taking place, the Court held must be duly performed. It is clear, then, that there was really no conflict of principle whatever between *Hammersley v. Baron De Biel* (4) and *Jorden v. Money* (7). In the case of *Maddison v. Alderson* (9), there were facts similar to the facts which might be thought to exist here if the latter part of Exhibit C be regarded as a Will. There the suit was by a house-keeper to recover on a writing which was in the form of a testamentary disposition of his property by her old master in her favour. Unfortunately, it was not duly attested and could not be proved as a Will; and the greater part of the judgment of Lord Selborne in the House of Lords is devoted to the examination of the doctrine of part performance. There was no doubt but that the deceased Alderson had promised to bequeath a certain part of his property to his house-keeper Maddison in return for her long and faithful services, but inasmuch as the writing could not be proved as a Will and intrinsically bore no relation whatever to the services of Maddison already performed, the reason for the decision appears to have been that the part performance could not be connected with the imperfect promise. So that in that case, the House of Lords rejected the plaintiff's claim. Had, however, the writing been directly connected with the services rendered, it appears that the decision would have been different; and in any event, the general line of reasoning would be different from that which is always followed in cases of alleged promises made in contemplation of marriage. Where such promises can be duly proved under the Statute of Frauds, the fact that the marriage takes place has, I think, invariably been held to complete the contract and the Court would then enforce performance. There may be special cases on the facts, such as the very recent case of *In re Fickus Farina v. Fickus* (10), where the Court, notwithstanding there was a writing suggesting an intention on the part of some

(9) (1883) 8 A. C. 467; 52 L. J. Q. B. 747; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

(10) (1900) 1 Ch. 331; 69 L. J. Ch. 161; 48 W. R. 250; 81 L. T. 740.

(8) (1762) 1 Black W. 363; 96 E. R. 208.

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third person to give consideration for the contemplated marriage, yet holds that it is not sufficiently specific to be regarded as a contract.

No difficulty of the kind could arise in the present case. It will be observed, however, that where there is a misrepresentation of an existing fact in consequence of which a marriage is brought about, the person making that misrepresentation would, on the principle of any one of these cases, be equally liable in law or in equity to make good his false representation. That is to say, in the present case, if Haridas represented that Lalji was his adopted son, although in fact Lalji was not his adopted son, and thereby induced Ratanbai to give her daughter, the plaintiff, to Lalji in marriage, Haridas would be held bound to make good the representation on the faith of which the marriage had taken place. It is true that in this particular case it would have been impossible for Haridas to make good his representation since at that time Lalji was an orphan. He could not have adopted him even had he wished to do so. But I apprehend what the law means is that all the rights and privileges of the parties shall be adjusted in law as though what had been stated by Haridas had been true, and this adjustment will be as binding upon every one seeking to take the estate after Haridas in the character of heir or legal representative as upon Haridas himself. If I am right so far and I entertain no doubt whatever upon the point—then it is clear that on the death of Haridas in 1912, Lalji was entitled to succeed him as his sole heir and in law must be taken to have done so. On the death of Lalji in July 1913, his widow, the plaintiff, takes the whole life-estate. At present that life-estate is in the hands of the defendant, Navivahu; but had the fact represented by Haridas in Exhibit F, been true, it is clear that she would have been entitled to no more than maintenance and to that she appears to me to be still entitled.

If I am wrong on this point, it will be still necessary to consider the latter part of Exhibit C. In this country, we are not faced by the same difficulty as that which pressed upon the English Courts in such cases as that of *Jorden v. Money* (7). The fourth section

of the Statute of Frauds has been repealed so far as India is concerned and has no operation here. But it is contended that the latter part of Exhibit C is really in the nature of a Will and, therefore, cannot be proved since it is attested by one witness only. It is not, however, as a Will that effect is sought to be given to it. There can be no doubt but that it was a declaration of intention, or it might be called a representation, by Haridas with the object of influencing Ratanbai to give her daughter in marriage to Lalji, Haridas' nephew. Even were the Statute of Frauds in force here, this writing would fulfil the requirements of the fourth section, and I cannot see why it should not be used for such a purpose, and such a purpose only, although no doubt effect could not be given to it as a Will. It is not open to the objection which proved fatal to the case of *Mrs. Maddison*, because it is here expressly connected with the contemplated marriage and the contemplated marriage did in fact take place. Regarded, then, as no more than a contract to do certain acts, as for example to make Lalji the sole heir of the promisor, Haridas, in the event of the marriage taking place, it would become a complete and valid contract upon the marriage being solemnized. And I see no difficulty in following the practice of the English Courts in such cases and directing any of the heirs, executors or legal representatives of the deceased Haridas thereon to convey the whole of his estate in their hands to the heir so designated, that is to say, Lalji; and Lalji being dead, his widow, the plaintiff, would take after him.

It has been objected further that Exhibit C is inadmissible in evidence for non-registration. It is not, however, an instrument which, as it stands, falls within the prohibition of clause (b) of the seventeenth section of the Registration Act. Viewed as I view it, it is simply a promise to do a certain act in the future, in other words, an offer which became a complete contract when the marriage between Lalji and the plaintiff took place. That being so, it would not require registration in its present form.

If we had neither Exhibit C nor Exhibit F in this case, it would still be open to the Court to consider upon the evidence of Ratanbai whether Haridas and the defendant, Navivahu,

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did not jointly represent to Ratanbai in Cutch that Lalji was their only son and heir and so induce her to consent to give her daughter in marriage to him. That would certainly be a misrepresentation of fact again and would, it appears to me, fall under the principle laid down by Lord Cranworth in the case of *Jorden v. Money* (7). But even if it be no more than a promise that Lalji should inherit to Haridas' wealth if Ratanbai gave her daughter in marriage to him, still I do not see that in this country there would be any objection to prove such an oral contract, and, if proved, give effect to it on the ground that it was made in contemplation of marriage, that the marriage took place in consequence of it and thereon it became a complete valid legal contract. I have not gone very deeply into the legal question here, because I think that the ground upon which I am putting my decision, namely, that there was a representation that Lalji was the adopted son of Haridas and that it was upon the faith of that representation that the plaintiff married him, whereupon the law requires that the representation should be made good, is a ground so simple and so firmly established by English authorities that it is unnecessary to elaborate it further.

But I cannot leave this part of the case without expressing my indebtedness to learned Counsel on both sides, whose patience and industry has laid before me almost every important judgment upon the rather unusual but interesting branch of the law with which I had to deal, and my acknowledgments are particularly due to them for what, I am afraid, must have been a fatiguing labour of cheerfully reading to me the extremely long judgments in all these cases. I do not think either their time or labour has been wasted, although I have not gone as deeply and critically as I intended to do into all the interesting cases which have been under discussion here, because, I think, we shall be all much better informed upon the general principles which have underlain the judicial pronouncements of the highest authority in the Courts of England upon this topic.

I pass now to the consideration of another point, namely, whether or not the house in Mint Road formed part of the estate of the deceased Haridas at the time

of his death, or whether it was the sole property of the defendant, Navivahu. In favour of Navivahu there is nothing really except the conveyance itself (Exhibit 8) in the case. I entirely disregard Chhotalal's evidence; and while, no doubt there is a statement in Exhibit 8 that the earnest money was paid out of Navivahu's private purse, I think that the document on the whole is only one of a very common class, the husband desiring to make the purchase *benami*, or to some extent *benami*, in the name of his wife in order to evade the possibility of attachment by creditors. Exhibit C in the case is a letter written by Haridas to Ratanbai shortly before the purchase, in which he announces that he has bought the house for Rs. 30,000 and requests her to send him Rs. 5,000 and any more money that she can spare in order to make up the purchase-money. There is not a word in this letter to suggest that the house is being bought by Navivahu for herself out of her own money. Chhotalal has sworn that when Navivahu married some seven or eight years before the purchase of this house, she received Rs. 8,000 worth of ornaments and Rs. 12,000 in cash from Haridas. It appears that Navivahu's father was a poor man, and we have none of the books of accounts of those early days which should have been forthcoming to show, even assuming that this Rs. 12,000 remained with her husband, Haridas, how that sum increased by the year 1907 to Rs. 30,000. Certain Exhibits of later date, have been put in to show that a *khata* was kept in Navivahu's name and the rents, etc., of this house were credited to her in it. These are Exhibits 13, 14, 15 and 16, I attach, however, little or no importance to such evidence. It is obvious, I think, that if Haridas cared to make the purchase *benami* in the first instance, that is to say, if he was under any apprehension that the property would be taken by any creditor, he would naturally have kept the books in such a way as to give colour to the genuineness of the transaction as it was made in the first instance to appear. I am satisfied that the house was purchased out of Haridas' own money and that if we had all the books covering

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that period before us, this could very easily have been proved.

As a result, then, I find that the plaintiff is entitled to obtain the whole of the estate of the deceased Haridas from the defendant, Navivahu, and that the defendant, Navivahu, is entitled to simple maintenance thereout.

I do not think that it would be worth while after this decision to put the parties to the further expense and harassment of a reference to the Commissioner in respect of these ornaments. Neither do the parties desire such a reference to be made at present; but this is not to be understood as implying that the plaintiff gives up her claim to the ornaments.

On a statement of Counsel, I fix the defendant's maintenance at Rs. 150 a month. The amount is to be paid after the estate has been delivered to the plaintiff, Ladhakabai.

Let Navivahu be continued as Receiver and pay to the plaintiff Rs. 200 a month and pay herself Rs. 50 a month.

In view of the rather peculiar features of the case and that the decision had to turn upon the construction of documents and acts made and done by the husband of the defendant, I think that the costs of both the parties should come out of the estate.

Let the maintenance to Navivahu and interim payment to Ladhakabai both run from the 16th of one month to the 16th of the next month. The first payment and appropriation to commence from the 16th of this month.

The ornaments mentioned in Exhibit 3 to the written statement of Navivahu to be handed over to Ladhakabai at once, subject to the prohibitory order of the Small Cause Court.

Suit decreed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 113 OF 1915.

August 4, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

DESRAJ—OBJECTOR—APPELLANT

versus

SAGAR MAL—JUDGMENT-DEBTOR, AND

ANOTHER—DEBTOR—HOLDER—RESPONDENTS.

Provincial Insolvency Act (III of 1907) s. 37—Lease by insolvent of his occupancy holding, validity of—Duty of Receiver.

If an insolvent lets at a reasonable rent his occupancy holding, the transaction is valid and cannot be avoided under section 37 of the Provincial Insolvency Act, 1907. [p. 717, col. 1.]

It is the duty of the Receiver and the Court administering the estate of an insolvent to preserve, as far as possible, the estate of the insolvent for the benefit of the creditors. It is not desirable to give up any property that is of value. [p. 717, col. 1.]

First Appeal from an order of the District Judge of Meerut

Vessrs. Mohan Lal Sandal and Girdhari Lal Agarwala, for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapru, for the Respondents.

JUDGMENT.—This appeal arises out of an insolvency matter. One Sagar Mal was adjudicated an insolvent upon his own petition on the 1st of August 1914. His petition of insolvency was presented on the 3rd of May previously. A Receiver was duly appointed, who attached certain crops growing on an occupancy holding which belonged to the insolvent. Desraj objected and said that the crops were his, Sagar Mal having executed a lease in his favour on the 16th of April 1914. He lodged security with the Receiver and had the crops released. He then made an application to have his money returned to him. Rao Girraj Singh, one of the creditors who had obtained a decree against Sagar Mal, challenged the validity of the lease, alleging that the lease was fictitious and that the value of the occupancy holding was far beyond the rent mentioned in the lease, which was the sum of Rs. 260 per annum. He further alleged that the insolvent was in actual possession and cultivated the land. The learned District Judge in a short judgment states as follows:—"Under section 37, Act III of 1907, this lease shall be deemed fraudulent and void and I now annul it. Desraj then has no

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locus standi. He has got the crops and his deposit of Rs. 330 is forfeited. I dismiss this objection with costs." Later on the learned Judge says: "The Receiver will arrange to surrender the insolvent's occupancy rights and to vacate the holding. He should enter into negotiations with Rao Girraj Singh for this purpose. The Government demand must be secured and my official expenses." It seems to us that the order of the District Judge was altogether wrong. In the first place, section 37 had no application whatsoever. This section deals entirely with transfers, payments, *et cetera*, made in favour of one creditor by an insolvent with a view of giving that particular creditor a preference over the other creditors (see marginal note to the section). If the insolvent in the present case had in truth made a lease in favour of Desraj at a reasonable rent, the transaction would have been a perfectly valid one. The Receiver would step into the shoes of the insolvent and become entitled to the rent reserved by the lease, which he would hold for the benefit of the creditors. Of course, on the other hand if the Court came to the conclusion that the lease was a mere blind, that it never was intended that any person except the insolvent should cultivate the land, then the crop which was attached still belonged to the estate of the insolvent and the Receiver was entitled to it. It seems to us also that the learned District Judge made a great mistake when he directed the Receiver to surrender the occupancy holding. According to the objection taken by Rao Girraj Singh, the occupancy holding was a very valuable holding. He goes so far as to say that it would let for Rs. 45 a year. It is very difficult to see how the creditors of the insolvent would profit by the surrender of this very valuable holding. It is the duty of the Receiver and the Court when administering the estate of an insolvent to preserve such estate, as far as possible, for the benefit of the creditors. The last thing desirable would be to give up any property that was of value. We allow the appeal, set aside the order of the District Judge and remand the case to him with directions to re-admit it under its original number in the file and to proceed to hear and determine the same according to law, having regard to what we have said

above. Costs of both sides will be costs in the matter.

Appeal allowed; Case remanded.

ODH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 13 OF 1914.

May 12, 1915.

Present:—Mr. Stuart, A. J. C., and
Mr. Kanhaiya Lal, A. J. C.

MAHESH AND OTHERS—DEFENDANTS—
APPELLANTS

versus

Goswami BANWARI LAL—PLAINTIFF,
AND Goswami SUNDER LAL AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by father—After-born son, right of, to question alienation.

As a son acquires a vested interest only in such family property as exists on the date of his birth, he cannot question an alienation made by his father before his birth. [p. 79, col. 1.]

Chuffan Lal v. Kallu, 8 Ind. Cas. 719; 8 A. L. J. 15; 33 A. 283; *Chatarpal Singh v. Natha*, A. W. N. (1906) 26; 3 A. L. J. 38; *Bholanath Khattri v. Kartick Kissen*, *Das Khattri*, 11 C. W. N. 462; 34 C. 372; *Tulshi Ram v. Babu Lal*, 10 Ind. Cas. 908; 8 A. L. J. 733; 33 A. 654; *Hazarimal v. Abani Nath*, 18 Ind. Cas. 625; 17 C. W. N. 280; 17 C. L. J. 38, referred to.

Appeal against the decree of the Subordinate Judge, Gonda, dated the 2nd January 1914.

Babus Bisheshwar Nath and Sarju Parshad, for the Appellants.

Messrs. H. H. Thomas and Wazir Hasan, for Respondent No. 1.

JUDGMENT.—The plaintiff-respondent sued in this case for possession of a 4-annas share of village Ferozpur and for mesne profits on the allegation that he and his father, Sunder Lal, and his younger brother, Murli Lal, lived together as members of a joint Hindu family, owning a 6-annas share of that village, and that Sunder Lal wrongfully made certain alienations of the joint family property without any necessity for immoral purposes. The defendants-appellants are the representative-in-interest of Kali Prasad, the deceased transferee.

On the 20th August 1899, Sunder Lal sold a two-annas share of the said village to Kali Prasad in lieu of Rs. 4,000, out of

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which Rs. 2,000 were stated to have been received in advance and the balance was paid before the Sub-Registrar. On the 6th January 1892, he sold another one-anna share to Kali Prasad in lieu of Rs. 2,000, out of which Rs. 378 were paid before the Sub-Registrar and the balance was left to be paid or credited towards what were described as antecedent debts. On the 13th April 1894, he sold another one-anna share to Kali Prasad in lieu of Rs. 2,000, out of which Rs. 700 were paid before the Sub-Registrar, and the balance was left to be paid or credited towards what were described as antecedent debts. The remaining two-annas were similarly sold by Sunder Lal to other persons, but with those sales we are not concerned. The plaintiff stated that he attained the age of 21 on the 4th January 1913, and that the claim was consequently within time under section 6 of the Indian Limitation Act. The suit was filed on the 2nd January 1913.

The defence was that the plaintiff was more than 21 years old on the date of the suit and consequently the claim was barred by limitation, that the property sold was not the ancestral property of the family, that the plaintiff lived separate from his father, that the sales in question were effected to pay ancestral debts and that the plaintiff had no right to question the same.

The learned Subordinate Judge decreed the claim. He found that the plaintiff was born on the 4th January 1892, after the first sale was effected, that the property sold was ancestral or joint family property, that the sales were effected to raise money for immoral purposes, and that the plaintiff lived jointly with his father and had a right to question the validity of the sales. The defendants-appellants contested all those findings in their memorandum of appeal, but it was conceded during the hearing of the appeal that the plea of separation between the plaintiff and Sunder Lal was untenable. The main matters of evidence on which arguments were addressed to the Court related to the age of the plaintiff as given in the plaint, the alleged separation of Sunder Lal from his brothers Purnanand and Rahas Behari Lal prior to the sales, his right to sue and the purposes for which the sales were effected.

We do not consider that the findings of the learned Subordinate Judge on any of these matters can be accepted. It appears that Sunder Lal was a resident of Brindaban, District Muttra, and was the owner with his brothers, Purnanand and Rahas Bihari Lal, of an 8-annas share in Ferozpur by ancestral right (*vide* the copies of plaint, Exhibit 17, and the settlement decree, Exhibit 18, filed). At Brindaban, Sunder Lal, Purnanand and Rahas Bihari Lal lived jointly. About 24 or 25 years ago Sunder Lal left Brindaban in consequence of the indebtedness of the family and settled at Ferozpur, where he expected to derive some help from the Raja of Mankapur of whose family he was the accredited *guru*. He got his brothers, Purnanand and Rahas Bihari Lal, to sell to him their shares in Ferozpur to the extent of one anna eight pies each and undertook to pay their share of the joint family debts incurred at Brindaban. The original sale-deeds were summoned from Sunder Lal, in whose custody they would naturally be expected to be. Sunder Lal stated that they were in the possession of a son of Purnanand named Chiranji Lal. They were then summoned from Chiranji Lal, but Chiranji Lal stated that he had not got them. Sunder Lal was a defendant to the suit, and his failure to produce the original sale-deeds, which ought to have been in his possession, justified the plaintiff in producing secondary evidence of their contents within the meaning of section 65, clauses (a) and (f), of the Indian Evidence Act, read with section 57, clause (5), of the Indian Registration Act. These sale-deeds were executed on the 3rd June 1889, and are proved by the evidence of Nakhed. Mutation of names was effected on their basis. Sunder Lal became thereby the owner of a six-annas share in Ferozpur, out of which 3 annas four pies were acquired by him. Whether Sunder Lal paid the debts due by the vendors, does not appear from the record, but it is not disputed that Purnanand and Rahas Bihari Lal did not go to Ferozpur, and the entire six-annas share continued to be recorded in the name of Sunder Lal and remained in his possession. Kishori Lal, a witness for the plaintiff, states that Sunder Lal and his brothers continued joint as long as

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they were at Brindaban. There is nothing to show that Sunder Lal remained joint with his brothers in business, mess, or worship after he left Brindaban, or that he possessed any ancestral funds from which the above purchases could have been made. Sunder Lal had no co-parcener on the date of the first sale. The plaintiff was born after the first, but before the second and third sales; and, as pointed out in *Chuttan Lal v. Kallu* (1), *Chatarpal Singh v. Natha* (2) and *Bholanath Khetry v. Kartick Kissen Das Khetry* (3) which were amplified and explained in *Tulshi Ram v. Babu Lal* (4) and *Hazurimul v. Ahani Nath* (5), Sunder Lal was competent on the date of the first sale to sell his proprietary interest in any way he liked. By his birth, the plaintiff acquired a vested interest in such family property as existed on the date of his birth, and the sale of a two-annas share by the first sale-deed cannot, therefore, be impugned.

Regarding the second and third sales, it is clear that Rs. 1,£22 were taken under the former to pay certain antecedent debts due to the vendee and his son Mahesh and a person named Sadho Charan, and Rs. 153-2 were credited in the latter towards a prior bond returned before the Sub-Registrar (*vide* Exhibit AS). Rs. 1,162 are stated in the sale-deed last mentioned to have been credited towards a pledge of ornaments, but no mention was made of any such pledge in the list of antecedent debts given on the date fixed for issues (*vide* the proceedings of the 23rd April 1933). The evidence adduced on the point cannot, therefore, be trusted. There is no satisfactory proof that the remainder of the consideration of the said sale-deeds was taken for legal necessity.

The plaintiff is not, however, entitled to sue to set aside the sales unless he can establish that he attained majority within three years before suit (section 8 of the Indian Limitation Act). He states that he was born on the 4th January 1892; but

when examined by the Court below before the settlement of issues, he stated on oath that he was born on the 6th January 1892. He did not explain how he came to know of his age. His father and mother who are alive, did not come into the witness-box to give evidence as to the date of his birth. He produced Colonel Birdwood, Dr. P. C. Mukerjee and Major Baird in support of his statement as to his age. But when the question resolves itself into a difference of a few days this way or that way, no medical testimony can be of any avail. Colonel Birdwood states that he examined the plaintiff on the 9th March 1913, and judging from his general appearance and the fact that he had cut one wisdom tooth and had also a small moustache, he considered him to be about 21 years old. He admits, however, that "by about 1" he means "a little bit more or a little bit less." Dr. Mukerjee and Major Baird state that they examined the plaintiff on the 15th May 1913, and similarly considered him to be about 21 years old. But both of them admit that they cannot be absolutely positive as to his exact age and that it was possible that he might be 22. If the plaintiff was about 22 years old in May 1913, his suit would obviously be barred by time, for even if section 6 of the Indian Limitation Act, on which he relies, applied, the suit should have been filed within three years from the date when the disability ceased.

The direct evidence produced by the plaintiff in support of his statement as to the date of his birth, consists of three witnesses, Shiva Lal, Girdhari Lal and Baldeo. The plaintiff was born at Ferozpur, District Gonda. Shiva Lal describes himself as a resident of Brindaban, District Muttra. He calls himself the *purohit* or priest of the plaintiff's family and gives his age as 38 years. He states that he was on a visit to Gaya and on his return went to Ajodhiya and thence to the plaintiff's village and was present there when the plaintiff was born. He asserts that a note was made by him at the time in his almanac, to the effect that a son was born to Sunder Lal on *Pus Sudi 5, 1948*, at 4 *gharis* 32 *pals* after sunrise with the object of preparing a horoscope. But he admits that he did not prepare the plaintiff's horoscope, and that there was

(1) 8 Ind. Cas. 719; 33 A. 283; 8 A. L. J. 15.

(2) 3 A. L. J. 38; A. W. N. (1906) 26.

(3) 34 C. 372; 11 C. W. N. 462.

(4) 10 Ind. Cas. 908; 33 A. 654; 8 A. L. J. 733.

(5) 18 Ind. Cas. 625; 17 C. L. J. 38; 17 C. W. N. 280.

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another entry in the almanac in the same month, nine days earlier, which was not in his hand. He further admits that he did not remember the dates on which the other children of Sunder Lal were born. He was on his own statement about 17 years old at the time he went to Ferozpur, and his statement that he went to Gaya and to other places and thence to the plaintiff's village to see the plaintiff's father, who had left his village several years earlier, cannot be trusted. Girdhari Lal, the other witness, is a resident of Benares. He describes himself as a son of the plaintiff's maternal uncle and gives his age as 40 years. He states that he and his mother went to help the plaintiff's mother during her confinement, as there was nobody with her and that he had to leave Ferozpur on the very day the plaintiff was born in consequence of the receipt of a telegram from Allahabad that his grandmother had died on that date. He is, however, contradicted on this point by Baldeo, the next witness, who alleges that he was called by Sunder Lal a day after the birth of the plaintiff and that Sunder Lal told him of the child's birth. Girdhari Lal is unable, moreover, to give the dates of birth of two of his own children, and his statement that he went with his mother to help the plaintiff's mother in her confinement and returned the very afternoon on which the plaintiff was born, taking his mother with him, cannot be accepted. Baldeo, the third witness, professes to have prepared the horoscope of the plaintiff. He brought the horoscope of the plaintiff, but it does not appear how that horoscope if it was genuine, remained in his possession. He admits that he used to cultivate some land belonging to the defendants for about 25 years, and that the defendants got him to relinquish the land about four years ago. He does not mention the presence of either Shiva Lal or Girdhari Lal at the house of the plaintiff's father at the time when he went to prepare the horoscope, and if Shiva Lal was there and was asked to note the birth of the child with a view to prepare a horoscope, it is unlikely that Baldeo would have been called for the same purpose. The evidence of these witnesses appears to us to be absolutely unreliable, and we are unable to find that the date of the plaintiff's birth, as given in the plaint, is satisfactorily established.

Article 126 of the Indian Limitation Act allows a period of 12 years for a suit by a son to set aside an alienation of ancestral property made by his father, from the date when the alienee takes possession of the property. The alienee in this case has been in possession of the property from the dates of the sales and got the shares purchased by him formed into a separate *mahal* in 897 (Exhibit A10). The plaintiff has failed to establish that the suit was filed within three years from the date of his attaining majority. His claim is, therefore, barred by Article 126 of the Indian Limitation Act.

The appeal is accordingly allowed and the plaintiff's claim dismissed with costs here and below. The plaintiff-respondent will bear his own costs throughout.

Appeal allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 20 OF 1914.

October 12, 1914.

Present:—Mr. Justice Oldfield and
Mr. Justice Tyabji.

PARA KOOTHAN AND OTHERS—DEFENDANTS
— APPELLANTS

versus

PARA KULLA VANDU—PLAINTIFF—
RESPONDENT.

Specific Relief Act (I of 1877), s. 9—Plaintiff in joint possession with defendant—Court, whether can restore such possession.

A Court has no power to give joint possession to the plaintiff and the defendant in a suit under section 9 of the Specific Relief Act [p. 721, col. 2.]

Hari Narsin Das v. Eleman Bibi, 23 Ind. Cas. 618; 19 C. L. J. 117, followed.

Sabapathi Chetti v. Subaraya Chetti, 3 M. 250, distinguished.

Appeal under section 15 of the Letters Patent against the judgment of Mr. Justice Sankaran Nair, in Civil Revision Petition No. 428 of 1912, preferred against the decree of the Court of the District Munsif, Panruti, in Civil Suit No. 247 of 1911.

FACTS.—Plaintiff sued on the 28th April 1911 for recovery of possession of certain lands, alleging that he had been in possession for 12 years prior to the suit but that the defendants had taken possession of them on the 16th November 1910. Defendants denied

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the claim and contended that the plaintiff's claim was barred, as he was not in possession within six months prior to the suit. The District Munsif found that plaintiff's evidence as to possession within six months prior to suit was unreliable and that defendants' predecessor-in-title had been admittedly in possession till 5th September 1910. He, therefore, dismissed the suit.

On revision to the High Court the case was sent back for a finding whether the plaintiff was actually in possession within six months before the date of suit and if the possession was not such as could entitle him to maintain the suit, what the nature of that possession was. In compliance with the order of the High Court, the District Munsif submitted a finding to the effect that the plaintiff was not in exclusive possession of the lands in suit within six months prior to suit, that he was only in joint possession with others of whom defendants' predecessor-in-title was one and that such possession did not entitle him to a decree. On a return of the finding, Mr. Justice Sankaran Nair delivered the following

JUDGMENT.—The plaint was presented on the 28th April 1911. The plaintiff was in actual possession, but the defendant took exclusive possession on the 15th or 16th November 1911. This possession of the plaintiff is found by the Munsif to have been not exclusive, but only joint with one Pavadai Asari who is found to be the predecessor-in-title of the defendant. The Munsif also states that even if he converted his joint possession into exclusive possession, it was a trespass and such possession will not be protected under section 9 of the Act.

Thus the plaintiff alleges exclusive possession, but it is found to have been joint possession with Pavadai Asari and the defendant took exclusive possession within six months before suit. The Munsif on these facts was wrong in dismissing the suit. The plaintiff is entitled to be restored to the possession which he held before he was dispossessed by the defendant. Such possession may be or may not be in law joint possession with Pavadai Asari. But it was certainly not joint possession with the defendant. The defendant may be entitled to step into the shoes of his vendor but as the plaintiff claims

to hold to his exclusion, he cannot be considered to be in a better position than a vendee from the plaintiff himself whose title to possession is not admitted by the plaintiff and who dispossesses him without his consent. I think he is now entitled to his decree under the Specific Relief Act. The decree of the Munsif is reversed and there will be a decree for the plaintiff with costs throughout."

Against this judgment, a Letters Patent Appeal was filed by defendants.

Mr. T. M. Krishnaswami Iyer for Mr. C. Padmanabha Aiyangar, for the Appellants.

Mr. G. S. Ramachandra Iyer, for the Respondents.

JUDGMENT.—The District Munsif no doubt found in terms against the plaintiff on issue 1. But we understand the learned Judge as having been unable to accept parts of the judgment as reconcilable with that finding and as having, therefore, thought it necessary to obtain a proper finding after making sure that all material considerations had been dealt with. We are not prepared to hold that he was not entitled to do this in revision.

The question then is only of the propriety of the order he eventually passed, giving the plaintiff a decree with costs throughout, although the finding (accepted by him), was that the plaintiff was entitled to joint possession with the defendants. In *Hari Narain Das v. Elemjan Bibi* (1) it was held that a Court had no power to give joint possession under section 9 of the Specific Relief Act.

In *Sabapathi Chetti v. Subraya Chetti* (2) the decision was only that a person, whose possession has been partially disturbed, can be restored to possession under that provision. We follow the Calcutta decision, and allow the Letters Patent Appeal with costs, dismissing the civil revision petition with costs.

Appeal accepted.

(1) 23 Ind. Cas. 618; 19 C. L. J. 117.

(2) 3 M. 250.

JHABBAN LAL V. SAFDRI BEGAM.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 973
OF 1912.11

May 6, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Leslie Jones.

JHABBAN LAL AND ANOTHER—PLAINTIFFS
DECREE-HOLDERS—APPELLANTS

versus

Musammat SAFDRI BEGAM AND OTHERS—
DEFENDANTS—JUDGMENT-DEBTORS—
RESPONDENTS.

Execution of decree—Decree passed against heirs of
debtor—Attachment—Objection by judgment-debtor—
Possession in lieu of dower Lien.

A decree-holder in execution of a consent
decree passed against his judgment-debtors as heirs
of a debtor attached a house. One of the
judgment-debtors, a young *pardanashin* lady,
objected to the attachment. It appeared that by an
arrangement arrived at between her and other
judgment-debtors she had been placed in possession
of the house in lieu of the dower due to her. Among
other pleas, she contended that as she was a minor
at the date of the decree, she was not bound by it.
The executing Court dismissed the objection but on
appeal her objection was allowed. On second appeal:

Held, that the possession of the objector was
that of a mortgagee; [p. 723, col. 1.]

Ghazidin v. Fakir Bukhsh, 7 A. 73 at p. 77; A. W.
N. (1884) 226; *Azizullah Khan v. Ahmad Ali Khan*, 7
A. 352; A. W. N. (1884) 54; *Ali Bukhsh v. Allahdad
Khan*, 6 Ind. Cas. 76; 7 A. L. J. 567; 32 A. 551;
Ramzan Ali Khan v. Asghari Begum, 6 Ind. Cas. 405;
32 A. 563; 7 A. L. J. 614; *Musammat Bebee Bachun
v. Sheikh Hamid Hossein*, 14 M. L. A. 377; 17 W. R.
(P. C.) 113; 10 B. L. R. P. C. 45; 2 Suth. P. C. J. 531;
3 Sar. F. C. J. 39; 20 E. R. 828; *Banoo Begum v. Mir
Aun Ali*, 9 Bom. L. R. 188; *Tahir-un-nissa v. Nawab
Hasan*, 24 Ind. Cas. 938; 36 A. 558; 12 A. L. J. 906,
referred to.

that assuming that the objector was bound by the
decree, the house was liable to attachment subject
to the objector's lien over it to the extent of her
dower. [p. 723, col. 2.]

Miscellaneous appeal from the order of
the Court of the Divisional Judge Delhi
Division, dated the 21st March 1912, rever-
sing that of the District Judge, Delhi, dated
the 14th December 1911.

Messrs. Nanak Chand and Muhammad
Rafi, for the Hon'ble Mr. Muhammad Shafi,
K. B., for the Appellants.

Messrs. Fazal-i-Hussain and Santanam and
Sheikh Gulab Din, for the Respondents.

JUDGMENT.—This following family
table will be useful in considering the
questions that arise in this appeal:—

Zahir-ud-din=Musammat Nur Jahan Begam,
defendant No. 2

Riaz-ud-din=Musammat
Safdri Begam,
defendant No. 3.

Razi-ud-din,
defendant No. 1.

Zahir-ud-din died on the 5th December
1906, leaving very considerable property,
and a widow Musammat Nur Jahan
Begam, defendant No. 2. His son Riaz-ud-
din died on the 26th January 1909,
leaving a young widow Musammat Safdri
Begam, defendant No. 3.

After the death of Riaz-ud-din, a deed
of partition of the property left by Zahir-
ud-din was executed on the 28th March
1909 between the three defendants and by
this deed, which was duly registered, a
certain house was assigned to Musammat
Safdri Begam in lieu of her claim of
Rs. 25,000 as the deferred dower due to her
from her deceased husband Riaz-ud-din,
the deed stating that the value of Riaz-
ud-din's share in his father's property was
Rs. 47,000.

It is not denied that Musammat Safdri
Begum, in virtue of this arrangement, there-
after obtained possession of the said
house. On the 4th May 1910, plaintiffs
Jhabban Lal and Nathali Mal brought a
suit against all three defendants for recovery
of a sum of Rs. 3,414-1-3 due on a bond
executed by Riaz-ud-din and of a sum of
Rs. 2,000 due on promissory notes executed by
the same person, and on the 28th July 1910
obtained a consent decree against all three
defendants for the full amount claimed
and costs. This decree runs as follows:—

"It is also further ordered that the decree
will be executed against all the defendants
to the extent of property of Riaz-ud-din,
deceased, in their hands and also against
the person of defendant No. 1. It is also
further ordered that this decree is not to
be executed for six months from this date,
during which time the defendants will not
alienate in any way any property of
the deceased in their hands without the
permission of the Court and will pay into
Court what they realise by such transfer
up to the decretal amount, including
interest and costs."

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Before proceeding, we may here note that Musammat Safdri Begam is described by the Divisional Judge, writing in March 1912, as a "young *parlanahsin* lady of barely eighteen years of age." And this young lady must, therefore, at the time of the decree (July 1910) have been about 16 years old (see also the statement of her brother Mirza Hamid Ali Khan made on the 29th November 1911). It is also to be noted that about a year prior to the date of the decree, she had been given possession of the house in question in satisfaction of her undoubted and incontestable right to claim Rs. 25,000 as deferred dower from her late husband's estate, and she had been given possession of this house by the heirs of her husband. In these circumstances, there is ample authority for holding that she became, to all intents and purposes, a mortgagee of the house and was entitled to retain possession thereof until satisfaction of her dower claim [See, e. g., *Ghazidin v. Fakir Bakhsh* (1); *Ali Bakhsh v. Allahdad Khan* (2); *Ramzan Ali Khan v. Asghari Begam* (3); *Musammat Bebee Bachun v. Sheikh Hamid Hossein* (4); *Azizullah Khan v. Ahmad Ali Khan* (5); *Banoo Begum v. Mir Aun Ali* (6); *Tahir-un-nissa v. Nawab Hasan* (7), etc.] So far, then, as this house was concerned, there was no conceivable reason why she should have consented to a decree which might have imperilled her rights, as her lien over the property fully protected those rights as against such claimants as plaintiffs.

But she was a young *parlanashin* girl and was obviously duped by the other parties to the litigation, which resulted in the "consent decree," and everything points to the possibility that the decree-holders and defendants Nos. 1 and 2 conspired against her. That such may have been the case is, we think, a fair inference from the facts that though she was a minor at the time, no guardian *ad litem* appears to have

been appointed, and that though there is ample other property belonging to the estate of Riaz-ud-din in the hands of defendants Nos. 1 and 2, the decree-holders, as soon as the period of six months specified in the decree had elapsed, forthwith proceeded to attach the house in the possession of defendant No. 3. The first court unfortunately did not realise how defendant No. 3 had apparently been defrauded and, therefore, rejected her objection to the attachment on the ground that she was "estopped" from denying the force of the consent decree. It is to be regretted that the learned District Judge who had the minority of the girl brought to his notice did not, in deciding that she was "estopped" from contesting the decree, keep in mind the fact that defendant No. 3 was at the time of decree very young, if not a minor, and had nothing to gain but everything to lose by consenting to a decree which greatly prejudiced her undoubted rights.

The Divisional Judge reversed the order of the District Judge and upheld the objections urged by defendant No. 3, and in our opinion quite rightly. The decree is open to the gravest suspicions so far as it affects the rights of Musammat Safdri Begam and is highly suggestive of trickery practised upon her. But assuming that we cannot in these proceedings go behind the decree, we have no hesitation in holding that, properly construed, that decree merely amounts to this that the decree-holder is entitled to attach the house in her possession but that it does not give him the right to ignore the lien which she has, in law and equity, upon that house to the extent of her dower claim of Rs. 25,000. The order under appeal probably goes too far in declaring that the house cannot be attached at all, and we, therefore, accept the appeal to the extent of varying the declaration *pro tanto*. In other words, we declare that the house in question is liable to attachment, but that such attachment is subject to the objector's lien over the house to the extent of Rs. 25,000. As we practically uphold the order of the Divisional Judge, we direct appellants to pay respondent's costs in this Court. Mr. Santanam for defendant No. 1 contends that he was wrongly impleaded as a

(1) 7 A. 73 at p. 77; A. W. N. (1884) 226.

(2) 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567.

(3) 6 Ind. Cas. 405; 32 A. 563; 7 A. L. J. 614.

(4) 14 M. I. A. 377; 17 W. R. P. C. 113; 10 B. L. R. P. O. 45; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39; 20 E. R. 828.

(5) 7 A. 358; A. W. N. (1885) 54.

(6) 9 Bom. L. R. 188.

(7) 24 Ind. Cas. 988; 36 A. 558; 12 A. L. J. 906.

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respondent in this appeal as he is not interested one way or the other in it, and he asks for costs. But we see no reason to award him costs, as he must have known that his presence here to-day was quite unnecessary as no order of ours could possibly affect him on this appeal.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATIONS NOS. 43, 44 AND 45 OF 1915.

April 23, 1915.

Present:—Mr Lindsay, J. C.

VILLAGE CO-OPERATIVE BANK,
ANGURI BAGH, FYZABAD—

PLAINTIFF—APPLICANT

versus

KALI DIN AND OTHERS—DEFENDANTS—

OPPOSITE PARTY.

Co-operative Societies Act (II of 1912)—Debt due to a Village Co-operative Bank by one of its members—Successor-in-interest, liability of—Village Co-operative Bank, construction of bye-laws of.

Three suits were brought for the recovery of moneys due to the plaintiff Bank on promissory notes executed by one M deceased, who at the time of his death was a member of the plaintiff Bank. The defendant No. 1, who was the son of M, became member of the society on the death of his father. One of the bye-laws of the plaintiff society laid down: "If the heir or successor-in-interest is elected, all rights and liabilities of the deceased member shall devolve on him."

Held, that the defendant No. 1, having accepted the bye-law in question by joining the society as a member, was bound to pay the liabilities of his father to the Bank irrespective of the assets which he had received from his father. [p. 725, col. 1.]

Appeal against an order of the Munsif, Fyzabad, dated the 22nd February 1915, exercising Small Cause Court powers.

Mr. Haidar Husain, for the Applicant.

Mr. St. U. Thompson, for the Opposite Party.

JUDGMENT.—These three applications are made under section 25 of the Provincial Small Cause Courts Act for revision of three orders passed by the Munsif of Fyzabad. The facts are as follows. Three suits were brought by the village Co-operative Bank, Anguri Bagh, Fyzabad, against three defendants, Kali Din, Debi and Chhedi. Of these, the first defendant

Kali Din was the son of one Mangal. The suits were brought for recovery of moneys said to be due to the plaintiff Bank on promissory notes executed by this deceased Mangal. The second and third defendants in the case were sureties for the payment of the debts contracted by the deceased Mangal. Mangal was a member of the plaintiff Bank at the time of his death and it is an admitted fact that after his father's death the defendant Kali Din became a member of the society and was a member at the time these suits were brought. The question which has arisen here is as to the extent of the liability of Kali Din for the payment of the debts due on the promissory notes in question. The case for the plaintiff in the Court below was that Kali Din was responsible in the same manner as if he had executed the promissory notes himself. The view which was taken by the Munsif was that Kali Din was only responsible for these debts to the extent of the assets which he had inherited from his father. In support of the case put forward by the plaintiff society, bye-laws were produced, of which bye-law No. 12 lays down that "if a member dies and if his heir or successor-in-interest is eligible for admission as a member, it shall be open to the general meeting to elect such heir or successor-in-interest as a member in place of the deceased, but the general meeting shall not be bound to do so, nor shall the heir or successor-in-interest of a deceased member be bound to join as a member. If the heir or successor-in-interest is elected, all rights and liabilities of the deceased member shall devolve on him". It is admitted that these bye-laws were framed under the old Co-operative Credit Societies Act, X of 1904, but by virtue of section 49 of the new Act, II of 1912, these bye-laws are in force so far as they are not inconsistent with the express provisions of the new Act. The learned Munsif seems to question the validity of this particular bye-law which was relied upon by the plaintiff society, and for various reasons, he seems to have considered it *ultra vires* of the society. I am unable to agree with this view of the matter. The whole argument of the learned Munsif seems to me to rest upon a misconception

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of the relation existing between this defendant Kali Din and the plaintiff Bank. This is not a case in which the Bank is trying to enforce a liability, incurred towards it by the deceased Mangal, against his legal representative Kali Din. If that were so, then no doubt the view of the Munsif would be correct and Kali Din would not be liable to a greater extent than that of the assets which he has received from his father. That is the ordinary law; but Kali Din was not being sued as the legal representative of his father, but on the footing of his being a member of the plaintiff society and of his having contracted to become a member of the society on the terms laid down in the bye-law No. 12. There can be no doubt that when Kali Din joined the society as a member he, by acceptance of the bye-law in question, became entitled to all the rights and subject to all the liabilities of his deceased father. I fail to see why this bye-law should in any way be held *ultra vires*. The only reason which the Munsif can give is that it enhances the liability of Kali Din and imposes upon him more responsibility than would have rested on him had he merely been the legal representative of his father; but his liability is more than that of a legal representative, because he has undertaken all the rights and liabilities of his father by joining the society. I can see no reason why in the interest of these Co-operative Societies, a rule of this sort should not be made, and so far as I can see, there is no provision either in the old or in the new Co-operative Credit Societies Act rendering the bye-law *ultra vires*. The position is clear enough to me. It seems to me that Kali Din is not entitled to plead that he is only responsible to the extent of the assets which he has received from his father. I allow these applications and direct that the decrees of the Court below be amended so as to make Kali Din fully responsible for the debts in question and not merely responsible to the extent of the estate which he has inherited from his father. The applicants will have their costs in all the Courts.

Applications allowed.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 450 OF 1915.

November 24, 1915.

Present:—Mr. Justice Rattigan and Mr. Justice Shadi Lal.

BISHEN DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE LIQUIDATOR OF THE DOABA BANK, LTD., AMRITSAR, IS LIQUIDATION AND OTHERS—DEFENDANTS—RESPONDENTS.

Companies Act (VI of 1882), s. 169—Appeal against orders made in winding-up proceedings—Limitation—Extension of time—Principles—Special circumstances.

The general principles for extending time in winding up appeal cases are as follows:

(i) The object of the Act (VI of 1882) being that matters should be settled speedily and that winding-up proceedings should not be protracted unduly, an extension of time will not be granted except under 'special' circumstances; [p. 726, col. 1.]

(ii) in the absence of 'special' circumstances, a litigant who has obtained a judgment which, by expiration of the time limited for appeal, has become absolute, ought not to be deprived of it; [p. 726, col. 1.]

(iii) a person who applies for an extension of time must show, not an equity properly so-called, but something which entitles him to ask for the indulgence of the Court to relieve him from the legal bar that is imposed by the Act of the Legislature. [p. 726, col. 1.]

Lakhmidas Khinji Spinning and Weaving Company, Ltd., In re, Gureedhantias Khattar v. Sanders Slater, 11 Ind. Cas. 562; 13 Bom. L. R. 55, referred to.

Under section 169 of Act VI of 1882, the "special circumstances" which entitle a person to ask for extension of time require that he will not be granted the indulgence unless he can satisfy the Court that he himself has acted with reasonable diligence and that the delay in prosecuting his appeal, was due either to the respondents' conduct or to some action or inaction on the part of the Court below. [p. 726, col. 2.]

Daulat Ram v. Woolton Mills Company Ltd., Delhi, 95 P. R. 1908; *Sultan Singh v. Balthawa Singh*, 22 Ind. Cas. 795; 100 P. L. R. 1914; 68 P. R. 1914; *Hira Lal v. Himalaya Glass Works Company*, 10 Ind. Cas. 433; 100 P. W. R. 1911; 176 P. L. R. 1911; *Pava Chand v. Official Liquidators of People's Bank of India Ltd.*, 29 Ind. Cas. 265; 46 P. R. 1915; 71 P. W. R. 1915; 90 P. L. R. 1915; *East India Distilleries and Sugar Factories v. Tinnervelly Swarnapani Sugar Mills Co., Ltd.*, 4 Ind. Cas. 872; 19 M. L. J. 511; *Ramanappa v. Official Liquidators Bellary*, 22 M. 291, referred to.

Miscellaneous appeal from the order of the Additional Judge, Amritsar, dated the 11th January 1915, rejecting the application.

Messrs. C. Bevan Pethan and Bhagat Ram Puri, for the Appellants.

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Messrs. Santanam and Rup Ram and Lala Dharam Das Suri, for the Respondents.

JUDGMENT.—In the course of winding up the Doaba Bank, Limited, the then Official Liquidator applied to the Additional Judge, Amritsar, for sanction to a proposal made by him on behalf of certain of the Directors, but this application was rejected by order dated the 11th January 1915. An appeal has been preferred by the Directors interested in that application and it is not now disputed that the provisions of section 169 of Act VI of 1882 are applicable to it. A preliminary objection has been raised by Mr. Santanam to the effect that the appeal is time-barred, inasmuch as notice of the appeal was not served upon respondents within three weeks of the date of the order under appeal. This period of three weeks admittedly expired on the 1st February 1915, while the present appeal was filed in this Court on the 15th February. Mr. Santanam points out that the memorandum of appeal does not attempt to explain the delay; that it contains no prayer for extension of time; and that there is no separate petition on that behalf filed by the appellants. The appeal was laid in due course before a Judge in Chambers and was admitted to a hearing by an *ex parte* order dated the 23rd February, but so far as we can see from the record, the learned Judge was not asked to extend the period prescribed by section 169 of the Act.

Obviously, the appeal is barred under the strict provisions of section 169, but it is, of course, open to this Court to extend the time if good cause be shown for the grant of such indulgence.

The general principles applicable to cases of this kind are as follows:—

(1) The object of the Act being that matters should be settled speedily, and that winding-up proceedings should not be protracted unduly, an extension of time will not be granted except under "special" circumstances;

(2) in the absence of special circumstances, a litigant who has obtained a judgment which, by expiration of the time limited for appeal, has become absolute, ought not to be deprived of it; and

(3) a person who applies for an extension of time must show, "not an equity properly so-called, but something which entitles him

to ask for the indulgence of the Court to relieve him from the legal bar that is imposed by the Act of the Legislature" [Buckley's Companies Act, 9th Edition, page 415, and *Lakhmidas Khimji Spinning and Weaving Company, Ltd., In re Goverdhandas Khattao v. Sanders Slater* (1).]

It is impossible to define, with any attempt at precision, the "special circumstances" which would entitle a person to ask for an extension of time, but there is ample authority for the proposition that he will not be granted the indulgence unless he can satisfy the Court that he himself has acted with reasonable diligence and that the delay in prosecuting his appeal was due either to the respondent's conduct or to some action or inaction on the part of the Court below [see *Daulat Ram v. Woollen Mills Company, Ltd., Delhi* (2), *Sultan Singh v. Badhawa Singh* (3), *Hira Lal v. Himalaya Glass Works Company* (4), *Tara Chand v. Official Liquidators of People's Bank of India, Ltd.* (5), *East India Distilleries and Sugar Factories v. Tinnevely Sarangapani Sugar Mills Co., Ltd* (6), *Ramonappa v. Official Liquidators Bellary* (7) and *Lakhmidas Khimji Spinning and Weaving Company, Ltd., In re, Goverdhandas Khattao v. Sanders Slater* (1).]

The facts upon which appellants rely as explanatory of the delay and as affording ground for the Court to extend the ordinary period prescribed by the Act, are set forth in the affidavit of Mr. Gokal Chand, one of the appellants, and are not controverted by Mr. Santanam. From this affidavit, it would appear that the Directors heard on the 16th January that the Official Liquidator's application had been rejected and that Mr. Gokal Chand thereupon wrote to the Official Liquidators asking for an attested copy of the Court's orders. Before proceeding, we may here observe that no explanation has been given why the Directors did not apply direct to the Court

(1) 11 Ind. Cas. 562; 13 Bom. L. R. 558.

(2) 95 P. R. 1908.

(3) 22 Ind. Cas. 795; 68 P. R. 1914; 100 P. L. R. 194.

(4) 10 Ind. Cas. 433; 176 P. L. R. 1911; 100 P. W. R. 1911.

(5) 29 Ind. Cas. 265; 90 P. L. R. 1915; 46 P. R. 1915; 71 P. W. R. 1915.

(6) 4 Ind. Cas. 872; 10 M. L. J. 511.

(7) 22 M. 291.

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for the copy. On the 17th January Mr. Gokal Chand and another Director, Rai Bahadur Bishen Das, consulted Counsel with a view to an appeal being preferred to this Court and were informed that an attested copy of the order was necessary before any such appeal could be filed. The order in question was short and a copy of it could have been obtained, by the payment of what is known as an "urgent fee," within a few hours and at no appreciable expense. We may fairly assume also that Counsel had impressed upon his clients the necessity of filing the appeal without delay. But the Directors apparently preferred to wait until they heard from the Official Liquidator in reply to Mr. Gokal Chand's letter of the 16th January. On the 20th January, a reply was received from the Official Liquidator who, however, sent them merely an unattested copy of the Court's order. Again no action was taken on receipt of this letter till the 23rd January, when Rai Bahadur Bishen Das wrote to Counsel in Amritsar, asking him to obtain an attested copy of the said order. Here, too, no explanation is given why nothing was done between the 20th and the 23rd January.

Having written his letter of the 23rd January, Rai Bahadur Bishen Das took no further action till the 27th January. On the latter date, as he had received no reply from his Counsel in Amritsar, he telegraphed to one Lala Girdhari Lal to apply for an attested copy and on the same day Mr. Gokal Chand himself went to Amritsar to ask for an explanation from Counsel as to the delay. If Mr. Gokal Chand could go to Amritsar on 27th January, we see no reason why he could not have gone or sent one of his employees on the 7th January. On the 27th January, Counsel at Amritsar sent the Directors copies of various proceedings but not a copy of the order from which the appeal was to be preferred, and these copies were received on the 28th with a letter informing the Directors that the record was to be sent to this Court. Mr. Gokal Chand thereupon enquired from the office of this Court whether the record had arrived, but could get no definite information. It is said (and quite correctly) that the 29th and 30th January were Court

holidays and on the latter date, Mr. Gokal Chand again telegraphed to his friend at Amritsar, Lala Girdhari Lal, to obtain the requisite copy. A reply was received on the 2nd February to the effect that the record was in the Court of Rai Bahadur Damodar Das at Lahore. No attempt was made to obtain a copy of the order from the latter Court, but on the 3rd February Mr. Gokal Chand went to consult Counsel in Lahore but found that the learned gentleman whom he had engaged on the 17th January was away from the station, and though there had already been great delay in obtaining the copy, it did not strike Mr. Gokal Chand as necessary to get the copy from the Court of Rai Bahadur Damodar Das till the 4th or 5th February. On one of these dates, (he is not sure which) he instructed his Counsel's clerk to obtain the copy. As a matter of fact, application for the copy was made on the 6th February and the copy was supplied on the 8th February.

The period of three weeks had now already elapsed, but the appellants proceeded in the same leisurely fashion as they had done up to this time. The memorandum of appeal was drafted and was ready for presentation on the 10th February, but it was not till the 15th February that the appeal was actually filed in this Court, and even then the memorandum of appeal contained no prayer for an extension of time.

Such are the admitted facts, and we cannot find any ground to justify us in granting appellants an indulgence which is granted rarely and only in circumstances which show that the appellant has exhibited reasonable diligence. In the present case, it would have been quite easy for appellants to obtain the copy direct from the Court within a day or two after they had consulted Counsel on the 17th January, and this too without incurring any great expense. They elected, however, to proceed in a leisurely manner, though they must have known the urgent necessity for prompt action, and as a result they must suffer the consequence. They have not attempted in any case to explain how it was that they did not file their appeal till the 15th February, despite the fact that the period of limitation had long since expired, when they obtained the

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copy of the Court's order on the 8th February.

In our opinion, no cause has been shown why we should deprive respondents of the right which accrued to them when the period for appealing expired without an appeal being preferred, and we accordingly dismiss the appeal with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 49 AND 56 OF 1911.
April 7, 1915.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

Nawab Wala Qadar HUSAIN ALI MIRZA

AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD AZIM KHAN AND OTHERS —
DEFENDANTS—RESPONDENTS.

Grant—Jagir granted by King of Oudh. Sanad granted by British Government—Grant in perpetuity, so long as there are lineal heirs, rights conferred by—Grant, construction of—Pensions Act (XXIII of 1871)—Grant of villages revenue free, if pension—Document not enforceable as mortgage, whether admissible for collateral purpose—De facto guardian, effect of dealings of, on minor—Alienation of Muhammadan minor's property by unauthorized guardian, effect of—Muhammadan Law—Continuing obligation, ratification of.

A jagir granted by Wajid Ali Shah, the then King of Oudh, to his eldest son for the maintenance and support of the Prince and his children was maintained by the British Government after the annexation of Oudh. The sanad granted by the British Government provided that it having been established after due enquiry that the villages had been held in rent-free tenure under the former Government, the Chief Commissioner was pleased to maintain the tenure in perpetuity so long as there were lineal heirs subject to the conditions of loyalty, etc., specified in the sanad.

Held, that the grant in question conferred a heritable and transferable estate, that the duration of the grant was to last as long as the grantee had lineal descendants existing and that the grant was to lapse or to be resumed on the happening of any of the contingencies specified therein and on no other. [p. 732, col. 1.]

A grant of villages, revenue free, in consideration of the rights held by the grantee prior to the confiscation of Oudh, does amount to a pension within the meaning of Act XXIII of 1871. [p. 732, col. 1.]

A document which is not enforceable as a mortgage may be used in evidence for a collateral purpose unconnected with the mortgage. [p. 735, col. 1.]

Although as a rule the dealings of a *de facto* guardian of a Muhammadan minor with the minor's property do not bind the minor, there might be cases of urgent and imperative necessity where a transaction entered into for the benefit of the minor may be binding on him. [p. 735, col. 1.]

According to the general principles of Muhammadan Law an alienation of the minor's property by an unauthorized guardian, even if it is not made for a valid cause, is neither void nor voidable, but its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority though the effect of his decision will relate back to the date of the inception of the transaction. [p. 736, col. 1.]

In the case of a continuing obligation, such as the engagement of a servant or the continuance of a tenancy, an absence of repudiation or the acceptance of service or rent with full knowledge of the facts, implies an undertaking to adhere to the obligation and operates as a ratification or renewal of the old contract by the party accepting the service or rent. [p. 736, col. 1.]

Appeal against the decree of the Subordinate Judge, Lucknow, dated the 21st December 1910.

Messrs. Sami Ullah Beg, Wazir Hasan and Farzand Ali, for the Appellants.

Pandit Gokaran Nath Misra and Babu Salig Ram, for the Respondents Nos. 11 to 13.

Mr. A. P. Sen, for the Respondents Nos. 4 and 32.

JUDGMENT.—These appeals arise out of a suit brought by some of the heirs of Prince Hamid Ali for possession of certain jagir villages by redemption of a mortgage effected by an award, dated the 21st March 1877, and for the rendition of accounts and the recovery of surplus mesne profits appertaining to the mortgaged property.

The jagir was granted by Wajid Ali Shah, the then King of Oudh, to his eldest son, Prince Hamid Ali, for the maintenance and support of the Prince and his children, and was maintained by the British Government after the annexation of Oudh. Prince Hamid Ali died on the 8th July 1874, leaving a widow, Nawab Kaukab Mahal, three sons, Muhammad Mirza, Shappar Mirza and Qurratulain, and a daughter, Nawab Dilband Begam. Plaintiff No. 5 and defendants Nos. 21, 22 and 23 are the heirs of Muhammad Mirza, who died in 1887. Plaintiffs Nos.

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3 and 4 are the heirs of Shapper Mirza, who died in 1889. Plaintiff No. 2 is the son and defendant No. 23 is the widow of Qurratulain, who died in 1902. After the death of Prince Hamid Ali, Mahdi Quli Khan, the predecessor-in-title of defendants Nos. 1 to 10 and 26 to 43, brought forward a claim to recover certain debts, said to have been due by the Prince, which, at the suggestion of the ex-King, was referred to the arbitration of the Political Agent in Calcutta. On the 21st March 1877, the Political Agent made an award declaring Mahdi Quli Khan entitled to Rs. 36,836-4-5 and allowing him to retain possession of the *jagir* which was under his management on behalf of the Prince during his life-time, till the aforesaid debt with interest thereon at 6 per cent. per annum was liquidated. The plaintiffs stated that the said award operated as a mortgage in favour of Mahdi Quli Khan and that the mortgage money was satisfied from the income of the *jagir*, including the price fetched by the sale of *kaukar* and trees, and the compensation money realized by the mortgagee in respect of a portion of the *jagir* property. The allegation of the plaintiffs was that the defendants did not render any accounts to the plaintiffs and were refusing to give back possession, asserting a right to retain possession under certain leases and mortgages executed by Prince Muhammad Mirza, the eldest son of Prince Hamid Ali, to which Shapper Mirza and Qurratulain, the predecessors-in title of the plaintiffs, are said to have assented. The plaintiffs averred that they were not bound by the said deeds, but if for any reason the Court found that those deeds were binding on them and that any money was due to the defendants under those deeds or under the award, they were willing to pay whatever money might be found due on the same.

The claim was resisted chiefly by defendants Nos. 2 to 5 and 7, 19, 31 and 37, who are some of the heirs of Mahdi Quli Khan, and by defendants Nos. 11 to 14, who profess to be in possession of the *jagir* villages, save Kanausi and Sadrauna, under certain leases and mortgages effected by Jafar Quli Khan, one of the sons of Mahdi Quli Khan. Defendant No. 20 is also a mortgagee from Jafar Quli Khan, but no

defence was filed on his behalf. The other defendants did not put in their appearance. The defence, so far as it is material for the purpose of this appeal, was that the debt due under the award was not paid up, that the suit was premature, and that Jafar Quli Khan and his representatives-in-interest were in any case entitled to retain possession of the *jagir* villages under a lease executed by Muhammad Mirza, the eldest son of Prince Hamid Ali, in favour of Jafar Quli Khan on the 6th January 1882, which the other heirs of Prince Hamid Ali had ratified, and certain mortgage-deeds executed in his favour by the said heirs, till the debts therein referred to and the debts due under the award were paid. It was subsequently admitted by the contesting defendants during the hearing of the suit that the debt due under the award was satisfied from the usufruct in 1886, but it was pleaded that the claim was barred by time. The plaintiffs in reply urged that the alleged ratification by Shapper Mirza and Qurratulain was ineffectual, inasmuch as they were minors at the time of the alleged ratification, that the ratifiers had only a life-interest in the grant, and had no right to bind the succeeding life estates, and that the transfers relied on by the contesting defendants were inoperative under section 12 of the Pensions Act.

The learned Subordinate Judge found that the grant in question conferred an absolute and transferable estate on Prince Hamid Ali and his heirs in succession, that the lease effected by Muhammad Mirza on the 6th January 1882 created a charge on the *jagir* villages for Rs. 25,000, that the lease was ratified by the brothers and sisters of Muhammad Mirza and was binding on the plaintiff, that the rights claimed by Jafar Quli Khan and his representatives-in-interest under the lease of the 6th January 1882 had become absolute by lapse of time and that the claim for possession was not maintainable. The heirs of Shapper Mirza and Qurratulain have separately appealed. The primary question for decision in the appeals is, whether the rights conferred by the grant of the 18th February 1861 on Prince Hamid Ali and his successors-in-interest were heritable and

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transferable and whether the leases and mortgages set up by the contesting defendants bar the plaintiffs' claim for possession.

The contention of the learned Counsel who appeared for the plaintiffs-appellants was that the grant conferred a succession of life-estates without any power of alienation. It is not denied that the *jagir* in question was obtained by the Prince under a grant made by his father, Wajid Ali Shah, when he was King of Oudh and that it was maintained by the British Government with the object of relieving the ex-King from the burden of supporting such of his relations from his pension as were maintaining themselves from the *jagir* properties held by them from before the annexation. The original grant was made by the ex-King sometime in 1256 *Fasli* or 1849 A. D., and is not forthcoming. We find, however, from certain investigations made by the Government in 1869 that the Prince held the *jagir* by way of a *muafi* grant and realised its revenue from the persons in possession. The statement of royal *jagirs* prepared in that year shows that the investigating officer recommended that the *muafi* should be maintained for the benefit of the Prince and his progeny in perpetuity, but the Commissioner varied that recommendation by suggesting that it should be maintained only for the life of the Prince (Exhibit 6). The Government of India, however, by its letter No. 173, dated the 12th January 1861, sanctioned the grant in perpetuity so long as there were lineal heirs of the Prince in existence (Exhibit 5). On the 4th November 1861, a *sanad* was issued to the Prince (Exhibit B14), with a vernacular counterpart attached (Exhibit B25), couched in the following terms "It having been established after due enquiry that Mirza Muhammad Hamid Ali Khan held the under-mentioned villages in *Zila* Lucknow in rent-free tenure under the former Government, the Chief Commissioner under the authority of the Governor-General in Council is pleased to maintain the tenure in perpetuity so long as there are lineal heirs on the following conditions:—That he shall have surrendered all *sanads*, title-deeds, and other documents relating to the tenure in question to be delivered to the Government. That he and

his heirs shall strictly perform all the duties of landlords, in matters of Police and any Military or Political service that may be required of them by the authorities and that they shall never fall under the just suspicion of favouring in any way the designs of enemies of the British Government. If any one of these conditions is broken by the present incumbent or his heirs, the tenure will be immediately resumed." The property granted was described as comprising villages Bhelawan measuring 687 acres, Ali Nagar 437 acres, Para 1312 acres, Nadauna 337 acres, Kanandi 687 acres, Sadrauna 312 acres and Harchandpur Kanaura of which the area was not mentioned. A summary Settlement of these villages had taken place prior to the grant, but the land-revenue assessed was not mentioned in the *sanad*. In the letter sent by the Secretary to the Government of India, Foreign Department, dated the 12th January 1861, to the Chief Commissioner of Oudh sanctioning the grant (Exhibit 5), the Government of India stated: "In cases where the King (and still more where his predecessors) had given *jagirs* to individual members of the royal family and had so launched them into the world with fortunes of their own, it would be harsh in the extreme to resume these fortunes, or even to interfere with the descent of such fortunes to legitimate or recognized heirs, and to make them all dependent upon the King's consideration and carefulness, he having long ago disencumbered himself of them", and then proceeded to say: "as regards grants in perpetuity which the Chief Commissioner has ascertained, were liable to resumption on the failure of direct heirs of the body of the grantee, and also on the holder incurring the King's displeasure, the President in Council observes that the Government of India is not competent to enter upon judgment of such acts (especially where Begams are concerned) as were likely to cause the King's displeasure, and this being so, the fair course is to recognise the perpetuity of the grants. The President in Council, therefore, sanctions the continuance in perpetuity of the 15 *jagirs* referred to in paragraph 6 of this letter, so long as there are lineal heirs by the King." It is admitted that *jagir* No. 30 now in dispute was included in the 15 *jagirs* above referred to. The revenues of *jagirs* Nos. 2

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17, 18, 22, 29, 30 and 37 are stated in that letter to have amounted at the time to Rs. 33,279. But the reference to the revenue does not necessarily imply that the grant was in the nature of an assignment of land revenue as distinct from a grant of full proprietary rights. The Government had to refer to the revenue in its discussion with the local Government to indicate what it was losing by the grant, and the contention that the Government intended to assign the revenue but not the land is inconsistent with the terms of the grant, which describe the area of the villages without mentioning the revenue assessed, and assign to the grantee the duties of a landholder, and also with the admission, paragraph 2 of the plaint, that the British Government allowed to Prince Hamid Ali the *jagirs* and *zemdari* rights in Kanausi. The word "rent" was used loosely in those days for "revenue." The Government intended, it is manifest, not to disturb pre-existing rights and to allow the grantee to enjoy an independent means of subsistence. With the exception of the village Kanausi, of which the Prince was in *khas* possession or directly realized the rents, the villages granted were at the time of the grant in the possession of certain other persons from before the annexation. These persons obtained decrees for proprietary possession as against the Prince at the Regular Settlement (Exhibits 37, 43, 46, 52 and B41), but in regard to village Kanausi, it was found by the Settlement Officer that the claimants had lost their possession long before the date of the grant (Exhibit 51). The village was, therefore, settled with the Prince whose descendants have since then been in possession of the rights both of the British Government and of the original proprietors in it.

References to revenue-free tenures are found in several places in the Oudh Papers for 1856-58, where holders of rent-free tenures are described (page 266) as taking the place of the Government, leaving the rights of the actual possessors or old proprietors undisturbed, and in the Settlement Circular No. C/1123, dated the 16th April 1862, it was distinctly stated that the grant of rent-free tenure or *jagir* carried with it proprietary rights in the

soil, the Government simply consenting to waive its claim to the payment of the land revenue on the holding in perpetuity or for the life or lives of one or more persons specified without in any way affecting the proprietary rights of others in the soil existing at the time of the grant. (Banerjee's Settlement Circulars, page 87.)

It is contended that the word "*jagir*" as used by the Government of India in the letter above referred to, did not intend to confer anything more than a succession of life-estates on the Prince and his lineal descendants. But whatever meaning the word "*jagir*" may have carried during native rule or in the Maharatta country, where, as observed in *Ramchandra Mantri v. Venkatarao Mantri*(1), *jagirs* were generally resumable at the death of the grantee, there can be no doubt as to the fact that the British Government in conferring *jagirs* or revenue-free tenures intended to confer a heritable and transferable estate on the grantee, subject to such terms and conditions as might be contained in the grant. Bengal Regulation XXXVII of 1793 enacted rules for determining the validity of titles of persons holding or claiming a right to hold *altamgha*, *jagir* and other land under *Badshahi* grants. By section 15 of the Regulation, it was provided: "*Altamgha*, *ayna* and *madad mash* grants are to be considered as hereditary tenures. These and other grants, which from the terms or nature of them may be hereditary and are declared valid by this Regulation or which have been or may be confirmed by the British Government or any of its officers possessing competent authority to confirm them, are declared transferable by gift, sale or otherwise." In regard to *jagirs* granted by the old Kings, section 15 declared that they were to be considered as life-tenures, expiring with the life of the grantee, unless otherwise expressed in the grant. The grant confirmed in this case, was not that of a life-tenure, but of a rent-free tenure in perpetuity to subsist as long as the grantee had lineal descendants in existence and the effect of the confirmation was to substitute the Prince for the Government in regard

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to such interest as the Government had in the soil, and to give him a heritable and transferable right.

Such a grant bears no analogy to an estate tail, for an estate tail is conferred on a certain person and the heirs general or specific of a particular body or bodies. This grant now in question was conferred on a particular individual by name and was declared to be heritable so long as the grantee had lineal descendants in existence. In other words, the duration of the grant was to last as long as the grantee had lineal descendants existing, and the grant was to lapse or to be resumed on the happening of any of the contingencies specified therein and on no other. The grant did not specifically forbid an assignment, and based as it was on a recognition of pre-existing rights or of the principle that if there was any property to which the Prince was fairly entitled, he should be allowed to enjoy it (*vide* paragraph 3 of the letter of the Government of India, Exhibit 5), all proprietary rights other than those restricted by the grant will be deemed to have passed with it.

A grant of villages, revenue-free, in consideration of the rights held by the grantee prior to the confiscation, does not amount to a pension within the meaning of Act XXIII of 1871, and as held in *Ganpat Rao v. Ananda Rao* () a grant by the British Government confirming a previous grant made by the preceding ruler of such rights as the Government possessed, is excluded from the purview of the Pensions Act. In *Ravji Narayan Mandlik v. Dadaji Bapuji* (3), Westropp, C. J., in dealing with the grant of a village in *inam*, including the waters, trees, stones, quarries, mines and hidden treasures, but excluding the *hakdars* and *inamdars*, observed:—"It is no doubt true that 'sanadi grants in *inam*, *saranjam*, etc., are, generally speaking, more properly described as alienations of the royal share in the produce of the land,' i. e., of land revenue, than grants of land, although in popular parlance so-called, but it is not true that such is invariably the case. If words are

employed in the grant which expressly or by necessary implication indicate that Government intends that so far as it may have any ownership in the soil, that ownership shall pass to the grantee, neither Government, nor any person subsequently to the date of the grant deriving under Government, can be permitted to say that the ownership did not so pass."

In *Amna Bibi v. Najm-un-nissa Bibi* (4) where certain immoveable property was granted in lieu of a pension, and the *sanad* provided that upon the death of the original grantee the estate would be continued in perpetuity in the manner of an hereditary holding, and at the desire of the grantee, revenue was assessed and the members of the family treated it as an ordinary *zamindari* property subject simply to the payment of the Government revenue, Banerji and Tudball, J.J., held that the *zamindari* so granted was not a pension within the meaning of section 11 of the Pensions Act and was liable to attachment and sale in execution. The mere fact that a grant of property is made to provide the grantee with an independent means of subsistence does not make the property granted inalienable—*Thakur Kopilnauth Sahi Deo v. Government* (5) and *Kumara Tirumalai Naik v. Bengaru Tirumalai Sauri Naik* (6). A covenant declaring that the grant shall be liable to resumption on the failure of heirs to the original grantee, has similarly no such effect: *Maharaj Kumar Jagat Mohan Nath v. Brinda Saha* (7). In *Krishnarav v. Rangare* (8) a grant made to a person and his children in perpetuity, was held to be alienable, and in *Dosibai v. Ishvardas Jagjivandas* (9) and *Ramlal Mookerjee v. Secretary of State for India in Council* (10), it was held that alienability was not inconsistent with the fixation of a certain line of descent to determine the duration during which the grant was to last. Grants of land for past services or on

(4) 2 Ind. Cas. 100; 31 A. 382; 6 A. L. J. 519; 5 M. L. T. 388.

(5) 22 W. R. 17; 10 B. L. R. 168.

(6) 21 M 310.

(7) 1 C. L. J. 557 at p. 561.

(8) 4 B. H. C. R. A. C. J. 1.

(9) 15 B. 222; 18 I. A. 22.

(10) 7 C. 304; 10 C. L. R. 349; 8 I. A. 48; 4 Sar. P. C. J. 225; 5 Ind. Jur. 327.

(2) 28 A. 104; A. W. N. (1905) 206.

(3) 1 B 523.

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condition of loyalty, have similarly been deemed alienable [*Dosibai v. Ishwardas Jaggirandas* (11); *Lachmi Narain v. Mukund Singh* (12) and *Dost Muhammad Khan v. Bank of Upper India* (13)].

Section 4 of the Pensions Act (XXIII of 1871) evidently makes a distinction between a pension and a grant of money or land revenue, for section 12 of the Act merely prohibits the assignment of pension, pay or allowance and is silent with regard to grants of money or land revenue to which a reference is made in section 4. It seems impossible, therefore, to avoid the conclusion that the word "pension" denotes something different from a grant of money or land revenue, and as observed in *Panchanallayyan v. Nilkandayyan* (14) and *Manna Lal v. Fazal Imam* (15), a grant of land revenue free does not come within the purview of the Pensions Act. [See also *Secretary of State for India in Council v. Khemchand Jeuchand* (16) and *Subraya Mudali v. Velayuda Chetty* (17).] The learned Counsel for the plaintiffs-appellants has referred to a number of Bombay decisions in which grants of *inams* or *saraujams* were held to convey mere estates for life, but as pointed out in *Gulabdas Jaggirandas v. Collector of Surat* (18) and *Ramchandra Mantri v. Venkatarao Mantri* (1), the decisions in Bombay were generally based on the usages of the Mahratta country, which have no application in this part of India. The nature of the rights conveyed to holders of *jagirs* in these Provinces is aptly illustrated by a decision in *Bithu Bhut v. Lalla Raj Kishore* (19) where a grant in perpetuity, generation after generation, was held to confer a heritable and transferable estate. Each grant has to be construed according to its own terms, and if there is nothing in a grant to indicate that a limited estate was conferred or that the rights conferred amounted to a pension within the meaning of Act XXIII of 1871, alienability attaches to the grant of

proprietary rights or such rights as the grantor may have possessed subject to any conditions which the grant may impose. The decision of this Court in First Civil Appeal No. 92 of 1895 declaring that a mortgage made by Farkhunda Mahal, one of the *mutai* wives of the ex-King, could not be enforced after her death, is of no significance, because Farkhunda Mahal had no issue, and the grant to her, whether made in lieu of maintenance or otherwise, lapsed on her death.

* * * * *

It has been urged by the contesting defendants in connection with the plea of limitation that the award did not create a mortgage, and that the suit should have been filed within 12 years from the date when the right to possession accrued. An award is, however, in the eyes of law a substitution of the will of the arbitrator for the will of the parties. It amounts in fact to the subordination by the parties of their will to the will of another whom they nominate by mutual consent to interpose between them, and as observed by Russell (*Russell on Arbitration*, ninth Edition, page 333) an award is considered in equity as an act of parties validating the transaction, subject to certain qualifications, in the same manner as if the parties had entered into it themselves. The award was made before Act IV of 1882 came into force. Section 2 of the Act saves from its operation any right or liability arising out of a legal relation constituted before that Act came into force, and section 30 of the Specific Relief Act places awards for the purposes of specific performance on the same footing as any other contract. The award was made in pursuance of an agreement to which the ex-King, as the grandfather and guardian *de facto* of the descendants of Prince Hamid Ali, was a party and inasmuch as the property in dispute was conveyed to Mahdi Quli Khan as security for the money due to him or, in other words, to enable him to retain the possession and enjoyment of the usufruct thereof till his debt was satisfied, it created a relation analogous to that of a mortgagor and mortgagee and a suit for redemption is maintainable.

The award stated that the *jagir* shall remain in the possession of Mahdi Quli

(11) 9 B. 581.

(12) 26 A. 617; A. W. N. (1904) 44; A. L. J. 33F.

(13) 3 A. L. J. 129; A. W. N. (1906) 44.

(14) 7 M. 191.

(15) 0 Ind. Cas. 353; 33 A. 580; 8 A. L. J. 592.

(16) 4 B. 432.

(17) 20 M. 153; 2 M. L. T. 33.

(18) 3 B. 186 at p. 191; 6 L. A. 54.

(19) 2 Agra H. C. R. 284.

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Khan till the sum specified therein, was liquidated with interest at 6 per cent. per annum and that when the said debt was paid in full, the *jagir* shall be handed over by him to the person who may be determined at that time to be the surviving heir of the late Prince Hamid Ali according to the Muhammadan Law. The possession of Mahdi Quli Khan was that of a mortgagee entitling him to hold the property for a certain period in satisfaction of the amount due to him under the award and Article 145 of the Indian Limitation Act applies to the suit.

Assuming, however, that Article 144 of the Act is applicable to such a suit, there is nothing to show that the possession of Mahdi Quli Khan or his heirs or representatives ever became adverse to the plaintiffs or their predecessors-in-title * * *

* * * * *

It is urged by the learned Counsel who appears for the heirs of Shapper Mirza that the lease of the 6th January 1882 was not executed by Muhammad Mirza on behalf of the family and that the said ratification was not, therefore, of any legal value. But it is obvious from the terms of the lease that Muhammad Mirza was acting as the senior male member of the family in making the arrangement for the payment of the debts due by the estate which he and his brothers and sister had inherited from their father, and whether he was acting as an executor *de son tort* or as the self-constituted head of the family, his action was one which the other members of the family had a right either to impugn or to confirm, according as it was not for their benefit or otherwise. Section 196 of the Indian Contract Act lays down that where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority. Muhammad Mirza obviously did not purport to act in his own right, for in the very beginning of the leases, he described himself as the eldest son of Prince Hamid Ali, whose instructions, he wrote, he was carrying out in regard to the payment of his debts;

and while recognising that his younger brothers and sister had also an interest in the property, he went on to say that those debts were binding on the heirs, and that neither he nor his co-sharers would have any right to cancel the leases till the said debts were paid. By the leases, he was transferring the entire *jagir* belonging to the family, and whether his act was authorized or not, he was in fact acting on behalf of the family and for the benefit of all its members in dealing with the property of the deceased and making arrangements for the payment of the debts which the deceased had left unpaid. The receipt of his share of the rent by Shapper Mirza subsequent to the execution of the lease of 1882 from the lessee also indicates that he had approved of the arrangement which Muhammad Mirza had made for the payment of the debts, and it is not open to the heirs of Shapper Mirza to raise an objection on his behalf to the validity of the lease which he had expressly confirmed and ratified by agreement and conduct during his life-time.

Qurratulain attained majority in October 1887, and similarly confirmed and approved of the leases granted by Muhammad Mirza by express assertion, conduct and receipt of rent from time to time during his life-time. On the 29th October 1887, he executed a deed of simple mortgage (Exhibit B7) in favour of Jafar Quli Khan, wherein he referred to the leases of the 10th May 1880, and the 6th January 1882, which his mother and guardian, Nawab Kaukab Mahal, had ratified and stated that he was bound by the same (*Lihaza hamne apni walida sahiba ki jumla tahrirat wa rasidat o qabul wa mansur karlia hai aur maen hissalar 2/7th sharaet destawezat mazkura bala ka bil-ishtirak zimmedar a paband hunga*). On the 1st September 1888, he executed another deed of simple mortgage (Exhibit B6) in favour of Jafar Quli Khan, wherein he similarly referred to the leases of the 10th May 1880 and the 6th January 1882 in terms of approval. The first of these deeds is attested by one man, named Altaf Husain, and is not enforceable as a mortgage. The proof of the attestation of the other does not satisfy the requirements of section 58 of Act IV of 1882 and section 69 of the Evidence Act, as interpreted

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in *Shamu Patter v. Abdul Kadir Rowthan* (20); but the signatures of Qurratulain on those documents are proved by reliable evidence, and there is nothing in law to prevent those documents from being admitted in evidence for a collateral purpose, namely, to prove the ratification of the leases of the 10th May 1880 and the 6th January 1882 by Qurratulain. A document which is not enforceable as a mortgage may, as pointed out in *Ulfat-un-nissa alias Elahijan Bibi v. Hosain Khan* (21), *Tofaluddi Peada v. Mahar Ali Sha'a* (22) and *Pulaka Veetil Muthalakulan Gara Kunhu Meidu v. Thiruthipalli Madhava Menon* (23), be used in evidence for a collateral purpose, unconnected with the mortgage. * * *

It is contended on behalf of the heirs of Qurratulain, who died on the 12th July 1902, that the lease granted by Muhammad Mirza was not granted by him as a guardian of Qurratulain and was consequently incapable of ratification. But the lease was granted with the assent and concurrence of Nawab Kaukab Mahal, the mother and guardian of the minor, and although as a rule, the dealings of a *de facto* guardian of a minor with the minor's property, do not bind the minor there might be cases of urgent and imperative necessity, as for instance the maintenance of the minor or the performance of funeral ceremonies or the discharge of other obligations binding on the minor, where a transaction entered into for the benefit of the minor, may be binding on him. In *Mahomed Abdul Kadir v. Amtal Karim Banu* (24), where a mother executed a *sulehnama* on behalf of her minor daughters, by which she transferred the shares of those daughters in their estate, and it was found that the transfer had been acted upon and followed by possession and the daughters had after attaining full age allowed a lengthened period of 20 years to elapse without taking proceedings to dispute it, it was held by their Lordships of the Privy Council that if the mother had exceeded her powers in

executing the *sulehnama* on their behalf, and if they might at one time have had it set aside, their long acquiescence was sufficient to show ratification of the transaction. The *sulehnama* was, therefore, upheld. Their Lordships did not decide in that case whether the mother had an authority to transfer the shares of her daughters and came to the conclusion that their making no objection for so many years after they had attained majority was sufficient evidence that they had ratified and adopted it. In *Kali Dutt Jha v. Abdul Ali* (25), where a sale of certain property belonging to a minor was effected by his father, who was his natural guardian, to settle some disputes then pending in regard to the property of the minor of which the portion sold formed a part and the sale was effected for a fair price, their Lordships of the Privy Council, in upholding the sale as having been effected for the benefit of the minor, observed:—"It is not a case of a sale by a guardian of immoveable property of his ward the title to which was not disputed, in which case a guardian is not at liberty to sell except under certain circumstances.—Macnaghten's Principles of Muhammadan Law, Chapter VIII, clause 14. The right of Udulunnisa and Fakirunnisa to be purchasers of the nine annas was disputed. By the sale of the two annas the dispute was put an end to, and thus a settlement obtained of the seven annas. Moreover, the Rs. 6,235 appeared to be a fair price for the two annas which had in December 1856 been sold by Safdar Hossein for Rs. 2,250." In *Mata Din v. Sheikh Ahmad Ali* (26), where a mortgage was made by an elder brother on behalf of himself and his minor brother to pay certain debts binding on the minor, their Lordships of the Privy Council held that a person by *de facto* guardianship might assume important responsibilities in relation to the minor's property, but could not thereby clothe himself with the legal power to sell it and they declared the sale to be not binding on the minor, although made for the payment of an ancestral debt, as it was not made of necessity and was not beneficial to the minor. They,

(25) 16 C. 627; 16 I. A. 96; 13 Ind. Jur. 130; 5 Sar. P. C. J. 326.

(26) 13 Ind. Cas. 97; 15 O. C. 49; 16 C. W. N. 334; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 34 A. 213; 23 M. L. J. 6; 39 I. A. 49.

(20) 16 Ind. Cas. 250; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 334; (1912) M. W. N. 935; 10 A. L. J. 259; 35 M. 607; 14 Bom. L. R. 1034; 16 C. L. J. 594; 39 I. A. 220.

(21) 9 C. 620; 12 C. L. R. 209.

(22) 26 C. 78.

(23) 1 Ind. Cas. 1; 32 M. 40; 19 M. L. J. 584.

(24) 16 C. 161; 15 I. A. 220; 12 Ind. Jur. 416; 5 Sar. P. C. J. 224.

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however, abstained from expressing an opinion as to whether according to the Muhammadan Law, a sale by a *de facto* guardian, if made of necessity or for the payment of an ancestral debt, affected the minor's property and if beneficial to the minor was altogether void or merely voidable. The question was considered at some length by Abdur Rahim and Ayling, J.J. in *Thaulan Valappil Easuf v. Rotuseri Valappil Koya* (27) and the conclusion to which the learned Judges there arrived, was that according to the general principles of the Muhammadan Law a sale of the minor's property by an unauthorized guardian, even if it was not made for a valid cause, that is, of necessity or under circumstances which would make the transaction purely advantageous to the minor, was, strictly speaking, neither void nor voidable in the ordinary sense of the term and that an alienation of the minor's property without any justifying cause, must be regarded as *manquf* or dependent, that is, its validity depended upon the minor accepting the transaction on attaining majority. "It is", said Abdur Rahim, J., "a transaction in a state of suspense, its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority, though the effect of his decision will relate back to the date of inception of the transaction. If he accedes to adopt the transaction, it becomes valid from the inception; otherwise it will be treated as void and of no effect from the very commencement."

A lease is, moreover, in the nature of a continuing contract which a minor may adopt or repudiate on attaining majority by allowing or refusing to allow a lessee to continue in possession and accepting or refusing to accept the rent offered by him. In the case of a continuing obligation such as the engagement of a servant or the continuance of a tenancy, an absence of repudiation or the acceptance of service or rent with full knowledge of the facts, implies an undertaking to adhere to the obligation and operates as a ratification or renewal of the old contract by the party accepting the service or rent—(Trevelyan on Minors, page 235, and Woodfall's Law of Landlord and Tenant, page 44).

(27) 15 Ind. Cas. 576; 37 M. 514; 12 M. L. T. 147; (1912) M. W. N. 889; 23 M. L. J. 244.

In addition to the express ratification above referred to, both Shapper Mirza and Qurratulain allowed the lessee to remain in possession with full knowledge of the facts and continued to receive their shares of the rent secured by the lease as long as they were alive. They are, therefore, estopped from questioning the validity of the lease. On the 7th March 1882, Shapper Mirza borrowed Rs. 500 from Jaffar Quli Khan on an agreement that the interest due on the said money shall be liable to deduction from his share of the rent secured by the lease of the 6th January 1882 and that if he did not pay the principal money within four years, the lessee would be entitled to withhold the payment of his entire share of the rent until the said loan was liquidated—(Exhibit B4). By the deed of further charge, dated the 1st September 1888 (Exhibit B5), Qurratulain similarly borrowed a sum of Rs. 2,900 from Jaffar Quli Khan and after referring to the leases of the 10th May 1880 and the 6th January 1882, executed by his elder brother, Muhammad Mirza, and ratified by his mother, Nawab Kankab Mahal, on his behalf by an agreement, dated the 26th January 1882, under which Jaffar Quli Khan was in possession of the villages in dispute to secure the "payment of ancestral debts" stated that he was jointly responsible for the liabilities created by the aforesaid deeds according to the conditions therein laid down and stipulated that if he did not pay the sum borrowed with interest at 1 per cent. per mensem within four years, the mortgagee shall have power to deduct the same from his share of the rent secured by the lease. Shapper Mirza and Qurratulain could not have succeeded in securing the loans of Rs. 500 and Rs. 2,900 but for the assurance given by them in their deeds and the stipulation contained therein that the mortgagee could recover the same in case of non-payment within certain periods from the rents payable to them under the lease aforesaid. The law enacted in section 115 of the Indian Evidence Act relating to estoppel as a consequence of declaration, act or omission causing another's belief, and action thereon, does not differ from the English Law on that subject, and as observed

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by their Lordships of the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha* (28), the main question in determining whether estoppel has been occasioned is, whether the representation has caused the person to whom it has been made, to act on the faith of it, the motive or the knowledge of the matter on the part of the person making the representation being of little consequence.

The possession of a person under an express assertion of a title, whether proprietary or otherwise, within the knowledge of the person who has a right to oust him, may, besides under certain circumstances, vest the person in possession with the title asserted, if his possession and the right asserted in relation thereto remain unchallenged for more than 12 years, that is, for the period provided by law [*Parameswaram Mumbannoo v. Krishnan Tengal* (29) and *Thakore Fatesinghji v. Bamanji Ardeshir Dalal* (30)]. The lessee in this case has been in possession of the property by an open assertion of his title under a lease of 1882. Shapper Mirza and Qurratulain have been accepting the rents with full knowledge of the circumstances under which the lease was granted, as shown by the bonds dated the 7th March 1882 and the 1st September 1888 (Exhibits B4 and B6) above referred to. The acceptance of such rent does not merely involve the creation of a tenancy-at-will, for a landlord, who accepts rent under those circumstances and omits to exercise his right of ejectment, cannot preserve his right to other claims continuously denied by the tenant. The plaintiffs-appellants derive their title from Shapper Mirza and Qurratulain, and it is not open to them now to question the leases which their predecessors-in-title accepted and the benefits of which they enjoyed till the end of their lives.

* * * * *

We accordingly allow the appeals of Nawab Wala Qadar Husain Ali Mirza and Sultan Husain Mirza, plaintiffs-appellants

(28) 20 C. 296; 19 I. A. 203.

(29) 28 M. 135.

(30) 27 B. 515; 5 Bom. L. R. 274.

in Appeal No. 49 of 1911, in so far that they will be entitled to get proprietary possession of the property in dispute to the extent of 2/7ths share belonging to Qurratulain subject to the terms of the lease of the 6th January 1882 and Bazm Ara Begam and Shams Ara Begam, plaintiffs-appellants in Appeal No. 56 of 1911, will similarly be entitled to proprietary possession of 3/4ths of 2/7ths share in *Mauza Kanausi* and the entire 2/7ths share in other villages inherited by them from Shapper Mirza subject to the terms of the aforesaid lease. As the contesting defendants Nos. 11 to 19 have succeeded in establishing their right to retain possession of the property in dispute under the lease of the 6th January 1882, they will get their costs here and below from the plaintiffs-appellants, who will, under the circumstances, bear their own costs throughout.

Appeal partly allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1693 OF 1912.

December 3, 1915.

Present:—Mr. Justice Rattigan and

Mr. Justice Shadi Lal.

THE BHIWANI ORPHANAGE ASSOCIATION, HISSAR—DEFENDANT—APPELLANT
versus

PARMA NAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Construction of document—Consent by reversioners to widow's applying estate to charity. Failure of one form of charity. Gift to other form, validity of.

Where the reversioners to a Hindu woman's estate, gave the widow authority to devote the property to any charity but the particular form of charity which she had selected having failed, she applied the property to another form of charity:

Held, that the reversioners were not entitled to impeach it, as a general intention to give to charity was agreed to by them. [p. 739, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Hissar Division, at Delhi, dated the 18th July 1912, reversing that of the District Judge, Hissar, dated the 27th March 1912, dismissing the claim.

Bakhshi Tek Chand, for Lala Lajpat Rai and Messrs. Gokal Chand Narang and Nanak Chand, for the Appellant.

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The Hon'ble Mr. Muhammad Shafi, K. B., for the Respondents.

JUDGMENT.—This suit, which has given rise to this second appeal, was brought by the respondents Parma Nand and Kanshi Ram, the first cousins of one Badri, to contest a gift effected by his widow, *Musammam* Manbhari, in favour of an orphanage at Bhiwani. The deed of gift is dated the 1st of September 1911, and it is indisputable that under the Hindu Law, by which the parties are governed, the widow had no power to make the alienation in question. The cardinal point for decision is whether the plaintiffs had permitted her to give her husband's estate to any charitable object she pleased. The determination of this question depends upon the interpretation to be placed upon a document which was executed by her on the 4th January 1909 and attested by her husband's reversioners, including the plaintiffs in this suit.

Now, by this deed, the widow appoints Lala Chandu Lal as her agent for the purpose of selling the property and applying the sale-proceeds to the construction of a well and a *dharmshala*; and the first portion of the document recites the fact of the reversioners having given her general authority to devote the property to any charitable purpose. The relevant passage, the meaning of which is the subject of dispute between the parties, may be translated in the following terms:—

"My reversionary heirs, Parma Nand and Kanshi Ram, sons of Gauri Datt, and Shero Datt, son of Ballu Mal, *mahajans* of Hissar, consent to disposing of the above-mentioned property in charity (*khairat men*); and they have given me permission to dispose of it to charity or to apply it to charity, and are signing this instrument in the margin in token of consent. As I am a widow and cannot make proper arrangements for the application to charity, so I, being in my full senses, without any sort of compulsion and with the consent of my heirs, above mentioned, appoint Lala Chandu Lal, son of Lala Ram Sarn Das, *mahajan*, *Agarwal*, *sahukar* of Hissar, my agent and curator, and give him full power to dispose of the above-mentioned immoveable property in his charge by sale and to withdraw my

money from the Bank and to make a well or *dharmshala* in the name of my deceased husband, Lala Badri Pershad, for the comfort of the people, in whatever village or town he may consider suitable. Neither I, nor my heirs, will raise any sort of objection, and I will approve of the above-mentioned Lala's arrangements, as if they were my own, but the said Lala is not at liberty to devote the property, to any charity other than a well or *dharmshala*."

We have given our careful consideration to the document as a whole in order to ascertain the intention of the executant and the reversioners and have reached the conclusion that the latter gave the widow full authority to apply the property to charity, and that it was she who selected the particular charity specified in the deed. The earlier portion of the document, which concerns the collaterals, mentions general consent in clear and unmistakable terms; and the fact that the widow, at that time, favoured one specific charitable purpose, cannot be a valid ground for putting a restricted meaning upon the general words. It appears that the plaintiffs took a prominent part in the preparation and execution of this deed and that it was presented to the Sub-Registrar by the plaintiff Parma Nand, and it was at his house that the registration took place. In these circumstances, it is manifest that if the plaintiffs had agreed to the donation of the property only to a particular charity, and to no other, they would have stated so in the deed and would not have expressed their intention by using the word "charity" without any qualifying expression.

It is significant that the restricted meaning sought to be placed upon the language of the instrument, was not referred to in the plaint; nor was it mentioned by the plaintiff Kanshi Ram in his evidence before the Court of first instance. And though that Court pronounced its decision against the plaintiffs, the contention, upon which the judgment of the learned Divisional Judge proceeds, did not find a place in the memorandum of appeal preferred by them to his Court.

It seems to us that the reversioners originally gave the widow authority to

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devote the property to any charity and that, when the execution of the mode of charity selected by her, became impracticable on account of the death of Lala Chandu Lal, they repented of their action and wanted to raise all sorts of objections to her power of disposal. A general intention to give to charity was agreed to by them and the failure of the particular mode, by which the charity was to be effected, would not destroy the charity. We consider that the gift to the orphanage is covered by the consent given by the respondents and that they are not entitled to impeach it. We accordingly accept the appeal, and reversing the decree of the lower Appellate Court, we dismiss the suit with costs throughout.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 17 OF 1915.

November 2, 1915.

Present:—Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Aiyar.

V. SAMI SAH—DEFENDANT—APPELLANT
versus

J. PARTHASARATHY CHETTY—

PLAINTIFF—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 118—Promissory note, suit on—Defendant a young boy just emerged from minority with large expectations—Consideration—Burden of proof.

Where in a suit on a promissory note alleged to have been executed by the defendant, it appeared that the defendant was a young boy just emerged from minority, with large expectations but no ready money:

Held, that it was on the plaintiff to prove that consideration had passed for the purpose. [p. 739, col. 2.]

Moti Gulabchand v. Mahomed Mehdi Tharia Topan, 20 B. 367; *Sundarammal alias Soebhagiammal v. Subramania Chettiar*, 30 Ind. Cas. 971; 29 M. L. J. 236, followed.

Appeal from the judgment of the Hon'ble Mr. Justice Bakewell, in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 152 of 1914.

Messrs. V. V. Srinivasa Aiyangar and V. Sivaprakasa Mulaliar, for the Appellant.

Mr. K. Ramakhandran, for the Respondent.

JUDGMENT.—This is an appeal from a judgment of Mr. Justice Bakewell in a suit brought by the plaintiff on two promissory

notes for Rs. 2,000 each, alleged to have been executed by the defendant. The defendant, who admittedly was a young boy just emerged from minority and was the undivided nephew of one Purushothama Sah who was possessed of considerable property, alleged in his written statement that there was no consideration for the notes, and he went on to set up a case that he had been decoyed into the company of a young girl and had been drugged and that he had been made to sign his name on blank papers when he had not sufficient control over his mind and was in a position to be dominated by the will of one Erappa Chetty, who introduced him to this woman. The learned Judge was not satisfied with the evidence produced by the defendant in support of this plea, but he thought the case was a sufficiently suspicious one to call upon the plaintiff to answer it; and the plaintiff produced evidence which the learned Judge describes, and we entirely agree with him, as mostly "palpably false". Finding, however, that the execution of the notes by the defendant was proved and that he had failed to prove that he merely signed blank papers, the learned Judge came to the conclusion that the burden of proof which lay on the defendant had not been discharged, and, therefore, gave a decree for the plaintiff for the full amount sued for.

With great respect, while we entirely agree with the learned Judge's appreciation of the evidence, both for the defendant and for the plaintiff, we think that on the evidence as it stood as a whole at the close of the defendant's case, there was sufficient to throw the burden on to the plaintiff and that the plaintiff has not satisfied that burden. It was held in the case of *Moti Gulabchand v. Mahomed Mehdi Tharia Topan* (1), which was recently followed by this Court in *Sundarammal alias Soebhagiammal v. Subramania Chettiar* (2), that where the alleged executant of the note had just emerged from minority and had large expectations and no present command of money, very little was required to throw the burden on to the plaintiff. As the learned Judge has said, most of the plaintiff's

(1) 20 B. 367.

(2) 30 Ind. Cas. 971; 29 M. L. J. 236.

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story in this case is palpably false. His family are piecegoods merchants, and he says that the money he advanced to the defendant did not come from the piecegoods business, and that it was kept locked up in his box. He has not shown by satisfactory evidence that he was in possession of such a large sum as Rs. 4,000 and his own uncorroborated statements show that his money-lending business, if it existed at all, was exceedingly restricted. Then he has put into the box witnesses to prove, that these sums were borrowed by the defendant for the purpose of the business which was managed by his uncle, who carried on a large *abkari* business. The learned Judge has sufficiently shown how incredible it is that these large sums should have been lent to this boy without reference to the head of the family and without obtaining the promissory notes from him. We agree with the learned Judge that it is impossible in this state of the evidence to say what the exact truth is; but we think there is quite sufficient to throw the burden upon the plaintiff and that he has entirely failed to discharge it. We also think there is absolutely no doubt that he did not advance anything like Rs. 4,000 to this boy, though no doubt something was advanced on each occasion. We must, therefore, reverse the decree of the learned Judge and dismiss the plaintiff's suit. Neither of the parties is entitled to any consideration and we, therefore, make no order as to costs.

Appeal allowed; Suit dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 654 OF 1910.

November 18, 1915.

Present:—Mr. Justice Chevis and

Mr. Justice LeRossignol.

DEWA SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

LEHNA SINGH, MINOR, AND OTHERS—

DEFENDANTS—RESPONDENTS.

Custom—Appointment of heir—Succession to natural father, general rule of—Riwaj-i-am, entry in, whether

instances necessary to give effect to—Collaterals, exclusion of—Pleadings—New defence, whether can be raised in appeal.

A recital in the *riwaj-i-am* of a particular custom opposed to general custom and unsupported by instances, is insufficient to prove the existence of that custom. [p. 742, col. 2.]

A clause in the *riwaj-i-am* provided that when a man was adopted and subsequently his brothers died without issue, the adoptee could succeed to his natural father's estate only in the absence of brothers and nephews of his natural father:

Held, that the recital of the custom in the *riwaj-i-am* was opposed to general custom and unsupported by instances and, therefore, insufficient to prove its existence. [p. 742, col. 2.]

According to the Customary Law of the Punjab, in the absence of all other lineal male descendants of the natural father, an adoptee succeeds his natural father to the exclusion of the collaterals of that father. [p. 742, col. 1.]

In cases where an entry in *riwaj-i-am* has been attested by people for whom it has been prepared, the Courts have to see what the real custom is and not what the people think to be the custom. [p. 741, col. 2.]

A party is entitled to advance any argument even in appeal for the first time which might enable him to prevent the other party from getting a decree. [p. 741, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Ferozepore Division, dated the 4th April 1910, reversing that of the Subordinate Judge, 1st Class, Ferozepore, dated the 23rd August 1909, decreeing the claim.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellants.

Messrs. Kirkpatrick and Dalp Singh, for the Hon'ble Mr. Shadi Lal, R.B., and Mr. Morton, for the Respondents.

JUDGMENT.—The genealogical tree is as follows:—



The dispute is as to the property of the late Nand Singh. Nand Singh's younger

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son, Wazir Singh, was adopted by Thamman Singh. Whether Lehna Singh was alive or not at the time of the adoption is a disputed point. After the adoption of Wazir Singh, Bishen Singh died sonless. Three years later, in 1908, Nand Singh died. The plaintiffs, viz., Gyan Singh and the sons of Hari Singh and Harnam Singh, sue for $\frac{1}{4}$ ths of his property, treating Wazir Singh and Lehna Singh as belonging to Thamman Singh's line by reason of Thamman Singh having adopted Wazir Singh.

Wazir Singh and Lehna Singh first put in joint pleas, but a separate guardian was then appointed for Lehna Singh and separate pleas were then put in.

The main plea for Wazir Singh was that he had not lost his right to succeed to his natural father's estate.

Lehna Singh relied mainly on a Will made by Nand Singh in his favour.

The first Court decreed the claim, holding that the parties were governed by custom, that Wazir Singh had lost his rights of succession by reason of adoption, that Lehna Singh was not adopted by Nand Singh and that Nand Singh could not make a Will in his favour.

Wazir Singh and Lehna Singh jointly appealed to the Divisional Judge, in whose Court a novel line of argument was taken up, viz., that Lehna Singh, having been in existence before his father's adoption, remained in his natural family, and so must succeed to his grandfather's estate to the exclusion of the plaintiffs. This argument, the Divisional Judge held to be correct, and so he dismissed the suit. The result is that neither defendant was able to appeal to this Court, although the decision of the lower Appellate Court is in favour of Lehna Singh alone, and not in favour of Wazir Singh.

The plaintiffs appeal to this Court, urging that the lower Appellate Court's decision is unsound, that the lower Appellate Court should not have allowed a new line of defence to be set up, that as a matter of fact, Lehna Singh was born after his father's adoption, and that the question of his being born before that adoption and of the effect of his being in existence at the time of the adoption should

have been put in issue and the case remanded for further enquiry before any decision in defendants' favour was passed.

There is considerable force in these arguments, but for Lehna Singh, it is argued in this Court that, entirely apart from the fact of Lehna Singh's rights being unaffected by his father's adoption, the lower Appellate Court's order dismissing the suit is correct for the simple reason that Wazir Singh, though adopted, does not lose his rights of succession to his natural father's estate in the absence of other sons of that father.

This is, of course, an argument in favour of Wazir Singh's succession, but Lehna Singh is entitled to advance any argument which may enable him to prevent the plaintiffs from getting a decree.

The lower Courts have held that Wazir Singh's adoption bars his succession as son of Nand Singh. Their decision is based on a clause in the *riwaj-i-am* prepared in 1870, which lays down that when a man is adopted and subsequently his brothers die without issue, the adoptee succeeds to his natural father's estate only in the absence of brothers or nephews of his natural father.

The *riwaj-i-am* in question seems to have been prepared with great care for the *banias* of seventeen villages in the Muktsar Tahsil, and it is obviously a document entitled to considerable respect. Further, as is pointed out to us, it was attested by Nand Singh and Thamman Singh. It is also pointed out to us that Nand Singh himself thought that according to custom, the plaintiffs would succeed to his estate, his elder son having died sonless, and his younger son having been adopted, and so he wrote a Will in favour of Lehna Singh, in the course of which he mentioned Bishen Singh's death and Wazir Singh's adoption, and said "now I have no sons" (*ab muzhir ki koi aulad sulbi nahin hai*).

But in such cases what we have to see is, what is the real custom, not what the people think to be the custom. People have sometimes very strange and incorrect ideas of their own customs. If the custom alleged in the *riwaj-i-am* is correct, surely there should be some instances in support

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of it. This is not a case of a formal adoption under Hindu law; it is a case of appointment of an heir, and the ordinary custom is undoubtedly that laid down in paragraph No. 48 of Rattigan's Digest, viz., that the appointed heir retains his right to succeed in his natural family as against collaterals, though he does not succeed in presence of his natural brothers. It may well be that he would have to yield also to his brother's sons or even to his own son, assuming that that son was born before his own adoption or appointment (to use the proper term). But it seems clear that in the absence of all other lineal male descendants of the natural father, the adoptee succeeds to the exclusion of collaterals of that father; in other words, he is preferred to collaterals such as brothers and nephews of his natural father.

In the evidence, certain instances have been cited, but on examining them we find that every one of the five instances is in accord with the general custom, every one being a case of an adoptee being excluded by his own brothers. Not a single instance of an adoptee being excluded by collaterals of the natural father, is forthcoming. No doubt, it may be said that such instances must be rare. An only son is not adopted, and in the natural course of events, the father, being the older, survives the sons. But because instances are rare, we cannot guess at them. If they are *very* rare, then what becomes of the alleged custom? If such an instance only occurs once in a hundred years, are we to say that any custom exists? The fact remains that not a single instance in support of the alleged custom whereby an adoptee is excluded from succeeding to the estate of his natural father by the brothers or nephews of that father, is forthcoming, and we have to consider whether the bare statement to that effect in the *riwaj-i-am* is sufficient. Mr. Muhammad Shafi points out to us that the *riwaj-i-am* prepared by Mr. Francis at the later Settlement goes further and prevents the adoptee from succeeding to his natural father's estate entirely. That is to say, he has to yield not only to uncles and cousins but to all col-

laterals. We fail to see how this helps the case for the appellants. On the contrary, it shows that the *banias* in question have not always been consistent in their version of their own custom. At one Settlement, we find them so far conforming to usual custom as to admit the adopted son's right to succeed to his natural father's estate, failing other sons, brothers or nephews of that father; at a later Settlement we find them preferring all collaterals to the adoptee. Mr. Shafi speaks of this as a development of custom; we should rather regard it as a drifting back to personal law in the ideas of the people concerned.

Then Mr. Shafi argues that if no instance in point can be traced, the matter must be decided by personal law, but we fail to see how this helps him. For the personal law simply lays down that an adopted son loses rights of succession in his natural family, but this only refers to cases of formal adoption with due ceremonies as required by Hindu Law. Here, however, we are not dealing with such an adoption, but merely with a case of an appointment of an heir, and the Hindu Law is no bar to succession to the estate of the natural father in such a case. So if Wazir Singh is barred at all, he must be barred by custom. He is not barred by general custom which, as already stated, gives him the preference over all persons not directly descended from his natural father. And as to the alleged special custom, we hold the recital in the *riwaj-i-am* opposed to general custom and unsupported by instances, insufficient to prove its existence.

The result is that the plaintiffs' suit must fail. Whether Wazir Singh or Lehna Singh has the preferential right *inter se*, we do not decide. We find Wazir Singh has a better right to succeed than the plaintiffs, and if Lehna Singh has a better right than Wazir Singh, *a fortiori* he has a better right than the plaintiffs.

As regards costs, we note that Mr. Morton, appearing for Wazir Singh, urges that Wazir Singh's claim having been thrown out in the lower Appellate Court, his client is merely a *pro forma* respondent.

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ent in this case, and in fact need not have been made a respondent at all. If this be so, we fail to see why Wazir Singh went to the expense of engaging Counsel to represent him in this Court. He appealed jointly with Lehna Singh to the lower Appellate Court, and we consider it was quite unnecessary for him to engage separate Counsel in this Court.

We uphold the decision of the Divisional Judge dismissing the suit, and dismiss this appeal.

The plaintiffs-appellants will pay Lehna Singh's costs in this Court. Wazir Singh will bear his own costs in this Court.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 478 OF 1907.

September 2, 1909.

Present:—Mr. Justice Stephen and

Mr. Justice Chatterjee.

MUHAMMAD IDRIS AND OTHERS—

PLAINTIFFS NOS. 1 TO 6, 10 TO 12, 24 AND 27—

APPELLANTS

versus

MOTASADDI MIAN AND OTHERS—

DEPENDANTS—AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), s. 14—Sale for arrears of revenue—Suit for annulment—Sale for arrears of kist not due, ultra vires—Duty of Collector.

Where in a suit for the annulment of a sale for arrears of revenue, it appeared that the estate consisted of two *manzas* with revenue assessed proportionately on each payable by *kists*, and several accounts having been opened in respect of this estate, the June *kist* of one of the accounts fell in arrears and the Collector ordered the sale for the arrears of the March *kist* (none being found to be due for which):

Held, (1) that there being no arrears for the March *kist*, a sale held expressly for such arrears, was *ultra vires*, although the sale might legitimately have been held for the June *kist* and consequently the sale of the entire *mahal* under section 14 of the Bengal Land Revenue Sales Act was void: [p. 745, col. 2.]

(2) that it was the duty of the Collector to close all the separate accounts before ordering sale of the entire estate. [p. 745, col. 1.]

Halkishen Das v. Simpson, 25 C. 833; 25 I. A. 151; 2 C. W. N. 513, referred to.

Appeal against the decree of the Subordinate Judge, 1st Court of Saran, dated the 29th of June 1907.

Babu Umakali Mookerjee and Mr. Muhammad Mustafa Khan, for the Appellants.

Syed Shamsul Huq and Babu Chandra Sekhar Prasad Singh, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the annulment of a sale for arrears of revenue which took place on the 19th of September 1904. The main grounds upon which the plaintiffs come to Court, are two. *First*, that the Collector had no jurisdiction to hold the sale as no arrears were legally due and *second*, that the sale was brought about by the fraud of defendant No. 3, who was the accredited agent of some of the plaintiffs for the payment of revenue and being as such bound to give information of the estate having fallen into arrears, did not do so, but on the contrary, colluded with defendants Nos. 1 and 2 whose servant also he was and purchased the estate for himself, his relation defendant No. 4 and defendants Nos. 1 and 2, entitling the plaintiffs to a reconveyance of their shares on payment of the proportionate value.

The learned Subordinate Judge has decided the suit against the plaintiffs on both these points and they have appealed mainly on the grounds indicated above.

The main facts of the case are that the estate called *Mahal Fakruddinpur* bearing *tanzi* number 1146 of the Saran Collectorate and consisting of the two *Manzas* Pakri Fatehulla and Fakruddinpur bore a Government revenue of Rs. 186-14-2½. The *manzawar* register kept by the Collector under section 4 of the Land Registration Act, Exhibit 19, page 117, shows that the revenue assessed upon *Manzah* Pakri Fatehulla was Rs. 79-2-5½ and that upon Fakruddinpur Rs. 107-11-8½. The learned Subordinate Judge says: "This so-called *mahalwar* register which bears the signature of the Superintendent of Survey, is not binding on the Collector, as the *jama sular* of 2 villages cannot be apportioned except under the *Balwara* Law." This seems to be a misconception of the Subordinate Judge. The keeping of these *manzawar* registers, called *mahalwar* registers in Behar is enjoined by section 4 of the Land Registration Act, VII of 1876, B. C. and even before that enactment, there were the quinquennial registers under Regulation XLVIII of 1793 and estate registers under

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Regulation VIII of 1800. The attested copy filed, was taken from the Collectorate and the mere fact that it bears the signature of the Superintendent of Survey on a corner, does not make it a document kept by that officer. This document does not show any apportionment of revenue within a *mouzah* but states the revenue assessed on each *mouzah*, so that the reference to the *Butwara* Law is quite irrelevant. Now several separate accounts were opened in respect of this estate, four in respect of *Mouzah* Pakri Fatehulla comprising the whole 16 annas and 2 in respect of Fakruddinpur comprising 6 annas, leaving 10 annas as the *ijmali* or residuary share bearing the original *touzi* number 1146: the separate account shares being numbered as 1146/1, 1146/2, 1146/3, 1146/4, 1146/5, 1146/6, the first four relating to Pakri Fatehulla and the rest to Fakruddinpur. The first separate account 1146/1 was in respect of 9 annas 4 pies of Pakri for a revenue of Rs. 46-3-1, which is exactly proportionate to the basis of the revenue for the 16 annas being Rs. 79-14-5½. The second separate account 1146/2 was opened in 1872 in respect of a 2-annas share of Pakri Fatehulla and the revenue fixed was Rs. 10-11-6. The third account 1146/3 was opened in 1882 for 4 annas 8 pies for a revenue of Rs. 22-4-3, the 16 annas, making a total of Rs. 79-2-10, a little more than the actual amount of Rs. 79-2-5½, small fractions being taken as units for the convenience of realization and payment. In 1884, account No. 4 bearing T U 1146/4 was opened out of account No. 2 for 6 pies 13 *krants* and odd and the revenue assessed was Rs. 2-11-11. Account No. 5 was opened in 1892 for 2 annas of Fakruddinpur with a revenue of Rs. 13-7-6 and another of 4 annas of Fakruddinpur with a revenue of Rs. 26-15-0, both amounts being in exact proportion to a revenue of Rs. 107-1-8¼ for 16 annas. Thus 10 annas of Fakruddinpur was left as the residuary share and its revenue should be Rs. 107-11-8¼ minus Rs. 40-6-6, the total of the *jamas* for Nos. 5 and 6, that is, Rs. 67-5-2¼. It would appear that when account No. 4 was opened out of account No. 2, the original revenue for the original No. 2 was not reduced but left as before and the *jama*

of the *ijmali* share was reduced by Rs. 2-11-11 which was assigned to account No. 4. In this way from June 1884 to March 1904 for a period of 19¾ years, the *jama* of account No. 2 was from year to year kept up on the erroneous basis of Rs. 10-11-6, i. e., Rs. 2-11-11 more than it should have been and the result was that account No. 2 was erroneously charged with Rs. 2-11-11 multiplied by 19¾ = Rs. 54-3-5 in excess. The arrear shewn on the March *kist* of 1904 is Rs. 52-4-4 and if the accounts of the Collector had been correctly kept, the account No. 2 would not only have been not in arrears in March 1904 but have had an excess payment of Rs. 1-15-1 to its credit. It is contended that even the figure of Rs. 10-11-6 is not correct and it should have been Rs. 9-14-4. Upon this amount being taken as the correct *jama* for the original No. 2, the excess payment would be much more on the 28th of March 1904, so that on either calculation, there was no arrear due from account No. 2 on the 28th of March 1904, and the proceedings for the sale of account No. 2 for the March *kist* of 1904 are entirely void, and consequently the sale of the entire *mahal* under section 14 is also void. See *Balkishen Das v. Simpson* (1). The learned Subordinate Judge says that "If the plaintiff's Pleader had shown by means of *chalans* that the owners of *khata* No. 2 have all along paid their share of Rs. 8 rent since the opening of the *khata* No. 4 and that the arrear is due to their not paying Rs. 2 odd, then that would have shown to some extent the reason of his contention. Here also the learned Judge is under a clear misconception. For as soon as we have it that since 1884, *khata* No. 2 has been charged with Rs. 10-11-6 and that on the March 29th of 1904, the arrear due on that basis was Rs. 52-4-4, the natural conclusion must be that the owners have paid the balance. There is another view of the case also in which the sale can be held to be *ultra vires*. Taking it for granted that the Collector's books were all correctly kept and that the plaintiffs were not entitled to rely upon the legally payable proportion of revenue for account No. 2, the arrear upon the 29th

(1) 25 C. 833; 25 I. A. 151; 2 C. W. N. 513.

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of March 1904 was Rs. 52-4-4 for account No. 2.

Account No. 2 was put up for sale for that amount on the 6th June 1904 and the bills not reaching the said amount of arrear, the Collector declared that the whole *mahal* would be sold if the co-sharers did not make a purchase under section 14 within 10 days, i. e., up to the 17th June 1904. Now the June *kist* fell due on the 7th June 1904 and the owners made payments for that *kist*. When the co-sharers did not take advantage of the offer of the Collector under section 14 up to the 17th June, he had to sell the whole estate for such arrears as would be due upon the whole estate at that time. What he did, however, was that he closed the accounts up to 29th March 1904 and taking into account all excess payments made by other co-sharers up to March 29th found an arrear of Rs. 3 odd upon the whole estate as due for the March *kist* 1904 and sold the whole estate on the 19th September 1904 for this arrear of Rs. 3 odd as due up to the 29th March 1904. It is admitted that upon the basis of the Collector's books this would be the arrear up to the 29th March and Rs. 2-0-6 the arrear up to the June *kist* upon the whole estate, and the respondent contends that as there were arrears on the March *kist* as well as on the June *kist*, the *mahal* was liable to sale and the question of *ultra vires* goes out and the appellants cannot succeed on the errors and irregularities pleaded, as they were not specifically pleaded in the appeal before the Commissioner. It is admitted that the Collector was bound to close all the separate accounts before he could sell the entire estate under section 14. The Collector became entitled to sell the whole estate on the 17th June 1904. On that date, all the separate accounts must be considered as merged in one account for the whole estate, and if on that date all demands up to that date and all payments up to that date including the June *kist* were taken one against the other, there would be no arrear on the March *kist* but there would be an arrear of Rs. 2-0-6 for the June *kist*. There being no arrear for the March *kist*, a sale held expressly for such an arrear would be *ultra vires* although the sale might legitimately have been held for the June *kist*, which it was not. Therefore, on

either view of the case, i. e., whether we take the Collector's books as incorrect and base our calculation on the correct revenue assignable to the several accounts, or whether we take the Collector's books as correct and consider how the Collector should have closed the separate accounts, there was no arrear for the March *kist* of 1904 and the sale must be held to be *ultra vires* and void. Having held that the sale was void on the first branch of the case, it is not necessary to go into the question of fraud and reconveyance. The learned Subordinate Judge was of opinion that defendant No. 3 was the servant of defendants Nos. 1 and 2 and that he was the agent of some of the plaintiffs for the payment of revenue, but that the treachery to the *maliks* of Fakraddinpur could not be of any avail to plaintiffs Nos. 1-9, who are *maliks* of Pakri Fatehulla with which defendant No. 3 had no concern. That is not, however, the right view to take of the case. If Wakif Hussen was the agent of some of the plaintiffs and the servant or agent of defendants Nos. 1 and 2 and also interested as a co sharer in the right of his father and uncle in one of the *mouzas* comprising the estate, and if he brought about the sale in breach of his duty to the Pakri *maliks* whose agent he was and if the defendants Nos. 1 and 2 took advantage of his treachery, no Court of Justice would be inclined to allow defendants Nos. 1 and 2 to retain the benefit of the sale. As we have said, however, we do not think it necessary to go into these questions as our decision on the first branch of the case is quite sufficient to dispose of the appeal. The result, therefore, is that the appeal is decreed with costs of both the Courts. The sale is declared inoperative. The plaintiffs will recover possession of their shares with mesne profits, the amount of which will be ascertained in execution. The purchaser defendants will be entitled to a refund of the purchase-money with interest at the legal rate.

Appeal allowed.

LAHORE BANK, LTD. v. KIDAR NATH.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 665
OF 1915.

November 19, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Shadi Lal.THE LAHORE BANK, LTD., IN LIQUIDATION
—APPELLANT

versus

KIDAR NATH—RESPONDENT.

Companies Act (VI of 1882), s. 150—Money due from him to the Company; Interpretation of Winding-up—Contributory—Debt due on pro-note to Company—Summary Jurisdiction of Court—Marginal notes to sections, reference to—Interpretation of Statute.

A debt due on a pro-note by a contributory is "money due from him to the Company" within the purview of section 150 of the Companies Act (VI of 1882). [p. 746, col. 2.]

Under section 150 of the Companies Act, the Court has, upon a summary application presented to it, the power to direct the contributory to pay not only all moneys due from him as a member, but also any debt due from him to the Company. The jurisdiction is permissive, but when a case is made out for the exercise thereof, it should not be declined unless very cogent reasons to the contrary are shown. [p. 747, col. 2.]

Kamta Pershad v. Industrial Bank of India, Limited, 31 Ind. Cas. 54; 59 P. R. 1915; 139 P. W. R. 1915 and *Mercantile Trading Company, In re, Stringer's case*, 4 Ch. App. 475; 38 L. J. Ch. 698; 20 L. T. 553; 17 W. R. 694, referred to.*Semble*.—The marginal note to a section cannot be relied upon in clearing up the ambiguity in the text of the written law, but it may with advantage be referred to when it confirms the conclusion warranted by the language of the section. [p. 747, col. 1.]

Miscellaneous first appeal from the order of the Additional Judge, Lahore, dated the 19th February 1915.

Mr. Sundar Das, for the Appellant.

Messrs B. Revan Pe'man and Gullu Ram,
for the Respondent.

JUDGMENT.—The facts of this case are very simple and do not admit of any dispute. The respondent, Lala Kidar Nath, has been settled on the list of the contributories of the Lahore Bank, Limited, which is being wound up subject to the supervision of the Court, and he owes a sum of money to the Bank on a pro-note executed by him. The main question for decision is whether the Court in a winding-up proceeding is empowered to call upon him to pay the debt to the Liquidator. The answer to this question depends upon the interpretation to be placed

upon section 150 of the Indian Companies Act, VI of 1882, which runs as follows:—"The Court may, at any time after making an order for winding up the Company, make an order on any contributory for the time being settled on the list of contributories directing payment to be made, in manner in the said order mentioned, of any moneys due from him, or from the estate of the person whom he represents to the Company, exclusive of any moneys which he, or the estate of the person whom he represents, may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act." Now, the language of the Statute is very comprehensive, and it appears to us that a debt due on a pro-note by a contributory is "money due from him to the Company" within the purview of the aforesaid section.

The learned Counsel for the respondent contends that the law is intended to apply only to such moneys as are due by a contributory in his capacity as a member, and not to debts due in his private capacity. To sustain this contention we would have to read into the section after the word "due" some words to the following effect: "as contributory," and we do not see any reason for making this addition. Indeed, there is no canon of the interpretation of Statutes which would justify us in adopting this course.

The learned Counsel on both sides are unable to cite any case, in which the matter in controversy in this appeal was raised and adjudicated upon. The judgment in *Kamta Pershad v. Industrial Bank of India, Limited* (1) delivered by a member of this Bench determines the question against the respondent, and the only other case having a bearing on the subject, we have been able to discover, is that of *Mercantile Trading Company, In re, Stringer's case* (2). That case related to the Court's power to order a contributory to repay a dividend declared and paid under a fraudulent balance-sheet and the decision on the point rested upon the interpretation of section 101 of the English Companies Act of 1862, which section, it is to be noticed, is in *totidem verbis* as the

(1) 31 Ind. Cas. 54; 59 P. R. 1915; 139 P. W. R. 1915.

(2) 4 Ch. App. 475; 38 L. J. Ch. 698; 20 L. T. 553; 17 W. R. 694.

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aforesaid section 150 of the Indian Act. The Vice-Chancellor Malins, before whom the case came up in the first instance, was of opinion that the liability to refund a dividend paid under a delusive and fraudulent balance-sheet could not be regarded as money due from a contributory to the Company within the meaning of section 101, and his judgment on this point was set aside by the Court of Appeal which came to the conclusion that the section conferred upon the Court the jurisdiction to grant a summary application for the return of the dividend so paid. Now, we find that, despite the fact that the Vice-Chancellor was not prepared to go so far as to bring the aforesaid claim within the terms of the section, he made the following observations with reference to the meaning and the object of the law:—"Now this appears to me to be directed to the case of debtors to the Company in the ordinary sense of the word. If you go through the ledger, you find A, B, C, and D, and so forth, indebted to the Company; the account being settled, the object of this section is to enable the Court to make a summary order upon the debtors of the Company, in the ordinary sense of the word, to pay that debt." These remarks of the learned Judge make it clear that the present claim of the Liquidator against the respondent is within the strict letter of the law and that the Court can exercise its summary jurisdiction to enforce the recovery thereof.

It is to be observed that the marginal note, both in the Indian and the English Acts, is in the following terms: "Power of Court to order payment of debts by a contributory", and the same expression is repeated in the Companies Consolidation Act of 1908 and the Indian Companies Act, 1913 (*vide* section 165 and section 186 respectively). The word "debts" is significant, and though the marginal note cannot be relied upon in clearing up the ambiguity in the text of the written law, it may with advantage be referred to when it confirms the conclusion warranted by the language of the section.

We are fortified in the result we arrive at by the consideration that the Legislature in enacting the section intended, as pointed out in *Ramta Pershad v. Industrial Bank of India, Limited* (1), to provide a cheap and expeditious method of getting at the assets of the Company and that the object aimed

at would be defeated, if the Liquidator were required to bring a regular action on payment of an *ad valorem* Court-fee and subjected to the usual delay consequent upon an appeal in a suit. To quote the words of the Court of Appeal in *Stringer's case* (2), the law was enacted in order that by means of proceedings under the Act "without any double process or double set of proceedings, complete justice might be done between the parties, and a complete winding up effected". One of the learned Judges of the Court of Appeal in explaining the principle of the section further observes that there may be some very rare instances "where it may be necessary to have the facts stated upon the records, but wherever upon notice of motion, and upon affidavit and due examination of witnesses, you can properly arrive at a conclusion, I can see no reason whatever why a bill should be filed. It only adds to the expense,—upon notice of motion, and affidavits, and examination of witnesses complete justice can be done—the evidence can be taken under the winding-up just in as many ways as it can be taken upon bill filed; and, what is more important, there are the same means of hearing in the Court below, and the same means of appeal to this Court and to the House of Lords. Therefore, I can see no reason why any narrow construction should be put upon the Act, and I think it would be to the disadvantage of the public that a narrow construction should be put upon it". The above quotation sets out very clearly the justification of the rule which finds expression in section 150 of the Indian Act. The party proceeded against has really no reasonable cause for complaint, because in the summary proceeding, every objection is just as open to the person sought to be charged as it would have been if a suit had been instituted.

Upon a careful examination of the very wide and general terms in which the section is expressed, we are of opinion that the Court has, upon a summary application presented to it, the power to direct the contributory to pay not only all moneys due from him as a member, but also any debt due from him to the Company. The jurisdiction under the Act is no doubt permissive, but when a case is made out for the exercise thereof, it should not be declined unless very cogent reasons to the contrary are shown. There

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are cases in which the Court has refused to proceed summarily, when all the parties concerned were not amenable to the jurisdiction of winding-up, and the Court did not consider it right and just to have a piecemeal litigation, but in the case before us, the debt is admitted by the respondent, and the circumstance that the pro-note in question was signed by another person as a surety, who is not before the Court and is not subject to the summary jurisdiction, cannot be regarded as an adequate reason for refusing to exercise the statutory power against a person who is amenable to its jurisdiction.

For the foregoing reasons, we accept the appeal and setting aside the order of the Additional Judge, we direct him to proceed against the respondent under section 150 in accordance with law. The respondent must pay the costs incurred by the appellant in this Court.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 66 AND 81 OF 1913.
July 5, 1915.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

GHULAM ABBAS KHAN AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

BIBI UMMATUL FATIMA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Oudh Estates Act (I of 1869), ss. 2, 14, 22—Oudh Estates (Amendment) Act (III of 1910), s. 3—'Primogeniture', meaning of—Res judicata—Talukdar—Heir or legatee of Talukdar—"Would have succeeded," meaning of—Sanad, nature of estate created by—"Successors", meaning of—"Nearest male heir," interpretation of.

The Maniarpur Estate was held, at the time of annexation of Oudh, by one Sughra Bibi a Bachgoti Khanzada of Shia faith. The Summary Settlement was made with her and a sanad in the ordinary primogeniture form was subsequently granted to her. She died on the 11th November 1865, but her name was entered in the first and second lists framed

under section 8 of Act I of 1869. She executed a Will on the 20th June 1862 bequeathing her whole estate to her youngest half-brother Akbar Ali Khan, who succeeded to the estate on her death. At the date of the execution of the Will and at the date of her death, her eldest half-brother Jafar Ali Khan was alive. Akbar Ali Khan transferred on the 23rd July 1869, by a *hiba-bil-ewaz* 39 villages to his wife Ilahi Khanam. On 29th June 1871, 16 days before his death, Akbar Ali made a Will by which he bequeathed the remaining 43 villages in the estate to Ilahi Khanam. At the time of Akbar Ali Khan's death on the 15th July 1871, his nephew Ghulam Husain Khan, son of his second brother Hasan Ali Khan, was alive. Ilahi Khanam died intestate on 20th April 1899 leaving six daughters Ummatul Fatima, Bibi Batul, Kaniz, Asghari, Ruqaiya and Haidari, who took joint possession of the estate on the death of their mother. After the death of Ilahi Khanam, the question of succession was brought before the Courts on several occasions.

Two suits were now brought, one by Ghulam Abbas son of Bibi Batul and the other by Mohammad Jafar son of Ummatul Fatima, both claiming possession of the Taluqa under the rule of primogeniture, asserting that succession to the estate was governed by the terms of the sanad. It was found that Ghulam Abbas was born before Mohammad Jafar.

Held (per Stuart, A. J. C.), that litigations which took place subsequent to the death of Ilahi Khanam to which her daughters were parties, could not operate as *res judicata* in the present suit as the daughter's sons were not parties to them. [p. 754, col. 2.]

That Ilahi Khanam was neither a *talukdar* nor an heir or legatee of a *talukdar* and that succession at her death was not governed by the provisions of section 22 of Act I of 1869. [p. 755, col. 1.]

That the amendment made by the Oudh Estates (Amendment) Act, III of 1910, in the definition of legatee, as given in section 2 of Act I of 1869, could not be given retrospective effect in the present case as it would have the effect of divesting persons who would otherwise be entitled at least to a portion of the estate. [p. 755, col. 2; p. 756, col. 1.]

That the words "would have succeeded" as used in section 14 of Act I of 1869 were not equivalent to "might have succeeded," and must be confined to persons in the special line of succession that would have been applicable to the particular case if the transferor or testator had died intestate and the death had occurred at the date of the transfer or in the case of a gift by Will, at the time when the succession opened. [p. 757, col. 1.]

That a transfer to a person coming under any of the clauses of section 22 did not bring the transfer within the provisions of section 14, if that person would be excluded by a senior member in his own class, and that the grouping in the clauses of section 22 could not be held to bind the rule of succession therein. [p. 758, col. 2; p. 759, col. 1.]

That therefore at the time of Sughra Bibi's death her eldest brother and the son of her second brother having been alive, the bequest made by her to her fourth brother Abbas Ali Khan had the effect of breaking the prescribed line of succession and so the provisions of section 14 could not be applied. [p. 759 col. 2.]

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That explanation to section 3 of the Oudh Estates (Amendment) Act III of 1910, referred only to succession to the estates of a *talukdar* and, therefore, could not apply to *Ilahi Khanam*. [p. 760, col. 1.]

That the rule of primogeniture laid down in the *sanads* granted by Lord Canning meant the rule of lineal primogeniture as known to English Law. [p. 762, col. 2.]

That the estate created by the aforesaid *sanad* was not an estate known to English Law and that, to a certain extent, it resembled an estate in fee simple but was differentiated from it by the fact that under its terms, no female could succeed and that it bore some resemblance to an estate in tail male, but was differentiated from that by the fact that a collateral could succeed under the *sanad* whereas no collateral could succeed to an estate in tail male. [p. 763, cols. 1 & 2.]

That the word "successors" as used in the *sanad* meant "successors on death" and included both heirs and devisees but not transferees during life-time. [p. 764, col. 2.]

That the words "nearest male heir" could not be interpreted as meaning "nearest male heir according to the personal law of the grantee." [p. 767, col. 1.]

That the meaning of the *sanad* with regard to succession might be summarized as follows:—In the event of intestacy the case of all relatives of legitimate descent would be considered, all females and those claiming through females would be excluded and the succession would go to the surviving representatives of the highest line, however, collaterals only being admitted in the absence of the survival of descendants. [p. 769, col. 2.]

That, therefore, although succession to the estate was regulated under the terms of the *sanad*, neither of the plaintiffs-appellants, as daughter's sons, had any title under its terms. [p. 770, col. 1.]

Held, (per *Kanhaiya Lal, A. J. C.*), that the word "successors" as used in the *sanad* denoted successive heirs or persons succeeding to the intestate or undisposed of residue rather than persons in whose favour a transfer or bequest might be made by the owner in his life-time. [p. 775, col. 1.]

That in the hands of Akbar Ali Khan and Bibi *Ilahi Khanam* the estate was governed by the Muhammadan Law and the plaintiffs as sons of the daughters were not entitled to the estate in preference to the daughters. [p. 780, col. 2.]

That exclusion of daughters by the *sanad* did not mean exclusion of the daughters' sons and that the disability attached to the sex and not to the line. [p. 781, col. 1.]

That among sons by different daughters the preference was to be determined by seniority of the line and the age of persons representing the senior line, but no question of age arose where the persons claiming were not of the same line. [p. 781, col. 1.]

First Civil appeal against the decree of the Subordinate Judge, Mohanlalganji, Lucknow dated 29th April 1913.

The Hon'ble Mr. Moti Lal Nehru and Babus Ram Chandra and Ram Bharose Lal, for the Appellants,

Messrs. Jagmohan Nath Chak, G. H. Thomas, Wazir Hasan, J. K. Banerji and Bepin Chander Chatterji, for the Respondents Nos. 3 to 6.

JUDGMENT.

STUART, A. J. C.—The facts of the case out of which these two appeals have arisen, are as follows:—

The Maniarpur Estate, which is situated in the districts of Sultanpur and Fyzabad, was held at the time of the annexation of Oudh, by a lady of the name of Sughra a Bachgoti Khanzada, a member of a family of Rajputs, who had previously become Muhammadans. The family were Shias. The Summary Settlement was made with Bibi Sughra, and a *sanad* in the ordinary primogeniture form was subsequently granted to her. She died on the 11th November 1865, but her name was entered in the lists framed under section 8, Act I 1869 in the first list as a person to be considered as *talukdar*, and in the second list, as one whose estate, according to the custom of the family, ordinarily devolved upon a single heir. This is not the only instance in which the name of a person who had died before the date of preparation, was inserted in the lists. Another well known case was that of Thakur Gajraj Singh of Mahewa [see *Thakur Sheo Singh v. Rani Raghubans Kunwar* (1)].

Musammat Sughra executed a Will on the 29th June 1862, bequeathing her whole estate to her youngest half-brother Akbar Ali Khan. The lady was the daughter of Basawan Khan by his first wife. Basawan Khan had four sons by his second wife—Jafar Ali Khan, Hasan Ali Khan, Baqar Ali Khan and Akbar Ali Khan. It was to the youngest of these four brothers that Sughra bequeathed her estate.

At the date of the execution of the Will and at the date of Bibi Sughra's death, Jafar Ali Khan was alive. It is to be noted that the Will of 29th June 1862, was made some years before the passing of Act I of 1869, and that, according to the definition of "legatee" in section 2 of Act I of 1869, Akbar Ali Khan was not a legatee within the meaning of that Act. Their Lordships of the Privy Council considered the meaning of the word "legatee" in *Thakurain Balraj Kunwar v. Rao Jagatpal Singh* (2). In view

(1) 8 O. C. 317; 27 A. 634; 15 M. L. J. 352; 9 C. W. N. 1039; 2 C. L. J. 149.
(2) 7 O. C. 248 (P. C.); 5 O. W. N. 699; 1 A. L. J. 354; 26 A. 893; 31 L. A. 132.

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of the fact that Jafar Ali Khan was alive at the time of Bibi Saghra's death, Akbar Ali Khan was not "heir" to the property within the meaning of section 2 of the Act and the terms of the *sanad*, and the bequest was a transfer by Will to a person who was not the heir. Akbar Ali Khan succeeded to the possession of the *taluka* on the 11th November 1865. He was not a "Talukdar" as his name was not entered in the lists. He was not an "heir" of a *talukdar* or a "legatee" of a *talukdar* within the meaning of the Act subsequently passed. Akbar Ali Khan transferred on the 23rd July 1869 by a *hiba-bil-ewaz*, ostensibly in satisfaction of the amount due for dower debt, 39 villages to his wife Ilahi Khanam. That transfer took effect at once, the lady being placed in possession of all the 39 villages. By an alteration of physical boundaries, the 39 units have since been reduced to 31, but the area transferred has remained the same. On the 29th June 1871, 16 days before his death, Akbar Ali Khan made a Will, by which he bequeathed the remaining 43 villages in the estate to Ilahi Khanam. At the time of Akbar Ali Khan's death, which occurred on the 15th July 1871, his nephew Ghulam Husain Khan, son of his second brother Hasan Ali Khan, was alive. Ilahi Khanam died intestate on the 20th April 1899 leaving issue, six daughters, Bibi Ummatul Fatima, Bibi Batul, Bibi Kaniz, Bibi Asghari, Bibi Ruqia and Bibi Haidri. These ladies took joint possession of the estate on the death of their mother. At first, the name of Ummatul Fatima was alone recorded in the Revenue papers, but by a subsequent order, the names of all the six ladies were recorded jointly.

So far succession had devolved without adjudication on the part of the Civil Courts. But after the death of Ilahi Khanam, the question of succession was brought before the Courts on several occasions. The first person to dispute the title of the ladies, was Ghulam Husain Khan, the nephew of Akbar Ali Khan, of whom mention has already been made. He filed suit No. 42 of 1900 in the Court of the Subordinate Judge of Sultanpur against the six ladies for the possession of the *taluka*. He based his claim on an alleged custom applying provisions of the Hindu Law, alleging that the family who

had originally been Hindus were governed by a custom originating in the doctrines of the Hindu Law with regard to succession and that this custom continued effective after they had become Muhammadans. His suit was dismissed on the ground that he failed to prove that succession in the family was governed by the provisions of the Hindu Law, or that a custom existed excluding daughters from succession. He filed no appeal, and this dismissal became final against him from its date, the 18th June 1903. The six ladies were defendants in that suit, but their sons were not parties to it.

The second suit was filed by another Akbar Ali Khan, the brother of Ilahi Khanam, against the six ladies for possession of the *taluka*. This Akbar Ali Khan based his claim on the following allegations. He asserted that Akbar Ali Khan, the husband of Ilahi Khanam, was a person who would have succeeded according to the provisions of Act I of 1869 to the estate, if Saghra had died intestate, and that in those circumstances, succession to the property was governed by the provisions of section 14, Act I of 1869. Reading those provisions with the provisions of section 22, clause 6, of the same Act, he claimed to succeed under the provisions of section 22, clause 6, basing his title to a certain extent upon the interpretation at which the Court of the Judicial Commissioner had arrived in the case of *Rae Jagatpal Singh v. Thakurain Balrai Kuar* (3), on the 6th March 1900. But before his case was decided, their Lordships of the Privy Council reversed the Judicial Commissioner's decision in *Thakurain Balraj Kunwar v. Rae Jagatpal Singh* (2) and the Counsel for Akbar Ali Khan, understanding the decisions of their Lordships to mean that the words "a person who would have succeeded, according to the provisions of the Act, to the estate if the testator had died intestate" denoted the heir-apparent rather than any possible heir, gave up the position that succession to the property was governed by the provisions of section 14 of Act I of 1869. In the decision of the case of Akbar Ali Khan, the Judicial Commissioner's Court

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arrived at the finding that section 14 did not govern succession to the estate but that section 15 had operation, that the estate was taken out of the operation of the Act owing to the fact that Sughra had bequeathed the estate to a person who was not her heir-apparent, that succession was governed by the Muhammadan Law, and that Akbar Ali Khan's case must fail accordingly. It is to be noted that Akbar Ali Khan's case was based entirely upon the allegation that succession must be governed by the provisions of sections 14 and 22, Act I of 1869, and that at first, he asserted no title by virtue of the rule of succession laid down in the *sanad*. The decision in question is reported as *Musammatt Ummatul Fatima v. Asgar Ali Khan* (4). At page 50, the Court of the Judicial Commissioner refers to a belated argument put forward by the Counsel for the plaintiff. The words are: "This view" (that is, the view that upon the construction of section 14 of Act I of 1869 accepted by the Court of the Judicial Commissioner, the Act does not apply to the Maniarpur Estate) "is accepted by the learned Advocate for the plaintiff. But he contends that though his case under the Act fails, yet he is entitled to succeed apart from the Act upon the terms of the *sanad* which is on the record and which provides that the estate shall descend to the nearest male heir according to the rule of primogeniture."

The learned Judges proceeded to find that the case so set up, was an absolutely new case, that it was not the case put forward in the lower Court, and that they would not be justified in awarding the plaintiff any relief upon a plea based on the terms of the *sanad*. They did not stop there, but proceeded to discuss briefly whether, even if such a plea was admissible, the plaintiff could succeed thereon. They held that he could not. They decided that the words "rule of primogeniture" referred to in the *sanad*, meant the custom of *gaddi-nashini* or descent to a single heir which prevailed in some thirty families in Oudh, and held that there were no materials upon which they could decide what particular custom of *gaddi-nashini* prevailed in the Maniarpur Estate. They decided that they had no reason to

(4) 8 O. C. 45.

suppose that such custom of *gaddi-nashini* as prevailed in the Maniarpur Estate would give a brother preference to a daughter's son, and in effect arrived at the conclusion that, even if the plea had been admitted, they would not have found it established. But the Court, nevertheless, dismissed the appeal on the clear point that the plea could not be admitted. Wells, A. J. C., remarks at page 54: "Finding, however, that the suit must fail on the ground that Act I of 1869 cannot be applied, that the plaintiff ought not to be allowed now to set up a case on the *sanad* and that if this be permitted, he has not established a clear title to succeed under it, I would decree the appeal and dismiss the suit with costs," and Scott, J. C., says, "I agree with my learned colleague that the plaintiffs cannot be permitted to set up an entirely new case in appeal." It may thus be taken, that the effect of the *sanad* on succession to the property was not effectively considered. It cannot be known what would have been the result if Akbar Ali Khan had based his case upon the terms of the *sanad* and if the case had been argued before the Court on the plea that the words "rule of primogeniture" used in the *sanad*, meant what they would mean in English Law.

Some years after this decision was passed, the Judicial Commissioner's Court had to decide the meaning of the words "rule of primogeniture" as used in section 8 of Act I of 1869 with reference to the succession to the property of a *talukdar* whose name was entered in the third list. While it is to be noted that the question in that case was with regard to the meaning of the words used in an Act passed by the Legislature, and in the case of Akbar Ali Khan, the question was as to the meaning of the same words used in a *sanad* made several years before the Act in question was passed, and in circumstances which (as will be subsequently shown) make it possible to doubt that the same legal knowledge was possessed by the drafter of the *sanad* that was possessed by the drafter of the subsequent Act, the fact remains that the words "rule of primogeniture" are exactly the same, and that many of the inferences drawn in the decision of the subsequent case, would have had a bearing on the previous case, had they been argued before the Court. The case to which I

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refer is the well-known case of *D-bi Bakhsh Singh v. Chandrabhan Singh* (5). At page 323, Chamier, J. C., remarks with reference to the use of the words in section 8 of the Act: "When the Legislature used the words 'rule of primogeniture', they must have intended some known rule of succession, the details of which in its application to collateral succession, could be ascertained. There was no such rule known to the Hindu or Muhammadan Law apart from special customs, the details of which are scarcely ever alike. They were providing a rule of succession which would be applicable to Hindus, Muhammadans and Christians alike and in the circumstance, I do not think it is an extravagant assumption that they had in mind the rule of primogeniture as applied to the succession of real estate in England." Their Lordships of the Privy Council observed at page 325: "What appears to be contended for is that some other rule of primogeniture than the rule of lineal primogeniture should be applied. In the first Court, a certain custom was appealed to, to make clear or illustrate what variation from lineal primogeniture was meant, but no success attended that plea and it was not maintained at their Lordships' bar. In their opinion, the language of the *sanad* emanating from the British authority, was simply language conveying the ordinary meaning of the word 'primogeniture' in the Law of England." Thus their Lordships carried the matter further than the meaning of the words "rule of primogeniture" in section 8 of Act I of 1869.

As Sugbra's name was entered in List II, Act I of 1869, this in itself goes no further than declaring that the Maniarpur Estate devolved ordinarily upon a single heir according to the custom of the family on or before the 13th day of February 1856. But the point before the Court in Akbar Ali's case was not with regard to the succession according to the custom of the family, for the decision of which it would undoubtedly have been necessary to discuss the custom of *gaddi-nashini* proved to be applicable to the particular estate, but with regard to the succession according to the

(5) 7 Ind. Cas. 724; 13 O. C. 316; 14 C. W. N. 1010; 12 O. L. J. 303, 8 M. L. T. 273; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 20 M. L. J. 917; 32 A. 539; 37 I. A. 168.

terms of the *sanad*, in which there was no reference to the custom of the family. In these circumstances, the observations of their Lordships of the Privy Council have a direct bearing. Had the interpretation at which their Lordships arrived in the subsequent case, occurred to the minds of the Judicial Commissioner's Court, the latter would, if they had admitted a plea based on the terms of the *sanad*, have discussed the terms of the *sanad* from the point of view that the words "rule of primogeniture" meant "rule of lineal primogeniture" according to their ordinary meaning in the Law of England. In no circumstances, would the result have been different as they refused to admit the plea at the late stage when it was placed before them, but they might not have made the remark that the words "rule of primogeniture" as used in the *sanad* meant nothing more or less than the rule of *gaddi-nashini* applicable to the estate. Their conclusion that succession was governed by the Shia Law, is necessarily incomplete, as they did not consider the effect of the terms of the *sanad*. In no circumstances, can this case operate as *res judicata* as the daughters' sons were not parties to it.

I now come to the third case. Ummatul Fatima had succeeded in obtaining physical possession over the whole *taluka* although the names of her five sisters were entered as co-sharers. Certain sisters applied for partition in the Revenue Courts. Ummatul Fatima opposed their application, alleging that as an eldest daughter, she was by right and custom entitled to the whole estate. The Revenue Authorities referred the parties to the Civil Court for a decision of title. Two sisters, Asghari and Ruqaiya, then instituted a case against the remaining sisters. Ummatul Fatima was the real defendant, the remaining three defendants being *pro forma* defendants. The plaintiffs in that suit claimed a declaration that they were entitled to have their 2/6ths share partitioned. They relied on Shia Muhammadan Law. The defendant Ummatul Fatima based her case on the *sanad*. According to the terms of the *sanad*, females are excluded. She admitted that females were excluded, but set up a *jus tertii* on behalf of her son Agha Muhammad Jafar. In this

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case also the daughters' sons were not parties. While this case was pending in the Court of first instance, the decision of their Lordships of the Privy Council in the case of *Thakur Sheo Singh v. Rani Raghubans Kunwar* (1), dated the 18th May 1905, was pronounced. Previously the Courts in Oudh had considered that the provisions of Act I of 1869 superseded the provisions of the *sanad* in all cases. They based their theory upon the decision of their Lordships of the Privy Council in *Brij Indar Bahadur Singh v. Ranee Janki Koer* (6), in which their Lordships had decided in 1877, in a case in which a *sanad* was granted with full power of alienation to the widow of the last owner, a Hindu, and to her heirs for ever, her name being entered in the first and second lists under Act I of 1869, section 8, and one condition of the grant being that in the event of her dying intestate or of any of her successors dying intestate, the estate should descend to the nearest male heir according to the rule of primogeniture, that in suits against the widow's daughter the *sanad* conferred upon the widow and her heirs male the full proprietary right and title to the estate, and not merely an estate for life with remainder to the male heirs of her husband in the event of dying intestate without having alienated it in her life-time, and also that with regard to succession the limitation in the *sanad* was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent, must be governed by section 22 of that Act.

This decision is, of course, still fully operative, but in interpreting it the Courts had omitted to distinguish the case in which Act I of 1869 had never come into operation owing to the fact that a transfer had been made by the *talukdar*, who had died before the passing of the Act, in favour of a person who was not his heir-apparent, and where that transfer had taken place before the Act came into operation. In such circumstances, it was possible that the terms of the *sanad* would govern succession. Such a case came before their Lordships in *Thakur Sheo Singh v. Rani Raghubans Kunwar* (1). There *Thakur Gajraj Singh*, *Talukdar* of the

Mahewa Estate, was the person with whom *Samnary Settlement* was made. A *sanad* was granted to him on the 19th October 1859, which was a grant to himself and his heirs without indication of the line of inheritance. *Gajraj Singh* died in 1860 and was succeeded by *Girwar Singh* his brother. *Girwar Singh* remained in possession until his death in 1865. A primogeniture *sanad* was granted to him. He bequeathed his estate to his nephew who succeeded him. Here the transfer had taken place before Act I of 1869 came into force. The name of *Gajraj Singh* was inserted in the lists prepared under Act I of 1869 although he had died many years before the Act was passed. Their Lordships decided that succession was governed by the terms of the *sanad*.

In the suit brought by *Asghari* and *Ruqaiya*, the two plaintiffs had at first based their title upon their rights under the Shia Law, accepting the previous decision of the Judicial Commissioner's Court in *Akbar Ali's* case as laying down the rule of succession. But, in view of their Lordships' decision in *Thakur Sheo Singh's* case (1), they altered their plea and took a position to the effect that neither they nor *Ummatul Fatima* had any title at all under the terms of a *sanad* which excluded females, but that as they were all in joint possession, they had a right to partition of their admitted shares. The Subordinate Judge decided that as their title was good against any one but the true owner, and as the true owner was no party, they should succeed. Then followed the appeal to the Judicial Commissioner's Court which was decided on the 14th January 1900. A copy of the judgment will be found as Exhibit 26 on this record.

The decision of the Judicial Commissioner's Court, dated 14th January 1900, was based on the finding that none of the sisters had any title to the property. The judgment shows that both sides accepted that position,—in other words, that in that particular case, it was agreed between the parties that succession was not governed by the provisions of Act I of 1839 or by the Shia Muhammadian Law. It is clear that in that case, the

(5) 5 F.A. 1; 1 O. L. R. 318.

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parties agreed that succession was regulated by the terms of the *sanad*. The plaintiffs put forward that under the terms of the *sanad* neither they nor Ummatul Fatima had any rights at all, but that as all six sisters had attained joint possession over the property, those who wished to do so, had a perfect right to have their shares partitioned off. Ummatul Fatima's defence was that the *sanad* governed succession to the property, that under its terms her son Agha Muhammad Jafar was entitled to succeed, that as a matter of fact, he had succeeded and that she was holding the property for him, the title having vested in him. The third issue in that suit raised the point as to whether succession was governed by the Shia Law or by the terms of the *sanad*. The Judicial Commissioner's Court found that it was not proved that Ummatul Fatima's son was entitled to the property under the terms of the *sanad*, or that Ummatul Fatima was holding it with his implied consent, or that the property had vested in him and that she was not in a position to put forward his title as a bar to the plaintiffs' claim for partition. It was decided that as the sisters had held possession together, and had all along been under the impression that according to the provisions of the Muhammadan Law, they were equally entitled to their respective shares in the property, their claims to their respective shares should be affirmed. The Court said: "It may be and apparently is correct that they made a mistake in law, but it is beyond doubt that under a mistaken idea of the law, they gained possession and that they have held possession and enjoyed the estate in equal shares. As among themselves, they are, therefore, entitled to equal shares, and if the property is partible, the possession of the plaintiffs entitles them to partition thereof. Until the plaintiffs are ousted from possession by a rightful owner, the appellant, who is equally with them a trespasser (but who is not in possession of the share held by them), is not in law entitled to deny their right to partition. The possessory title of the plaintiffs is good against the whole world except the true owner."

Thus it is clear that in the last case,

the Court of the Judicial Commissioner decided that succession to the Maniarpur Estate was neither according to the provisions of Act I of 1869, nor according to the Shia Law, but that it was according to the terms of the *sanad*. This conclusion was not, however, based on contest. The judgment shows that both sides agreed to this position. Ummatul Fatima set up that her son was entitled to succeed under the terms of the *sanad*. The other side denied the correctness of the assertion. But both sides agreed that succession would be according to the terms of the *sanad*. In no circumstances would this case also operate as *res judicata* as the sons of the daughters were not parties to it.

I now come to the present suits. They may be summarized shortly. In one suit Ghulam Abbas Khan, son of Bibi Batul, and his transferee claim possession of the whole *taluka* asserting that succession is governed by the terms of the *sanad*, and that under the terms of the *sanad*, Ghulam Abbas Khan is entitled to succeed under the rule of primogeniture.

In the other suit Agha Muhammad Jafar, son of Ummatul Fatima, and his transferee claim possession of the whole *taluka* asserting that succession is governed by the terms of the *sanad* and that under the terms of the *sanad*, Agha Muhammad Jafar is entitled to succeed under the rule of primogeniture.

The learned Subordinate Judge decided that Ghulam Abbas Khan was born before Agha Muhammad Jafar, that succession was not governed by the terms of the *sanad* in view of the fact that Akbar Ali Khan was not a successor of Bibi Sughra, and that Ilahi Khanam was not a successor of Akbar Ali Khan within the meaning of the words of the *sanad*. The words in question are:—

"It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture."

The learned Subordinate Judge held that the word "successors" did not include a transferee or a devisee, that Akbar Ali Khan was thus not a successor of Bibi Sughra, and that from the period of Akbar Ali Khan's succession, the *sanad* ceased to have operation

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He decided accordingly that succession to the estate was governed by the provisions of the Shia Law, that daughters had the right to succeed in equal shares, and dismissed both suits. The present appeals are preferred.

These appeals have been argued at length. The respondents have not accepted the decision of the learned Subordinate Judge on the points on which that decision has been against them, and, in consequence, most of the contentious matter before the learned Subordinate Judge has been again traversed before us. The learned Counsel for the respondents has re-asserted that succession to the estate is governed by the provisions of section 22, Act I of 1869. He has not pressed the point strongly, but he has not abandoned it and I consider it better to take it up in order that the position may be cleared with reference to any possible contest that may arise in the future. The words of section 22 which have a bearing on this case are, "If any *talukdar* whose name shall be inserted in the second of the lists mentioned in section 8, or his heir, or legatee, shall die intestate as to his estate." The dispute is as to the succession to Ilahi Khanam. She was not a *talukdar*. Was she an heir? She was clearly not an heir as the word "heir" refers to persons who succeed by intestate succession. Was she a legatee? The word "legatee" is defined in section 2, Act I of 1869, as a person to whom property is bequeathed under the special provisions of Act I of 1869. That section has been amended by the United Provinces Act III of 1910, and a "legatee" is now defined as a person to whom there has been or is bequeathed an estate or portion of an estate *whether before or after the commencement of this Act*. She took a portion of the property under the terms of the deed of *hiba-bil-uwaz* executed by her deceased husband, and the remainder of the property under the terms of a Will executed by her husband. Both these documents were executed after the 12th January 1869. With regard to the first property, she is clearly not a legatee. With regard to the second property she was the legatee of Akbar Ali Khan. But Akbar Ali Khan was not

a *talukdar*. So, in order to bring the provisions of section 22 directly into operation, it would be necessary to show that Akbar Ali Khan was an heir or legatee of Bibi Sughra. According to the terms of the explanation in section 2, United Provinces Act III of 1910, the words "heir" and "legatee" are not restricted to the immediate heirs and legatees of the *talukdar*. So if it can be shown that Akbar Ali Khan was an heir or legatee of Bibi Sughra, it might be held, if the amendment has retrospective effect, that section 22 would operate with regard to the succession of the 43 villages. Akbar Ali Khan was not the "heir" of Bibi Sughra. Apart from the fact that he was not the heir under the provisions of Act I of 1869, or under the terms of the *sanad*, he was not an "heir" because he succeeded as a "devisee." He succeeded under the provisions of the Will dated 29th June 1862, and was a person to whom Bibi Sughra who was a *talukdar*, had bequeathed an estate under the provisions of a Will made prior to the passing of the Act. As the Act stood before amendment he was certainly not a "legatee," as has been clearly decided by their Lordships of the Privy Council in *Thakurain Balraj Kunwar v. Rae Jugatpal Singh* (2). But as the words "*under the special provisions of this Act*" and "*under the same provisions*" have now been deleted from the definitions of "heir" and "legatee," and as under the provisions of section 2, United Provinces Act III of 1910, a "legatee" is a person to whom there has been bequeathed an estate before the commencement of the Act, he would be a legatee if the section has retrospective effect. But the section has only retrospective effect according to the conditions of section 21, United Provinces Act III of 1910, and that section contains the following words:—

"Nothing contained in the said sections shall affect suits pending at the commencement of this Act, or shall be deemed to vest in or confer upon any person any right or title to any estate, or any portion thereof, or any interest therein, which is, at the commencement of this Act, vested in any other person who would have been entitled to retain the same if this Act had not been passed; and the right or title of

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such other person shall not be affected by anything contained in the said sections."

The recent amendment of the Oudh Estates Act would completely alter the question of succession to the Maniarpur Estate. The provisions of section 22 of the unamended Act could not directly affect the Maniarpur Estate, as Akbar Ali Khan was according to those provisions neither a *talukdar*, nor the heir, nor legatee of the *talukdar*. Had he been a *talukdar*, or the heir or legatee of the *talukdar*, the succession with respect to a portion of the 43 villages would have gone to his heirs, for it is to be noted that the Will under the provisions of which Ilahi Khanam succeeded to the estate was invalid under the provisions of Act I of 1869 and could only affect a portion of the property devised under the provisions of the Shia Law. It was invalid under the provisions of Act I of 1869, because Akbar Ali Khan died within sixteen days of making it, and it could only be partially operative under the provisions of the Shia Law, because he could not bequeath more than one-third of his estate under the provisions of that Law. If succession to the estate were governed by the provisions of section 22, Act I of 1869, the terms of the *sanad* had no force, but this Will can only be held valid under the powers given to Akbar Ali Khan by the terms of the *sanad*. Therefore, the succession with regard to a portion, in any circumstances, lay to the heirs of Akbar Ali Khan and would not have gone to Ilahi Khanam. Thus the amendment of the Act would have the effect of depriving Ilahi Khanam and her heirs of certain rights which they had prior to the amendment, and conferring those rights upon the heirs of Akbar Ali Khan. The question of limitation may be left out. As the old law stood, the heirs of Akbar Ali Khan had no rights, and I can only understand the provisions as to vesting, to exclude the question of limitation, as it is obvious that no persons could in the past have asserted rights with success if they did not then possess them. Thus, as I understand it, a portion of the estate at any rate became vested in Ilahi Khanam and her heirs, and for this reason, I do not consider that the subsequent amendment of the Oudh Estates Act affects the position. Thus the provi-

sions of section 22, Act I of 1869, do not directly affect the question of succession.

The next point raised by the learned Counsel for the respondents is that the provisions of section 14 of Act I of 1869 operate to bring the provisions of section 22 into operation. The reference is to section 14 before amendment, as the new section 14 inserted by the United Provinces Act III of 1910 has no retrospective effect. The words of the old section are as follows:—

"If any *talukdar* or grantee shall heretofore," i. e., before 12th January 1869, "have transferred or bequeathed, or if any *talukdar* or grantee, or his heir or legatee, shall hereafter transfer or bequeath, the whole or any portion of his estate to another *talukdar* or grantee, or to such younger son as is referred to in section 13, clause 2, or to a person who would have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer, and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator."

In order to prevail on this contention, it is necessary for the respondents to show that Akbar Ali Khan would have succeeded according to the provisions of the Act to the estate of Bibi Sughra if she had died without having made the transfer and intestate. The subsequent transfer by Akbar Ali Khan to Ilahi Khanam may be left out of account, for Akbar Ali Khan was neither a *talukdar*, nor the heir, nor legatee of a *talukdar* within the meaning of the section in question.

The leading case which guides the interpretation of the words in question, is the case of *Thakurain Balraj Kunwar v. Ras Jagatpal Singh* (2). That case came before the Judicial Commissioner's Court in 1900, and the report of that Court's proceedings will be found in *Ras Jagatpal Singh v. Thakurain Balraj Kuar* (3). The facts in that case were as follows:—*Ras Pirthipal Singh* was the

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owner of *taluqa* Raepur Bichore. He had an elder son Jagmohan Singh and a younger son Bisheshar Bakhsh. Pirthipal Singh died before the passing of the Act, having executed a transfer under the terms of which he was succeeded by his younger son before the Act came into force. Bisheshar Bakhsh died after the Act came into force having been predeceased by the elder brother. Jagmohan Singh's son claimed to succeed under the provisions of clause 6, section 22, Act I of 1969, against the widows of Bisheshar Bakhsh. In that case it was admitted that, inasmuch as Bisheshar Bakhsh had succeeded Pirthipal Singh under the terms of a transfer before the passing of the Act, the provisions of section 22 could not be applied directly to govern the succession. But it was urged that section 14 had application, because Bisheshar Bakhsh was a possible heir of his father. The Judicial Commissioner's Court was of opinion that any person mentioned in section 22 as a possible heir was a person who "would" have succeeded according to the provisions of the Act to the estate if the testator had died intestate within the meaning of section 14. They interpreted the word "would" as being equivalent to the word "might." Their Lordships of the Privy Council took a different view. The quotation from that judgment is: "Their Lordships think that the learned Judges in the Court of the Judicial Commissioner have gone too far in holding as they did that any person mentioned in section 22 as a possible heir may be said to be 'a person who would have succeeded according to the provisions of the Act to the estate if the testator had died intestate' within the meaning of section 14." They think that the expression 'would have succeeded' must be confined to persons in the special line of succession that would have been applicable to the particular case if the transferor or testator had died intestate and the death had occurred at the date of the transfer or, in the case of a gift by Will, at the time when the succession opened. In short, they think that the expression 'a person who would have succeeded according to the provisions of the Act' is equivalent to 'the person or one of the persons to whom the estate would have descended according to

the provisions of the special clause of section 22 applicable to the particular case.' Their Lordships do not agree with the view of the learned Counsel for the respondent that clause 2 of section 13 was introduced by mistake and may be disregarded altogether. On the contrary, they think that that clause throws a good deal of light on the words in dispute. A younger son of a *talukdar* named in List III or List V, is no doubt among the possible heirs of his father, but he is not within the prescribed line of succession if the father leaves an eldest son or a male lineal descendant of an eldest son.

"The construction which commends itself to their Lordships, gives a meaning to every part of the sections under consideration. If a transfer or bequest is made to a person in the prescribed line of succession, there is reason for placing the transferee or legatee in the same position with regard to succession to the estate as the transferor or testator, but if the prescribed line of succession is broken by a transfer or bequest of the entailed estate to a person outside the prescribed line, it seems not unreasonable that the fetter of the entail, such as it is, should no longer apply to the estate."

The learned Counsel for the respondents has argued that the judgment of their Lordships goes no further than to lay down that a transfer to a person coming under any of the clauses contained in section 22, brings the transfer within the provisions of section 14, even though that person would be excluded by a senior member in his own class. With regard to the facts of this particular case, he urges that, inasmuch as Bibi Sughra's brothers were her heirs, a bequest by her to any brother would bring the provisions of section 14 into operation. He lays great stress on the words "to the person or one of the persons to whom the estate could have descended." I do not consider that the decision of their Lordships can be so interpreted. The clauses in section 22 are not arranged according to such a definite principle of grouping as that which he suggested. When they are examined this fact stands out clearly.

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The first clause contains the eldest son and his male lineal descendants without separating the relative rights of the latter to succeed. The second clause refers to the male lineal descendants of the eldest son in the case where he has predeceased the intestate, separating the relative rights both of the lines and the members to an infinite degree. The first and second clauses might have been combined to form one clause. The third clause takes into account the extinction of the line of the eldest son and lays down the rule of succession in a similar manner with regard to the relative rights of the sons and their lineal descendants to an infinite degree. Here again, there seems no reason why this clause should not have been combined with the second clause and the first clause. The fourth clause takes the peculiar incident of a daughter's son, who has been treated by the *talukdar* in all respects as his own son, and his male lineal descendants. The history of the legislation indicates that this exceptional treatment of a daughter's son who has been in effect treated as a real son of the intestate, was introduced to meet the wishes of a particular *talukdar*. This explains the introduction of the peculiar case. The fifth clause refers to a person adopted by the *talukdar* and not to such person's lineal descendants. The sixth clause takes the case of brothers and lays down rules for their succession which follow on the same lines as the succession of sons, but, whereas in the case of sons a sub-division is made into three clauses, in the case of brothers the rules are compressed into one clause. It was presumably only for considerations of convenience of drafting that the sixth clause was not made into three clauses to read as follows:—

"1. Or in default of such adopted son, then to the eldest brother of such *talukdar* or grantee, heir or legatee, and his male lineal descendants subject as aforesaid.

"2. Or if such eldest brother of such *talukdar* or grantee, heir or legatee shall have died in his life-time, leaving male lineal descendants, then to the eldest and every other son of such eldest brother, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid.

"3. Or if such eldest brother of such *talukdar* or grantee, heir or legatee shall have died in the life-time of the *talukdar* or grantee, heir or legatee, without leaving male lineal descendants, then to the second and every other brother of the said *talukdar* or grantee, heir or legatee, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid."

The meaning would have been absolutely the same. I need not continue discussion of the clauses further. This is sufficient to show that the grouping in the clauses cannot be held to bind the rule of succession therein. In fact with regard to the first six clauses the grouping might be arranged in a perfectly different manner and the rule of succession could be stated in the following ways:—

"If any *talukdar* or grantee whose name shall be inserted in the second, third, or fifth of the lists mentioned in section 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows:—

"1. To the eldest son and his male lineal descendants.

"2. To the second son and the male lineal descendants of the second son.

"2 (a). To the third son and the male lineal descendants of the third son.

"2 (b). To the fourth son and the male lineal descendants of the fourth son.

* * * * *

"2 (n). To the *n*th son and the male lineal descendants of the *n*th son.

"3. To the son of a daughter treated by the intestate in all respects as his own son and to his male lineal descendants.

"4. To a person adopted by the intestate.

"5. To the eldest brother and the male lineal descendants of the eldest brother.

"5 (a). To the next eldest brother and the male lineal descendants of the next eldest brother.

* * * * *

"5 (n). To the *n*th next eldest brother and the male lineal descendants of the *n*th next eldest brother.

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"A person in each class is excluded from succession by the existence of any person in a class above. Within the class, those of the lower line, how high soever, are excluded by those of the higher line how low soever."

The decision of their Lordships appears to me to lay down that in the case of a transfer which would come within the provisions of section 14, it is necessary first to look at the following point. What is the class of the transferee according to the classification which I have adopted? If at the time of the transfer (or, in the case of a gift by a Will, at the time when succession opened) there is no person alive in a superior class and the transferee is thus a person who would have succeeded according to the provisions of the Act to the estate if the testator had died intestate, the provisions of section 14 will come into operation, and it is thus that the words "The person or one of the persons to whom the estate would have descended according to the provisions of the especial clause of section 22 applicable to the particular case," should be interpreted.

I am supported in this view first by the fact that, if the view suggested by the learned Counsel for the respondents (which is the only alternative view that has been placed before us) be taken, its acceptance would involve the treatment of the words "would have succeeded" as equivalent to the words "might have succeeded." In the second place, the subsequent remarks of their Lordships in the latter paragraph which I have quoted, appear to make the matter absolutely clear. Their Lordships say: "If a transfer or bequest is made to a person in the prescribed line of succession, there is reason for placing the transferee or legatee in the same position with regard to succession to the estate as the transferor or testator." In other words, their Lordships considered that if the transferor transfer in such a manner as not to break the line of succession, section 14 has application, and they continue, "But if the prescribed line of succession is broken by a transfer or bequest of the entailed estate to a person outside the prescribed line, it seems not unreasonable that the fetter of the entail, such as it is, should no longer apply to the

estate," that is to say, that section 14 has not application.

Thus the question for determination appears to be, is the line of the succession to the estate broken? According to the provisions of section 22, clause 6, the succession to Bibi Sughra's estate, if she died intestate, went first to her eldest brother and his male lineal descendants, then to her second brother and his male lineal descendants, then to the third brother and his male lineal descendants, and finally to the fourth brother and his male lineal descendants. It is admitted that at the time of her death Jafar Ali Khan, her eldest brother, and Ghulam Husain Khan the son of Hasan Ali Khan, her second brother, were alive. So it is clear that by bequeathing the estate to Akbar Ali Khan she broke the prescribed line of succession and cut the fetter of the entail such as it was. Thus I consider that the provisions of section 14 cannot be applied.

I now come to the next point. Do the provisions of section 15 apply?

At first sight, it would appear that they must apply, because reading together sections 14 and 15, it would seem almost a necessary conclusion that succession to a transferee under any transfer made by a *talukdar* before 12th January 1869 would, if made to a person who would have succeeded according to the provisions of the Act to the estate if the transferor had died without making the transfer and intestate, be governed by the provisions of section 14, and succession to a transferee under a transfer made to a person who would not have so succeeded would be governed by the provisions of section 15. But, before this conclusion can be drawn, it is necessary to consider whether there may not have been conditions attached to the transferred property which would take it out of the scope of section 15 even in the latter case. The Crown Grants Act, Act XV of 1895, states in its third section: "All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid, shall be valid and take effect according to their tenor any rule of law, Statute or enactment of the Legislature to the contrary notwithstanding."

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Thus, if the terms of the primogeniture *sanad* govern succession to the property, succession to property transferred to a person who would not have succeeded according to the provisions of the Act, might not be governed by the law that would apply if the transferee or legatee had bought the same property from a person not being a *talukdar*, but might be governed by the terms of the *sanad*. This view is supported by the pronouncements of their Lordships of the Privy Council in *Thakur Sheo Singh v. Rani Raghubans Kunwar* (1): "Whatever force such a contention might otherwise have had, appears to their Lordships to be removed by the Act to which their attention was called, Act XV of 1895." Their Lordships then proceed to quote the section of the Act to which I have already referred. The only argument that can be advanced against the contention that the terms of the *sanad* might govern such a transfer or bequest in preference to the provisions of section 15, would be based on the words of the explanation to section 3 of the United Provinces Act III of 1910. This explanation is, "Notwithstanding anything contained in the Crown Grants Act, Act XV of 1895, the conditions of the *sanad* relating to succession, in so far as they are inconsistent with the provisions of this Act, shall not apply to the estate." This portion of the enactment does not, however, change the situation on this particular point, inasmuch as section 3 refers to the heritable and transferable rights of *talukdars* in their estates, and the explanation refers only to the succession to the estates of a *talukdar*. We are here not dealing with succession to the estate of a *talukdar* but with succession to the estate of a transferee of a person who succeeded partly by virtue of a transfer and partly by virtue of a bequest from a person who had succeeded by virtue of a bequest from a *talukdar*, who would not have succeeded according to the provisions of the Act to the estate if the *talukdar* had died intestate. In these circumstances, the particular legislation which has excluded the operation of the Crown Grants Act in one instance, has not excluded it in the present instance.

I now proceed to the next point. I have considered whether the provisions of Act I of 1869, either amended or unamended, can affect the succession to the estate of the late Bibi Ilahi Khanam, and I find that the provisions of that Act do not govern the succession. The question is then narrowed down as to whether the succession is governed by the terms of the primogeniture *sanad* or the terms of the Shia Muhammadan Law, and it may be stated to shorten the argument that both parties agree, and I agree with them that, if the terms of the *sanad* do not govern succession to the estate, succession will be governed by the rules of Muhammadan Law applicable to Shias.

It is necessary now to examine the terms of the *sanad*. In the first place according to the Crown Grants Act which, not having been excluded, has full effect in the circumstance of this case, the terms of the *sanad* must be operative if they have application. It is unnecessary to labour that point, as it is apparent. The learned Counsel for the respondents has argued that the terms of the *sanad* fell into abeyance, and that they would not be revived. He relied as authority for this proposition on the decision of their Lordships of the Privy Council in *Brij Indar Bahadur Singh's* case (6). But it is not necessary to pursue the point whether, if the *sanad* had become superseded, it could have revived, as I am of opinion that in the present case the terms of the *sanad* have never been superseded. Bibi Sugra transferred the estate to Akbar Ali Khan by a testamentary disposition which she was entitled to make only under the terms of the *sanad*. Akbar Ali Khan transferred a portion of the estate by a transfer, and the remainder by a testamentary bequest, to Bibi Ilahi Khanam. He was entitled to make the transfer and the testamentary bequest under the terms of the *sanad*. He was not entitled to make a testamentary bequest affecting the whole of his property otherwise than under the terms of the *sanad*. As I have already shown, succession in the Maniarpur Estate has never been regulated by the provisions of Act I of 1869, amended or unamended, and

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the provisions of that Act have had no application to succession to the estate.

The contest to the effect that it is not proved that a *sanad* was given, has now been abandoned, and the parties agree as to the fact that Bibi Sughra received a *sanad* of the nature known as the "primogeniture *sanad*" in the exact form given in Syke's Compendium of the Oudh Talukdari Law, Appendix E, No. III. It will be convenient to quote the form in full:—

"Know all men that whereas by the Proclamation of March 1853, by His Excellency the Right Hon'ble the Viceroy and Governor-General of India, all proprietary rights in the soil of Oude, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, George Udny Yule, Officiating Chief Commissioner of Oude, under the authority of His Excellency the Governor-General of India in Council, do hereby confer on you the full proprietary right, title and possession of the estate of consisting of the villages as per list attached to the *kubooliat* you have executed, of which the present Government revenue is.....

"Therefore, this *sunnud* is given you in order that it may be known to all whom it may concern that the above estate has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions of surrendering all arms, destroying all forts, preventing and reporting crime, rendering any service you may be called upon to perform, and of showing constant good faith, loyalty, zeal and attachment to the British Government according to the provisions of the engagement which you have executed, the breach of any one of which at any time shall be held to annul the right and title now conferred on you and your heirs.

"It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule

of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever you please.

"It is also a condition of this grant that you will, so far as is in your power, promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature."

The learned Subordinate Judge has found rightly that succession was regulated to the estate under the terms of the *sanad* while the estate was in the possession of Bibi Sughra, and his reason for deciding that the terms of the *sanad* have no application in the present case, is because he finds that the word "successors" means "heirs." Considerable argument has been devoted in these appeals to the meaning of the word "successors." The Counsel for the appellants has argued that the word "successors" has a very wide meaning and that it includes both persons who succeeded by virtue of a testamentary disposition and transferees. Before I proceed to examine the meaning of the words, I shall discuss the circumstances in which the *sanad* was issued.

After the conquest of Oudh and the Confiscation Proclamation of Lord Canning, title to the estates of the larger proprietors was re-conveyed by the grant of the *sanad* in the form given in Syke's book, Appendix E, Form II. The determination to make these grants, was mainly with Lord Canning, the Governor-General of the period, and the form in which these grants were made was the form sanctioned by him. The earlier *sanad* conferred on the grantees an absolute estate, something of the nature of an estate in fee simple as known to the Law of England, but nothing was laid down as to succession. Shortly afterwards, the question arose whether conditions should not be superadded to regulate succession to such estates. The Chief Commissioner of Oudh held the view that it would be

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to the advantage of the *talukdars* if their estates were made non-transferable, and succession was regulated by a strict rule unalterable by the holder which would partake to some extent of the nature of an entail as known to the Law of England. He apparently did not intend to introduce the exact rules of entail, for he seems to have desired to permit succession by collaterals. His main object was to prevent transfer or alienability. The Governor-General refused to accept the views of the Chief Commissioner. He considered that the holders should have free power to dispose of their estates as they pleased by sale, gift or bequest, and, while he agreed that in the case of intestate succession, the estate should remain impartible and descend to a single heir to be selected according to the principles of the law of primogeniture or according to the custom known as *gaddi-nashini* or descent to a single heir, which was stated to be prevalent in some thirty families in Oudh, he refused to deprive the holder while alive, of his right to transfer the estate. The discussion will be found in the introduction to Mr. Syke's book. It is not necessary to follow its details in full. But when considering the meaning of the terms of the primogeniture *sanad* which contains the final decision of the Crown at the time, it is necessary to examine the conditions under which the Governor-General was working. In Oudh at the present day, words used in Indian Legislative enactments and in legal documents drawn up in English in India have come to bear meanings, which are well understood by the judiciary and members of the legal profession and which are not always the meanings attached to those words in the Law of England. But at the period when this primogeniture *sanad* was drawn up, hardly any legal phraseology existed in India other than the legal phraseology of English Law. Amongst the Judges of the High Courts and the Bar was found to some slight extent, special Indian legal phraseology in the English language. But in Oudh and the North-Western Provinces, there would not have been ordinarily understanding of legal phraseology otherwise than according to the meaning that it bore in England. In the deliberations of the Government of India, legal advice

was given by an English lawyer whose knowledge of special Indian legal phraseology could not have been extensive owing to the short number of years that he spent in India as a Member of Council. In drafting a Legislative enactment or a grant or deed, the Governor-General would usually indicate his wishes to a legal adviser, who would record those wishes in the legal phraseology known to the Law of England, and in correspondence by the Government of India where legal terms were used, the terms would ordinarily have the same meaning as they would have in the Law of England. I, therefore, consider that in the interpretation of both the letters and correspondence the only possible course is to take the meaning of the legal terms to be as they would be understood by a practising lawyer in England at that period. The reason why I find it necessary to determine this question is, because there is frequently a real distinction to be drawn between English and Indian terms. I may take for example the meaning of the word "primogeniture." It has been argued that, when Lord Canning uses the word "primogeniture" in the *sanad*, he does not mean "lineal primogeniture" as known to the Law of England but the custom of *gaddi-nashini* or descent of an estate to a single heir existent in some thirty families in Oudh during the period. I am not satisfied that Lord Canning did not understand the distinction between the English rule of lineal primogeniture and the custom of *gaddi-nashini*, as I find in one passage of a letter from him, quoted in Mr. Syke's book at page 85 of the introduction, that he differentiates primogeniture from the transmission of estates undivided to an heir. But even on the supposition that he considered that the rule of primogeniture was equivalent to the rule of *gaddi-nashini*, it cannot be decided that, if a grant issued by him declared that succession should take place according to the rule of primogeniture, a Court should interpret that document as having the effect of declaring that succession should take place according to the custom of *gaddi-nashini*. The custom of *gaddi-nashini* as stated in the correspondence existed in some thirty families in Oudh. At that time, it was a custom in some thirty

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families in Oudh for an estate to descend to a single heir. There is nothing to show that succession was regulated by the same rules in every case. In one family, females may have been excluded, and in another females may not have been excluded, in a third, collaterals may have been preferred to junior descendants of a senior line, and the variations may have been (and probably were) considerable. It is too much to suppose that Lord Canning had any intimate acquaintance with the variations of succession in families in which this custom prevailed. There is no reason to suppose that the Chief Commissioner had intimate acquaintance with such variations, or that if he had intimate acquaintance with such variations he informed Lord Canning of their existence. The Governor-General was advised that in some thirty families in Oudh the estate descended as an impartible whole to a single heir, and this one element—that the estate descended as an impartible whole to a single heir—apart from variations with regard to rules of succession—was common to the families having that custom, and provided one element in common with succession in English Law under the rule of primogeniture. To a statesman, this might well represent sufficient cause for imposing succession according to the rule of lineal primogeniture in the case of intestacy on all grantees who should desire to accept the primogeniture *sanad*. It is to be remembered that it was optional for *talukdars* to accept or not to accept the primogeniture *sanad*. If Lord Canning considered that the rule of lineal primogeniture already existed in those thirty families or if he knew that it did not exist, the result would have been exactly the same. When the *sanad* abated the rule of primogeniture it meant the rule of primogeniture, and those grantees who accepted the grants were bound by the condition.

I now return to the consideration of the terms of the *sanad*. It will be observed that the *sanad* is full of terms well known to English Law, but the estate created by it, is not an estate known to English Law. To a certain extent, it resembles an estate in fee simple, but is differentiated from an estate in fee simple by the fact that under its terms, no female can succeed. In the case of

an estate in fee simple, in absence of males, females succeed as joint co-tenants. It bears some resemblance to an estate in tail male, but is differentiated from that by the fact that a collateral can succeed under the terms of the *sanad* whereas no collateral can succeed to an estate in tail male. No rule of succession is laid down in the *sanad*.

After this general examination of the contents, I now proceed to an examination of the particular words. The first word is the important word "successors." "It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate." The word "successor" is capable of a very large number of meanings both legally and according to the common use of the word. Literally successor is the converse of predecessor. The successor is the person who comes afterwards. It would be difficult, however, to find a legal document in which such wide sense is given to the words. The word "successor" may mean the successor on death, either as an heir by intestate succession or by devise. In a different context, it may mean a successor-in-office, and in certain circumstances it may include a transferee. There is nothing in the context of the *sanad* repugnant to the interpretation that it includes a transferee and a devisee. The conclusion of learned Subordinate Judge that it is a synonym for heirs, does not commend itself to me. If it had been intended to regulate succession only to the grantee and his heirs, there seems no reason why the word "heirs" should not have been used. The learned Counsels on both sides have appealed to *contemporanea expositio* to support their respective views. On the one side, it has been pointed out that in 1862 Lord Canning introduced a draft Bill for the regulation of succession to the estates in Oudh, in the second section of which it was provided that a transferee or devisee should have the same powers and hold the estate subject to the same rules of succession as the original *talukdar* or grantee. From this, it is argued that Lord Canning intended the word "successors" to include transferees and devisees. On the other hand, it has been argued that when the provisions of Act I of 1869 were under discussion in the Legislative

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Assembly, Sir John Strachey explained that it was not the intention of the Crown that the obligation devolving upon *talukdars* should devolve upon persons of non-land-holding families to whom portions of *talukdari* estates had been transferred. From this it is argued that the word "successors" was intended to include neither transferees nor devisees, although from the words used by Sir John Strachey, it is difficult to deduce any desire to lay down a rule of succession for devisees belonging to the same family other than the rule applying to the original *talukdar*. I do not consider that the case has been advanced by the above arguments. The latter argument is beside the point. In no circumstances, can it be argued that the intention of Sir John Strachey could assist us in arriving at the meaning of the words used by Lord Canning many years before. Nor can I take it that the desire of Lord Canning, expressed in 1862, to apply the same rules of succession to transferees and devisees as were applicable to *talukdars* and their heirs, can indicate that in a *sanad*, which was drafted at a period sufficiently long before 1862 to enable Lord Canning to reconsider the question, the word "successor" must be held to include transferees and devisees. But, in view of the difficulty of arriving at the exact meaning of the word from the context, I think that I am justified in using *contemporanea expositio* to a slight extent, under the conditions laid down by their Lordships of the Privy Council in *Raghojirao Saheb v. Lakshmanrao Saheb* (7). Here the word is admittedly capable of a variety of constructions. The document which I find of value is the letter of Lord Canning, dated 15th July 1860, quoted at pages 89 *et seq.* in Mr. Syke's book. It is in this letter that Lord Canning discusses the whole question of succession with a view to the drafting of this very primogeniture *sanad*, and, as I shall show later on, some passages of the letter have been reproduced almost bodily in the *sanad* itself. The word "successor" is used in this letter in a manner which sufficiently indicates the meaning of Lord Canning. He says in paragraph 7: "As on the one hand, it will be in

the power of every *talukdar* to refrain from making a Will and so to allow his estate to devolve undivided on his nearest heir, or, if childless, to adopt a son who will inherit the whole of his estate or to bequeath it by Will to any one person whom he may wish to designate as his successor, so, on the other hand, it is right that he should be at liberty to bequeath his estate to more than one person, in accordance with Hindu or Muhammadan Law or otherwise as may suit his pleasure. Though the present holder of a *talook* may be in favour of the rule of primogeniture, his successor may be of a different opinion."

The Governor-General here indicates the word "successor" directly as a devisee and lower down includes both heirs and devisees as successors. In other words, he considered the word "successor" to mean "successor on death." The close connection between this letter and the *sanad* is shown in the 8th paragraph, where he authorizes the Chief Commissioner to issue new *sanads* declaring, in addition to the conditions already sanctioned by the Governor-General, that the estate, in case of intestacy, shall descend to the nearest male heir, and adding, by way of proviso, that the *talukdar* has full power to alienate his estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever he pleases. In the primogeniture *sanad* it is stated: "It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever you please."

There is no indication in the above letter that the Governor-General desired to bind transferees during life-time in the same manner as successors after death. In fact, after reading the letter carefully I am drawn to the conclusion that it was then his deliberate intention not to bind transferees during life-time in this manner. In 1862, he appears to have been of a different opinion. But the *sanad* in question was executed to express his intentions in 1860. I, therefore, interpret the word "successors" to mean "successors on death" to include both

(7) 18 Ind. Cas. 239; 36 B. 639 at p. 56; 6 C. W. N. 1058; 23 M. L. J. 383; 12 M. L. T. 47; (1912) M. W. N. 1140; 14 Bom. L. R. 1226; 17 C. L. J. 17.

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heirs and devisees, but not to include transferees during life-time. Thus I find that the main reason given by the learned Subordinate Judge for holding that the terms of the *sanad* are not applicable, fails. I have already found that the terms of the *sanad* governed the succession from Bibi Sughra to Akbar Ali Khan, and that they were complied with owing to the fact that she devised her estate to Akbar Ali Khan by a Will in accordance with the authority given her by the terms of the *sanad*. I find that Akbar Ali Khan was her successor according to the terms of the *sanad*, that he, as he was allowed by the terms of the *sanad*, transferred a portion of the property in his life-time and the remainder by a bequest at his death to Bibi Ilahi Khanam, and that Bibi Ilahi Khanam was his successor according to the terms of the *sanad*. Thus the terms of the *sanad* govern succession to the property of Bibi Ilahi Khanam who has died intestate. It remains to consider whether either of the appellants has established a right to succeed according to the terms of the *sanad*. I here dispose of one point of fact. The learned Subordinate Judge has found that Ghulam Abbas Khan was born before Agha Muhammad Jafar. After examining the evidence and hearing the arguments upon this point, I arrive at the same conclusion.

In order that one of the appellants may succeed under the terms of the *sanad*, it is necessary to show that he is the nearest male heir according to the rule of primogeniture. The words "rule of primogeniture" can only be interpreted as "rule of lineal primogeniture." I have already discussed this point and given my reasons for considering that the finding of their Lordships of the Privy Council in *Debi Bakhsh Singh v. Chandrabhan Singh* (5), although it directly referred to the meaning of the words "rule of primogeniture" as used in section 8, Act I of 1869, is good authority for deciding that the words "rule of primogeniture" in the *sanad* mean the "rule of lineal primogeniture" as known to English Law. This condition, that the estate should descend to the nearest male heir according to the rule of primogeniture, does not, however, indicate in itself any rule of succession. The condition in the *sanad* gives preference to persons in the senior line how low soever as against

persons in the junior line how high so ever, but gives no indication as to the principle to be adopted in excluding a line. In a case in which the descent of all lines is through males there can be no difficulty, but in such a case as this, where the main question for decision is whether persons deriving their descent through females should or should not be included, the fact that the nearest male heir is to be selected according to the rule of primogeniture, affords no indication with regard to the point to be decided.

The learned Counsel for the appellants argued that the effect of the *sanad* was to enact a rule of succession according to the personal law of the parties modified by the clause of the *sanad*, which excluded females from inheritance. It was suggested that the heirs or class of heirs who would succeed according to the ordinary law, should be found, that those excluded under the *sanad* should be rejected, that the next class should be sought, and that when it had been ascertained who were the heirs who would succeed under the ordinary law who were not excluded under the terms of the *sanad*, the rule of lineal primogeniture should be applied. There was a further suggestion that the principles of English Law could be adopted. I am unable to see how the principles of English Law with regard to succession can afford any assistance in the determination of the person who has a right to succeed under the terms of the *sanad*, for, as has been already stated, the estate created under the terms of the *sanad* is not an estate known to the Law of England and I can find no general principles in the Law of England which can be applied to an estate unknown to that law. The general principles governing succession to an estate in fee simple or an estate in tail male or any other estate known to the Law of England are based upon conventions and in some instances, upon legal fictions peculiar to each form of estate, and there is no general principle of succession in the English Law which, according to my view, could have been in the minds of the framers of the *sanad*. The learned Counsel for the appellants would have it that, as under the Muhammadan Law applicable to Shias

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daughters' sons would be heirs in the absence of daughters and would exclude brothers, the proper course for this Court to take would be to ignore the existence of the mothers of the appellants, and find that the appellants were heirs as they are males, and that the nearest according to the rule of lineal primogeniture would be entitled to succeed. There was, of course, a diversity of opinion as to which should succeed, Agha Muhammad Jafar claiming as a member of the senior line and Ghulam Abbas Khan claiming as the older of the two cousins. There is a general objection to the application of the Muhammadan Law in this connection which is that, as the Muhammadan Law does not exclude daughters from inheritance and as the whole principles of inheritance, under the Shia Law contain the inherent principle that females are not excluded from inheritance, any attempt to apply Muhammadan Law when an inherent principle is violated is not applying Muhammadan Law but something which is neither Muhammadan Law, nor English Law, nor any other known system of law. In the next place, the suggestion for the appellants is open to a further and more serious objection. Even if Muhammadan Law were applied, and it were superadded that daughters were excluded from inheritance, how can a daughter's son have any title to inherit except through his mother? If she had no title, how could he have any title? Against this objection, it was urged that the Muhammadan Law excludes in certain instances persons from inheritance but does not exclude their descendants. The persons excluded under the Shia Law from inheritance whose descendants are not excluded from inheritance are apostates, murderers of the person whose estate is inherited, and slaves. But the principle guiding their exclusion is obvious. In each case, it is taken that the person so excluded has died from the date of his disqualification. From the time that a Shia Muhammadan has renounced his religion, from the time that the murderer of the intestate has committed the murder and from the time that the freeman has become a slave, he ceases to inherit, because according to a comprehensible fiction he is dead civilly. His death lets in his descendants in his place.

I can find no authority for the inheritance of the children of such persons born after the disability. The children of an apostate born after his apostasy are not likely to be Muhammadans, the case of the children of a murderer born after the commission of the murder, would hardly require treatment at the hands of a Muhammadan jurist, because the property of the intestate would have been divided long before such children could have been born, and the children of a slave born after he had become a slave would hardly be free. But in a case in which persons are disqualified from inheritance by reason of sex, the disqualification, as I have already stated, is unknown to the Muhammadan Law. It cannot be considered that they have died civilly. It must be considered they have never been born. Thus they cannot be taken into account and can provide, as far as I can see, no title to their descendants. The case for the appellants on this point is based upon the assumption that the children of daughters in such a case would succeed in virtue of their own title to their grandfather or grandmother because they are of the same blood, and the only reason that could be assigned for giving them such a position would be that the blood of the intestate ran in their veins. I cannot see that this circumstance would assist them. The mere fact that the blood of a person runs in the veins of his descendants, is not in itself under the Muhammadan or any other system of law, a sufficient reason for allowing succession. For example, the son of an illegitimate son could not inherit under Muhammadan Law from the illegitimate son's father, the reason being that unless there has been marriage, the existence of the child is ignored. Similarly here it would appear that the disqualification of the daughter would entail the disqualification of her heirs. It has further been argued on behalf of the respondents that daughters' sons cannot possibly be considered nearest male heirs when their mothers are alive under the Muhammadan Law, because they are not heirs at all. It is perfectly true that, during the life-time of the mother, a daughter's son is not an heir under the Shia Law. If he is not an heir, it is difficult to see

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how he can be considered to be the nearest heir. I am not, however, of opinion that Muhammadan Law can be applied in interpreting the terms of the *sanad*. I do not find any justification for interpreting the words "nearest male heir" as "nearest male heir according to the personal law of the grantee." That is in fact the position for which the appellants are striving.

In *Debi Bakhsh Singh v. Chantirahau Singh* (5), Chamier, J. C., remarked: "When the Legislature used the words 'rule of primogeniture', they must have intended some known rule of succession the details of which in its application to collateral succession could be ascertained. There was no such rule known to the Hindu or Muhammadan Law apart from special customs, the details of which are scarcely ever alike. They were providing a rule of succession which would be applicable to Hindus, Muhammadans and Christians alike and in the circumstance I do not think it is an extravagant assumption that they had in the mind, the rule of primogeniture as applied to the succession of real estate in England." Their Lordships of the Privy Council neither assented with nor dissented from these observations of Chamier, J. C. But as I read it, their decision went to some extent to support the correctness of the view enunciated by him. I think that, in considering the question of interpreting the *sanad*, it would be permissible to use the words "framers of the *sanad*" instead of "the Legislature," and that the conclusion of Chamier, J. C., could then be applied *en bloc*, and I would carry this further and convey to the words "the nearest male heir" the meaning which would have been attached to those words in 1860 by an English lawyer. Although no rule of succession is laid down in the *sanad*, it would be very easy to frame such a rule if the words "nearest male heir" are interpreted as they would have been interpreted by an English lawyer in 1860, and the rule of lineal primogeniture is applied. The words "nearest male heir" are not words ordinarily used in English conveyancing, but would have a distinct meaning to an English lawyer. I do not consider that these words were used in the

sanad loosely or carelessly. I take it that they were inserted under legal advice which, as I explained earlier in the judgment, must have been the advice of a lawyer conversant with English Law who would use the expressions of English Law to bear the meaning that they had in English Law, and that the framers had a distinct meaning which they intended to give to the words. I have not been shown any case in which the English Courts of Law had had to interpret the meaning of the words "nearest male heir." But I have been shown cases in which they had had to interpret words of a similar nature. The first of these cases is the case of *Oddie v. Woodford* (8), which was decided in 1825 and is reported in English Reports. In that case, it was held that the designation of eldest male lineal descendant was inapplicable to a male person claiming in part through a female. In a subsequent case, *Bernal v. Bernal* (9), which was decided in 1838 and is reported at page 1042 of English Reports, the Lord Chancellor stated at page 1049: "It must be considered, for the purpose of ascertaining who are to take, in the nature of an inheritance; the qualification to take being derived from the parties' descent; and that qualification is being male descendants. The general class is descendants; the qualification of the class is being male. To entitle any one to claim, he must show that he is one of the favoured class; that is, one of the class of male descendants. A male, descended from a female of the family, would undoubtedly answer the description, as he would be a descendant and a male; but he would not be one of the class of male descendants."

"Such would be the ordinary acceptance of the terms. In speaking of a man and his male descendants, as a class, no one would conceive the son of a female descendant as included; and such is the construction which our law has put upon the words; as 'issue male,' which is, in fact, the same thing as male descendants."

(8) 40 E. R. 1032; 3 Myl. & Cr. 584; 7 L. J. Ch. 117; 45 R. R. 331.

(9) 40 E. R. 1042; 3 Myl. & Cr. 559; C. P. Coop. 55; 7 L. J. Ch. 115; 2 Jur. 273; 45 R. R. 330.

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"The case of *Oddie v. Woodford* (8) appears to me to be a strong authority for the same purpose; for although the word 'lineal' was much relied upon, the force of that word was to mark the class to which the party was to belong, in contradistinction to the particular description of the individual. In no other sense, could the term 'lineal' be of any importance, as the party must have been lineally descended, whether descended through a male or a female; but considering the word 'lineal' as indicating the class, and, therefore, as meaning a descendant of the male line rather than a male descendant, the House of Lords held the grandson of the testator's second son (being the son of a daughter of the testator's second son) not to be entitled. In this case, it is clear that the testator is speaking of and describing a class; which brings it directly within the principle of *Oddie v. Woodford* (8).

"It appears to me, therefore, that the testator intended to designate the male line, as the class out of which the parties to be benefited were to be taken, and that such is the natural meaning of the terms used, explained by the other parts of the Will; and such an intention appears to coincide with the views and natural object of the testator. If instead of providing for the male line of the family, he had intended to provide for all the descendants of the persons named, why should he have selected sons of females as objects of his bounty, and have excluded the mothers of such sons and all other females? It would have been more natural to have provided for the unmarried females of the family of Bernal than for the sons of those females who might marry, and who would, therefore, properly belong to the families into which their mothers might have married."

The third case is that of *Lynwood v. Kimber* (10), which is reported in English Reports. The Master of the Rolls states at page 540: "I have looked through this Will in order to see if it contained anything to support the argument that the technical words 'issue male' are to be

restricted by the general scope and object of the Will. I am satisfied that there is nothing of that sort, and that these words must be construed in their strict technical sense, which means issue male claiming through males. I should be unsettling the settled rules of the Court if I gave any other meaning to these words, unless I found on the face of the Will something to show that he intended to use them in another sense."

This case was decided in 1860. The learned Counsel for the appellants has argued that the above decisions are not instructive as they are concerned with the interpretation of testamentary dispositions coming before the English Courts. I cannot see that this circumstance deprives the decisions of value as a guide to me in the present case. Whether a disposition be a testamentary disposition or it be contained in the terms of a grant from the English Crown prepared in English and drafted under legal advice, the rules of interpretation would, in my opinion, be identical for all practical purposes, and the meanings that the highest Judges of the English Courts in 1860 and at periods prior to that year attached to words and the principles which guided them in interpreting them are, in my opinion, of the greatest possible assistance in a case of this nature. There is undoubtedly some difficulty, owing to the fact that no decision interprets the words "nearest heir male" and there is a considerable distinction between a male descendant or an issue male and an heir male. The necessity for the use of the words "male heir" in the *sanad* is fairly obvious. If the words "issue male" had been used, collaterals would have been excluded. It was evidently intended not to exclude collaterals. But in the case of *Bernal v. Bernal* (9), the Lord Chancellor has, in his weighty remarks with regard to the interpretation of the Will, given an indication which appears to me to be of the highest value in interpreting the terms of the *sanad*. If his decision is paraphrased to apply to the circumstances of this case, I can see that it might fairly be read as follows:—

"It must be considered, for the purpose of ascertaining who are to take, in the nature of an inheritance; the qualification

(10) 54 E. R. 539; 29 Beav. 38; 30 L. J. Ch. 507; 7 Jur. (N. S.) 507; 9 W. R. 86; 131 E. R. 457.

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to take being derived from the parties' descent: and that qualification is being male heirs. The general class is heirs; the qualification of the class is being male. To entitle any one to claim, he must show that he is one of the favoured class; that is, one of the class of male heirs. A male, descended from a female of the family, would not necessarily answer the description as, though a male, he need not be an heir. Such would be the ordinary acceptance of the terms.

"It appears to me, therefore, that the grantor intended to designate the male line as the class out of which the parties to be benefited were to be taken, and that such is the natural meaning of the terms used, explained by the other parts of the Will; and such an intention appears to coincide with the views and natural object of the grantor."

The next portion of the Lord Chancellor's judgment appears to have peculiar application. It may be paraphrased:

"If instead of providing for the male heirs of the grantee, the grantor had intended to provide for all his descendants excluding females, why should he have selected the sons of females as the objects of his bounty, and have excluded the mothers of such sons and all other females? It would have been more natural to have provided for the unmarried females of the family of the grantee than for the sons of those females who might marry, and who would, therefore, properly belong to the families into which their mothers might have married."

I admit that the question is one of the greatest difficulty, and I do not approach its decision in a confident spirit. It is not easy to interpret the meaning of the drafter of a grant in 1860 when he was using words which were not usually used in English conveyances, but they nevertheless, are sufficiently similar to the words used in English conveyances to justify an attempt to interpret them by analogy. I am of opinion, after lengthy consideration of the point, that the words "nearest heir male" can only include those male persons who claim through males and not those male persons who claim through females.

There must have been some object in the mind of the grantor when he deliber-

ately excluded the ladies of the family from inheritance. It can hardly be suggested that in arriving at this decision, he was affected by the apprehension that owing to their sex, they would be incapable of managing their estates, for such an apprehension would be of less weight after the restoration of the British rule in Oudh, and could never have been of great weight in view of the fact that prior to annexation, many ladies, and amongst them Bibi Sughra herself, had been the holders of *taluqs*. If they were competent to manage their *taluqs* before annexation, it would appear that they were competent to manage them afterwards. I am thus not inclined to suppose that any question of disability of sex occurred to the mind of the grantor. What, it appears to me, did occur to his mind was that it was necessary to retain the estate impartible in case of intestacy and further to retain it in the family of the grantee from generation to generation. If it were permitted to devolve upon a married woman, it would be lost to the family as it would pass to the family of her husband. The remarks of the Lord Chancellor in *Becaul v. Becaul* (9), as to the inconsistency involved in supposing that the testator was ready to exclude his own family stock from inheritance and nevertheless ready to admit to inheritance the families of their husbands, afford a singularly pertinent argument in favour of my view. To suppose that the grantor wished to exclude daughters and yet to admit daughters' sons to inheritance, involves a great inconsistency, and there is nothing in the terms of the grant which would justify its acceptance. To conclude this portion of the decision, I am of opinion that the meaning of the *sanad* with regard to succession, can be summarised as follows: In event of intestacy, the case of all relatives of legitimate descent would be considered, all females and those claiming through females would be excluded, and the succession would go to the surviving representative of the highest line how low soever, collaterals only being admitted in absence of the survival of descendants. Such a rule of succession would be unknown to any estate known to the Law of England, but it would follow necessarily from the words of the *sanad* itself.

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An argument was addressed to the Court to the effect that it could hardly be considered possible that the Crown intended to exclude daughters' sons from the succession as, if such had been their intention, many grants would have rapidly escheated to the Crown. This argument is of the nature of a plea *ad-miseri-cordiam*, and if the terms of the grant are sufficient to support the meaning that daughters' sons are excluded, as I find them to be, it could have no possible weight. But looking at the subsequent Legislation on the subject, it would have no weight upon the evidence of the intention of the Crown as shown in subsequent legal enactments. In the first place, the admitted exclusion of daughters is sufficiently drastic. Daughters are not excluded by either the Hindu or the Muhammadan Law. Yet it is admitted that they are excluded under the terms of the *sanad*. The exclusion of their sons, is a minor matter in comparison with their exclusion. They are descendants of the *talukdar* whereas their sons are primarily the descendants of the daughters' husbands who belong to another family. Further, in Act I of 1869 as unamended, daughters are absolutely excluded in the first ten clauses of section 22 and a daughter's son is only admitted if he falls under the peculiar heading of clause 4. In the amended Act, the position of daughters and the sons of daughters is somewhat worse. Thus, even if it were possible to attach any weight to sentimental considerations based upon a hypothetical intention not disclosed in the terms of the grant to preserve the property to the descendants of the *talukdar*, it would appear that the Legislature has subsequently shown a direct intention to place daughters and daughters' sons in a position inferior to that of any other descendants of the intestate.

Such being the view that I take, I determine that although the succession is regulated under the terms of the *sanad*, the appellants in neither appeal have title under its terms. It is not necessary to decide whether Ghulam Abbas Khan has a right preferential to Agha Muhammad Jafar. Such decision involves the supposition that each has a right, and I find that neither has a right under the terms of the *sanad*. I am further not called upon

to decide who is entitled to succeed under the terms of the *sanad*, or whether the grant has in the circumstances escheated to the Crown. The appellants have no title under the terms of the *sanad* or under the provisions of the Shia Muhammadan Law. Under the provisions of the latter law, they are excluded by their mothers. As I find that they have no title to succeed, it is unnecessary to decide the points raised by the respondents as to limitation and champerty. The appeals fail and are dismissed. The appellants will pay their own costs and those of the respondents.

KANHAIYA LAL, A. J. C.—The dispute in this case relates to the Maniarpur Estate, which originally belonged to Bachgoti Khanzadas, who became converts to Muhammadanism and adopted the Shia faith. The last holder of the estate at the time of the annexation was Bibi Sughra, the sole daughter of Basawan Khan. The Summary Settlement was made with her by the British Government, and a primogeniture *sanad* was granted to her sometime in 1862. She died on the 11th November 1865. The lists appended to Act I of 1869 had been prepared before her death, and she was entered as No. 228 in list No. I and as No. 100 in list No. II, when the said Act was passed. The delay, which attended the passing of Act I of 1869 owing to the dropping of the first Bill in consequence of some differences between the Government of India and Sir Charles Wingfield the then Chief Commissioner of Oudh who questioned the policy of giving an absolute power of alienation to the *talukdars*, led to the inclusion in many instances in the lists appended to that Act of the names of persons who had died before the Act came into force, and the effect was that, though the persons recorded in the lists, whether dead or alive, were declared to be *talukdars* for the purposes of the Act, yet their heirs and legatees were excluded from the operation of the Act by reason of the definitions of those terms given in the Act, as it stood at the time. In *Muhammad Abdus-samid v. Qurbis Husain* (11) and *Thakur Shoo*

(11) 26 A. 113; 6 Bom. L. R. 238; 3 C. W. N. 201; 31 I. A. 30 (P.C.).

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Singh v. Rani Raghubans Kunwar (1), their Lordships of the Privy Council held that Act I of 1869 did not apply to the estates held by such heirs or legatees from before the date when the Act came into force. An attempt was made by U. P. Act III of 1910 to amend the definitions of the words "heirs" and "legatees," so as to include persons who got an estate by inheritance or bequest prior to the 12th January 1869, when Act I of 1869 came into force. But the Legislature in carrying out that amendment did not give retrospective operation to the amended definitions when the effect of the retrospective operation would have been to vest in or confer upon any person any right or title to any estate or any portion thereof or any interest therein, which was at the commencement of the amended Act vested in any other person, who would have been entitled to retain the same if the amended Act had not been passed. Section 20 of the amended Act accordingly provided that the right or title of such other person shall not be affected by anything contained in the amending sections, to which retrospective effect was assigned. The amendment aimed at remedying the difference which the entries of the names of dead men in the lists appended to Act I of 1869 made in the devolution of the estate, but it left all vested interests untouched.

Sughra Bibi left no husband or children surviving her. Her father had by another wife, named *Musammam Batasa*, four sons, Jafar Ali Khan, Hasan Ali Khan, Baqar Ali Khan and Akbar Ali Khan. Section 8, clause (2), read with section 10 of Act I of 1869, raises conclusive presumption that her estate was impartible and devolved by a family custom on a single heir. Jafar Ali Khan, the eldest son of *Musammam Batasa*, was, it is admitted, alive on the date of Bibi Sughra's death. The person who was entitled to succeed to the property of Bibi Sughra, according to the custom of the family, was in the circumstances Jafar Ali Khan. Sughra Bibi, however, bequeathed her entire property on the 29th June 1862 to her youngest step-brother, Akbar Ali Khan. He succeeded to the property and was alive on the date when Act I of 1869 was passed.

On the 2nd July 1869, Akbar Ali Khan made a gift of 39 villages, since consolidated into 31 villages, forming part of the Maniarpur Estate, to his wife, Bibi Ilahi Khanam, in lieu of her dower (Exhibit 87). On the 29th June 1871, he executed a Will, bequeathing the remainder of his estate to her (Exhibit 129). On the 15th July 1871, he died leaving a widow, Bibi Ilahi Khanam, six daughters, who are defendants Nos. 1 to 6 in these suits, and a nephew, Ghulam Husain Khan, the son of his elder brother, Hasan Ali Khan, surviving him. His brothers had died before. The name of Bibi Ilahi Khanam was entered in the revenue papers after his death. Bibi Ilahi Khanam made a gift of six villages, forming part of the Maniarpur Estate, in favour of her daughters on the 13th December 1877. She died on the 20th April 1899. A contest thereupon arose between her nephew Ghulam Husain Khan, son of Hasan Ali Khan, and her daughters for succession to the estate. The daughters took possession and succeeded in getting mutation effected in their favour. Ghulam Husain Khan then filed a suit against the daughters, claiming that the family had preserved Hindu customs and was governed by the Hindu Law, that Bibi Ilahi Khanam had a life-interest in the estate, and that by virtue of a family custom, daughters were excluded from inheritance. The daughters denied the existence of the alleged custom and pleaded that the estate was not governed by the Hindu Law. The suit was dismissed by the Subordinate Judge of Saltanpur on the 13th June 1903 on the ground that Ghulam Husain Khan had failed to establish the custom set up by him. There was no appeal from that decision to this Court.

Akbar Ali Khan, the brother of Bibi Ilahi Khanam, then sued the daughters for the possession of the estate, claiming title under clause (6) of section 22 of Act I of 1869 in preference to the daughters. The Subordinate Judge, following the decision of this Court in *Rae Jagatpal Singh v. Thakurain Balraj Kuar* (3), held that Act I of 1869 applied to the estate of Bibi Ilahi Khanam and decreed the claim. The decision on which the learned Subordinate Judge relied was, however, subsequently set aside by their Lordships of the Privy

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Council in *Thakurain Balraj Kunwar v. Rae Jagatpal Singh* (2). This Court on appeal, therefore, set aside the decision of the Subordinate Judge and dismissed the suit. It held that on the death of Sughra Bibi, the person who would have succeeded to the estate under section 22, was her eldest brother, not the youngest, and that the person who would have succeeded Akbar Ali Khan was Ghulam Husain Khan, his elder brother's son, rather than his widow, thereby rendering Act I of 1859 inapplicable to the estate. An attempt was made during the hearing of that appeal to claim the estate under the *sanad*, but it was held that no relief could be granted under the *sanad*, because no such ground of title was asserted in the pleadings [*Musammatal Ummatul Fatima v. Asghar Ali Khan* (4).]

Musammatal Asghari and *Musammatal Ruqaiya*, two of the daughters of Bibi Ilahi Khanam, afterwards applied to the Revenue Court for a partition of their 2/6ths share. They were opposed by *Musammatal Ummatul Fatima*, the eldest daughter of Bibi Ilahi Khanam, who set up a right to the whole estate on the ground that she was entitled to it according to the rule of primogeniture laid down in the *sanad*. The Revenue Court referred the parties to the Civil Court. A suit was then filed by *Musammatal Asghari* and *Musammatal Ruqaiya* against their sisters, *Musammatal Ummatul Fatima*, *Musammatal Batul*, *Musammatal Kaniz* and *Musammatal Haidri* for a declaration of their right to obtain partition of their 2/6ths share. They pleaded that the property was governed by the Shia Law and that they were entitled to a 2/6ths share by inheritance from their mother. On behalf of *Musammatal Ummatul Fatima*, who set up the right of her eldest son to succeed to the estate as the eldest representative of the senior line, reliance was placed on the *sanad* by which females were excluded from the inheritance. The Counsel for the plaintiffs conceded that the estate was governed by the *sanad*, but contended that, as neither party was entitled under the *sanad*, the plaintiffs were entitled to succeed on their possessory title. The Court of first instance accepted

that contention and gave the plaintiffs a decree on the strength of their possession, which was confirmed on appeal.

The present suit was then brought by Agha Muhammad Jafar, the eldest son of *Musammatal Ummatul Fatima* who is the eldest daughter of Bibi Ilahi Khanam, for possession of the estate and mesne profits, claiming the estate under the *sanad* as the eldest male member of the senior line. He joined with him the transferees of a portion of his interest as co-plaintiffs in the suit. Another suit was instituted by Ghulam Abbas Khan, son of *Musammatal Batul*, the second daughter of Bibi Ilahi Khanam, claiming that he was entitled to it according to the rule of primogeniture contained in the *sanad*, by reason of his being the eldest grandson of Bibi Ilahi Khanam. He joined with him Babu Bhan Pratab Sthi, the transferee of a portion of his interest, as a co-plaintiff in the suit. *Musammatal Ummatul Fatima* and *Musammatal Batul* naturally supported their respective sons and also claimed alternately a right to succeed to the estate under the Muhammadan Law. The contention of the other daughters was that either Act I of 1869 or the Muhammadan Law governed the estate, and that the daughters were entitled by custom to inherit the property of their mother. It was further pleaded that the sales effected by Gulam Abbas Khan and Agha Muhammad Jafar of their alleged shares in the estate were champertous and not legally enforceable, and that the six villages given by Bibi Ilahi Khanam to her daughters in her life time, should be exempted from the claim.

The learned Subordinate Judge found that the estate had devolved on Akbar Ali Khan under a bequest made by Sughra Bibi before Act I of 1869 came into force and was not, therefore, governed by that Act, that Akbar Ali Khan gave 39 villages to his wife Bibi Ilahi Khanam, which were afterwards consolidated into 31 villages, and also bequeathed the rest of his estate to her, that Bibi Ilahi Khanam gave six villages in her life-time to her daughters in regard to which no suit was maintainable, and that the rule of succession given in the *sanad* applied to the estate so long as it was in the hands of Sughra Bibi, but did not apply to it after it had passed from

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her by alienation or bequest to another person. In other words, he held that the rule of devolution laid down in the *sanad* was intended to apply to cases of inheritance, but not to cases of transfers *inter vivos* or bequests where the effect of the transfer or bequest was to pass the property to a person who was not a *talukdar* or the immediate heir of a *talukdar* within the meaning of sections 14 and 15 of Act I of 1869. He, therefore, dismissed the claims of the plaintiffs and declared that the daughters of Bibi Ilahi Khanam were entitled to inherit such portion of the estate as Bibi Ilahi Khanam had not disposed of in her life-time, under the Muhammadan Law in preference to the plaintiffs.

It is not disputed in these appeals that six specific villages, forming part of the estate, were given by Bibi Ilahi Khanam in her life-time to her daughters. All that is contended is that the gift did not convey anything more than an under-proprietory right in the said villages, but the deed of gift (Exhibit A1) shows that the donor purported to convey all the rights she possessed in the property given without the reservation of any superior proprietary interest or of rent, with which an under-proprietor is ordinarily chargeable. It is clear, therefore, that the entire proprietary rights held by Bibi Ilahi Khanam, which were conveyed by the said gift, passed to her daughters, and that no suit by any of the plaintiffs in regard to the villages comprised in the deed of gift, is maintainable.

The dispute between the parties is mainly clustered round the remainder of the property and the first question raised during the hearing was, whether section 14 of Act I of 1869 brought the estate within the purview of the Act. Sughra Bibi was a *talukdar*, and had a right under the *sanad* to bequeath her estate to any one she liked. She bequeathed it to a person who was not in the prescribed line of succession or, in other words, was not a person to whom the estate would have descended according to the family custom or under Act I of 1869, had the testator died after that Act came into force. The scope of section 14 of Act I of 1869 is wide enough to cover transfers made by *talukdars* or grantees before that Act came into force, but as observed in *Thakurin Balraj Kunwar v. Rae*

Jagatpal Singh (2) the person referred to in that section, is the immediate person who would have been entitled to the estate under the Act, had the owner died intestate after the Act came into force without making any transfer.

It is contended that a person who would have succeeded to the estate had Sughra Bibi died after Act I of 1869 came into force was a person to whom a transfer or bequest would have carried the privileges conferred by section 14 of the Act. But the person to whom a transfer could have been made with the consequences referred to in that section, would vary according to the date on which the succession opened out owing to the death or survival of nearer relations, and it would be unreasonable to apply the rule of succession provided by the Act for determining that person, by assuming that the *talukdar* or grantee in question had died after the Act came into force, and not making a similar assumption in favour of other persons of the same class, who were alive on the date when the succession opened out. There is nothing in that section to indicate that the words "would have succeeded," were merely descriptive of a certain class falling within the specific clause of section 22, applicable to the case, because within each class, the right of the person entitled to succession, is determined by seniority and survival in the case of estates like the present, which are governed by the rule of descent on a single heir. According to section 15 of Act I of 1869, where an estate is transferred or bequeathed to a person who is neither a *talukdar* nor a grantee nor a person who would have succeeded to the estate under the Act had the transferor died intestate and without making a transfer, the rule of succession laid down in the Act, does not govern the transferee or legatee, whether the transfer or bequest was made before Act I of 1869 came into force or afterwards. Akbar Ali Khan was not, therefore, governed by Act I of 1869.

The next question is whether the devolution of his estate was governed by the *sanad* or by the Muhammadan Law. Section 3 of the Crown Grants Act (XV of 1895) provides that all provisions, restrictions, conditions and limitations, contained in any grant or other transfer of land or any interest therein,

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made by the Government before or after the Act came into force, shall be valid and take effect according to their tenor, any rule of law, Statute, or enactment of the Legislature to the contrary notwithstanding. In *Thakur Sheo Singh v. Rani Raghubs Kunwar* (1) their Lordships of the Privy Council accordingly held that in cases where Act I of 1849 does not apply, the rule of descent laid down in the *sanad* supersedes the personal law of the grantee.

The *sanad* does not, however, explicitly say whether the rule of descent laid down in it, is equally applicable to persons to whom the estate or any portion of it may be transferred or bequeathed by the holder of the *sanad* or his heir in his life-time. It does not specify whether by the exclusion of females is meant the exclusion of every one of their line even when no paternal kinsmen are in existence; and it leaves further open whether among the male descendants of females, preference is to be adjudged by age or by the seniority of age and line, where they are of the same degree. Apart from usage, there is no such thing as a rule of primogeniture known to the Hindu or Muhammadan Law. According to the English rules of primogeniture governing the descent of estates in fee simple, males exclude females of equal degree, and in the absence of such males, females of equal degree inherit together as co-heiresses.

The *sanad* does not, therefore, follow or adopt any known or recognized system of law, and its interpretation must largely depend on the language used in the *sanad* itself, and such evidences of contemporaneous exposition as may be gathered from the official papers of the time.

The *sanad* granted to Sughra Bibi was in the form given at page 514 of Chhail Behari Lal's *Talukdari Law of Oudh*. It is divided into three paragraphs. The first paragraph, after referring to the confiscation of proprietary rights in the soil of Oudh by the Proclamation of March 1858 and the conferment of the full proprietary right, title and possession of the estate of Maniarpur, consisting of the villages specified in the list attached to the *kobuliat*, on Sughra Bibi, goes on to say:-

"Therefore, this *sanad* is given you in order that it may be known to all, whom it

may concern, that the above estate Maniarpur has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions of surrendering all arms, destroying all forts preventing and reporting crime, rendering any service you may be called upon to perform, and of showing constant good faith, loyalty, zeal and attachment to the British Government, according to the provisions of the engagement which you have executed, the breach of any one of which at any time shall be held to annul the right and title now conferred on you and your heirs."

The second paragraph states:—"It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest or adoption to whomsoever you please."

The third paragraph declares:—"It is also a condition of this grant that you will, so far as is in your power, promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature."

It is noticeable that the word "heirs" occurs in the *sanad* in four different places, and has apparently been used to signify persons successively inheriting the estate under the *sanad*. In the second paragraph, however, in dealing with the question of intestate succession, the word "heir" is used once to denote the person entitled to succeed according to the rule of primogeniture, and the word "successors" is used in two different places in connection with the rule of descent and the right of alienation. The meaning of the word "successor" varies in

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different documents and Statutes according to the context, and, though it literally means "he that followeth or cometh in another's place," it is applied as much to successors by inheritance or operation of law as to successors by testamentary disposition, voluntary alienation or change of incumbents. If a word is capable of a restricted as well as an extended meaning, the principle of interpretation is to assign to it the meaning which the context warrants. The paragraph in which the word occurs, begins with a reference to intestate succession and is followed by the laying down of a rule to govern that succession, with an antithetical clause indicating that the rule of succession therein laid down shall not prevent the grantee and his or her successors from alienating the estate forming the subject of the grant. If the rule of descent laid down in the *sanad* be held to apply to all transferees, it is obvious that it should apply to vendees, mortgagees, donees, legatees and adopted sons alike. To apply the rule of descent to legatees and adopted sons, where adoption is not recognised by the personal or customary law, and to exclude vendees, mortgagees and donees from its application, would not be consistent, for all these classes of persons are dealt with in one and the same clause and treated as transferees. The reasonable inference from the context is that the word "successors" is used in connection with the rule of descent to denote *successive heirs* or persons succeeding to the intestate or undisposed of residue, rather than persons in whose favour a transfer or bequest might be made by the owner in his life-time.

A change in the language is generally due either to the exigencies of style or to a desire to restrict or widen the significance. Adverting to the rule that if the meaning of a word cannot be ascertained from a section itself, its meaning can be ascertained from the use of that word in other parts of the Act, Maxwell says:—"But just as the presumption that the same meaning is intended for the same expression in every part of an Act is, as we have seen, not of much weight, so the presumption of a change of intention from a change of language

(of no great weight in the construction of any documents) seems entitled to less weight in the construction of a Statute than in any other case; for the variation is sometimes to be accounted for by a mere desire of improving the graces of style, and of avoiding the repeated use of the same words, and often from the circumstance that the Act has been compiled from different sources; and further, from the alterations and additions from various hands which the Acts undergo in their progress through Parliament"—(Maxwell on the Interpretation of Statutes, 4th edition, page 482)*. What applies to Acts, applies with equal force to documents written by less skilful hands, specially where, as I shall show hereafter, additions are made to such documents from time to time. It is probable that the word "successors" was then considered more appropriate to signify successive heirs than the word "heirs" itself, which would not have included an adopted son, where adoption was not recognised by the personal or customary law. It is true that the *sanad* makes the rule of descent laid down therein a condition of the grant, but it is a condition of the grant only to the extent therein specified. What it practically declares is:—"In the event of you or any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to take the estate out of the rule by alienating it either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever you like." The juxtaposition of the two clauses shows that what follows, limits, restricts or qualifies the preceding. Had the intention been otherwise, one would have expected the *sanad* to say so unequivocally or at least to put it in such a form as to indicate unmistakeably that the grantee and his successors would have full power to alienate the estate in whole or in the part, but it was a condition of the grant that in the event of the grantee or any of his successors or assigns dying intestate, the estate would descend to the nearest male heir according to the rule of primogeniture. A previous reference to the

*See Fifth Edition, page 580.—Ed

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transfers might possibly have indicated the kind of successor intended or referred to in the clause which followed. As it now stands, the rule of descent is qualified by the conditions under which the estate may go out of the rule. It is suggested that the object of adding the clause about the alienation was to obviate an impression that the *sanad* intended to grant an estate tail male, but no estate tail male can be created unless a body is specified. The object of introducing the rule of primogeniture was to prevent the disintegration of the estate by partition, but the framers of the *sanad* must have foreseen its disintegration when they provided for its voluntary alienation by means of sale, mortgage, gift or bequest, and it can hardly be supposed that they intended to make the rule of primogeniture applicable to every portion to split out of the estate; for partition, though involuntary, if burdened with such a rule, could not have made much greater difference. Any other interpretation would make the rule of primogeniture applicable to every plot of land which a *talukdar* or grantee may transfer or bequeath for building a shop or house to any shop-keeper or resident of the village, whose other property would be governed by the ordinary law. In cases of mortgage, the equity of redemption forms part of the undisposed of residue, and would naturally be governed by the rule of primogeniture, but it is hardly likely that the intention was that ephemeral rights like those of a mortgagee should be governed by the rule any more than the rights acquired by lessees under leases granted by the holder of the *sanad* for fixed periods or in perpetuity.

The history of the conditions and circumstances under which the rule of primogeniture was introduced into the *sanad*, also bears out the above interpretation.

In the case of ancient documents, evidence is admissible as to the interpretation placed upon them by persons who lived at or about a time not remote from the time of the execution of the document. Commenting on this rule, Norton observes:—

"The longer the period that elapses between the time of executing and the time of interpreting a document, the greater is

the difficulty in obtaining direct evidence as to the meaning of the words employed; and if the document is very ancient, the difficulty becomes insuperable. When this is the case, the meaning of the words can sometimes be arrived at with a fair degree of certainty by ascertaining what was the interpretation placed on the document immediately after its execution. The probability is great that at the time there were some persons whose interest it was to insist upon the document being properly interpreted, and the fact that a particular interpretation was then placed on it, affords a great probability of the correctness of such particular interpretation; and this probability is increased, if it is found that during a long course of years such interpretation has been acquiesced in."—(Norton on Deeds, p. 140). The rule applies with greater force to the exposition of old grants, containing general words capable of more than one interpretation made by the author of the grant at or about the time when the grant was made, for there can be no better exponent of a grant than the grantor himself. In *Gulabdas Jugjivandas v. Collector of Surat* (12), their Lordships of the Privy Council, in construing a grant made by the then Governor of Bombay to a person who held an office before under the Nawab of Surat, observed that the construction might be aided by a consideration of the minute then issued by the Governor of Bombay, and the surrounding circumstances under which and the occasion in connection with which the grant was made. In *Raghojirao Saheb v. Laksmanrao Saheb* (7), where certain words used in a grant were capable of a restricted and an extended interpretation, their Lordships of the Privy Council went into the entire history of the family and the official documents relating to the grant to ascertain its true meaning on the principle of *contemporanea expositio* as a guide to its interpretation. In *Thakur Sheo Singh v. Rani Haghubans Kumkar* (1) Sir Arthur Wilson, who delivered the judgment of the Judicial Committee, similarly referred to the history of the grant and the correspondence showing the development of the policy of the Government in connection

(12) 3 B. 186 (P. C.), 6 I. A. 54.

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with different *talukas* to ascertain whether the rule of descent laid down in the *sanad* was applicable to the estate in supersession of the ordinary law.

A careful study of the correspondence between Lord Canning, the author of the grant, and Sir Charles Wingfield, the then Chief Commissioner of Oudh, relating to the desirability of introducing the rule of primogeniture in the *sanads* which has been summarized by Mr. Sykes in his introduction to the Compendium of the Oudh Talukdari Law, pages 80 to 109, discloses an unmistakable clue as to what Lord Canning actually intended, when he permitted the clause relating to primogeniture to be added to the *sanads*. The rights recognized by the *sanads* were those determined in the Summary Settlement of 1858-59, and the *sanads* as originally issued did not contain any rule of descent in regard to the estate. On the completion of the Summary Settlement, the Government of India intimated to the Chief Commissioner of Oudh their decision to maintain the *talukdars* in possession of the *talukas* for which they had been permitted to engage, and directed the Chief Commissioner to issue *sanads* under their authority, giving them a permanent, heritable and transferable proprietary right.—(Vide the letter dated the 10th October 1859, appended to Act I of 1869).

The Chief Commissioner prepared a form of *sanad*, and sent it to the Government of India for approval on the 15th October 1859. The Government of India made a few verbal alterations in the draft and sent the revised form with their letter, dated the 19th October 1859, to the Chief Commissioner of Oudh for adoption.—(Vide the letter of that date appended to Act I of 1869 and printed with the revised form of *sanad* at page 32 of the Oudh Papers for 1861 and Syke's Compendium, Appendix E.)

On the 26th October 1859, a *darbar* was held by Lord Canning at Lucknow, which was attended by about one hundred and fifty *talukdars*, to each of whom a *sanad* was granted in the form approved without any reference to the rule of primogeniture.

On the 11th October 1859, the Chief Commissioner had meanwhile issued a cir-

cular, calling upon the Commissioners of Divisions to furnish a list "of the *talukas* in which the law of primogeniture prevailed in opposition to the Hindu Law of succession, such as are known as having a *gaddi*, and resemble the magnates of continental Europe." On the 18th January 1860, the Government of India called for a copy of the said circular and the correspondence which had taken place between the Commissioner of Lucknow and the Chief Commissioner in connection with it. In forwarding the copies of that correspondence, the Chief Commissioner opened a discussion with the Government of India on the rule of succession in *talukas*, observing that in about 30 families, succession was regulated by the rule of primogeniture, but in the greater number of *talukas*, the rule of primogeniture was not in force, and recommending that in order to prevent a sub-division of their estate into a multitude of petty holdings by impoverished proprietors, it might be made a condition of the gift of each estate that the property shall not be subject to sub-division (Oudh Papers for 1861, page 47). On the 10th March 1860, the Government of India, in replying to what the Chief Commissioner had proposed, said—

"As respects the law of primogeniture, I am directed to observe that the condition which you propose to insert in the *sanads* which remain to be conferred, is much too stringent. It would limit the power of the *talukdar* over his estate to a degree which is not consistent with the promise of the Governor-General that his right shall be hereditary and transferable. It would also have the evil effect of a law of entail in leading to the retention of large estates by an impoverished proprietor, in the not unfrequent case of long continued extravagance and wastefulness. The Governor-General has no doubt that each *talukdar* ought to be left free to dispose of his estate in whole or in part as he pleases, either by sale, gift, or bequest. But when a *talukdar* dies intestate, his Excellency agrees with you in thinking it desirable that the estate should devolve on the nearest male heir according to the rule of primogeniture, applicable at present to estates having a *gaddi*." The Government of India agreed

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to a primogeniture *sanad* being granted to persons who were willing to surrender the old *sanads*, and went on to say—

"The Governor-General recognises the advantage of encouraging the inheritance of landed estates by primogeniture, or, at least, the transmission of them *undivided to one heir*; but the most that can be done towards bringing this about, will be to make it a condition with those to whom *sanads* have not yet been granted, that if they die without having disposed of the succession to their estates, that succession shall follow the rule observed in the families which have a *gaddi* in Oudh, and not the rule of partition. The first of these rules, though not the one most prevalent in the Province, is certainly well understood there."—(*Ibid.*, pages 49 and 50.)

The Governor-General obviously meant that the succession was to be governed by the rule of primogeniture or the descent of property undivided to a single heir, if the grantee had not already "*disposed of the succession*" to his estate in his life-time, and though the Chief Commissioner in his subsequent letters reiterated that the *gaddi* or law of primogeniture should be declared by the Governor-General to be the rule of succession to all considerable landed estates in Oudh, the Governor-General adhered to the view he had originally expressed and in his letter of the 17th July 1860 wrote as follows:—"The Governor-General agreed with the Chief Commissioner in thinking it desirable that all *talukas* should devolve on the nearest male heir, according to the rule of primogeniture at present applicable to estates having a *gaddi*.....

But the Governor-General in Council will not consent to limit the absolute power over his estate, which has been guaranteed to every *talukdar* in Oudh, and is convinced that the existence of such a power is just as essential to the prosperity of the Province and to the maintenance of a landed aristocracy on a sound footing as the extension of the rule of primogeniture in cases of intestacy. As, on the one hand, it will be in the power of every *talukdar* to refrain from making a Will and so to allow his estate to devolve undivided on his nearest heir, or, if childless, to adopt a son who will inherit

the whole of his estate, or to bequeath it by Will to any one person whom he may wish to designate as his successor, so, on the other hand, it is right that he should be at liberty to bequeath his estate to more than one person, in accordance with Hindu or Muhammadan Law; or otherwise, as may suit his pleasure. *Though the present holder of a taluqa may be in favour of the rule of primogeniture, his successor may be of a different opinion: and His Excellency in Council would not deprive taluqdars in all future generations, of the power of bequeathing their estates in accordance with their own views.* To deny them this power, would be in effect to establish a strict entail so far as bequests are concerned, and would operate at least as injuriously in one direction as the existing rule of partition does in another. If opinion among the *talukdars* is in favour of primogeniture and the maintenance of their estates undivided in the hands of one member of the family, partition will be rare. Partition by bequest will be especially rare, for Wills are said to be at present unknown in Oudh, and natives general are supposed to be averse to them; and to partition by sale, mortgage or gift, the Chief Commissioner himself is not averse." In conclusion, the Governor-General authorised the Chief Commissioner to issue new *sanads* declaring in addition to the conditions already sanctioned by the Governor-General that the estate in case of intestacy shall descend to the nearest male heir, and adding by way of a proviso that the *talukdar* has full power to alienate his estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever he pleases.

In regard to the *talukdars* in whose family the rule of primogeniture prevailed from before, His Excellency pointed out that there was no necessity for calling upon them to declare in formal terms whether they were desirous that the rule of primogeniture should be applicable to their estates or not, because their estates would pass in case of intestacy as before, but any *talukdar* of that class might be permitted to give up his *sanad* and to receive in lieu thereof another in which the rule of primogeniture shall be expressly recognized as applicable to his estate and family, and

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in which it shall be declared that the title conferred on him by the Governor-General included a full right to dispose of his estate as he pleased during his life-time and by bequest or adoption at his death. (*Ibid.*, pages 65 to 67).

A rule of descent was added in the *sanad* in accordance with the above direction, and fresh *sanads*, containing the new clause, were issued to a large number of *talukdars* who expressed their wish to the adoption of the rule. The letter of the Government of India permitting the addition of the clause sufficiently indicates that the rule was only to be applied, if the holder of the *sanad* had not disposed of his estate by sale, mortgage, gift, bequest or adoption, for it recognised that "though the present holder of a *taluk* may be in favour of the rule of primogeniture, his successor may be of a different opinion." In reviewing the Oudh Administration Report for 1860-61, the Governor-General in Council, referring to the new *sanads* issued under their authority, recounted what they had done and observed:—"His Excellency the Governor-General in Council has during the year passed final orders on the question of making primogeniture the rule of succession in great *talukdari* families. His Excellency has refused to restrict in the smallest degree the power of *talukdars* to dispose of their estates during their life-time, or bequeath them by Will at their death, in any way and to whomsoever they please. This right was guaranteed by the terms of the *sanad* granted at the *darbar* held by His Excellency at Lucknow in 1859, at which the settlement made with the *talukdars* was declared final and perpetual. His Excellency, however, expressed his opinion that whenever a *talukdar* died intestate, it would be advisable if his estate devolved entirely to one heir, instead of being subjected to division amongst several. He, therefore, authorised the insertion of a fresh clause in the *sanads* granted to those *talukdars* in whose families the *raj* or *gaddi* had not hitherto existed, and who expressed their desire to adopt such a rule, making it a condition of the grant by Government that the estate should, in the event of the intestacy of the *talukdar* or any of his descendants, be subject to the rule of

primogeniture. These instructions have been carried out, the wishes of the several *talukdars* have been ascertained, and fresh *sanads*, containing the new clause, have been issued whenever necessary." (*Ibid.* for 1865, page 34).

On behalf of one of the plaintiffs-appellants, reliance is placed on a Bill introduced by Lord Canning on the 12th March 1862 to regulate the succession to and the rights in respect of certain *taluk*s and granted estates in Oudh, clause 2 of which provided:—

"Any person to whom any such *talukdar* or grantor shall, before the passing of the Act, have transferred or bequeathed, or shall hereafter transfer or bequeath, any interest in the whole or in any part of any *taluk* or granted estate in manner aforesaid, and his heirs, successors, and assigns shall have the same rights and powers in regard to the transfer or bequest of the interest to which he shall have succeeded, or to which he shall succeed under such transfer or bequest, and shall hold the same subject to the same rules of succession as the original *talukdar* or grantee, subject, however, to the express terms and conditions of such transfer or bequest." (Oudh Papers for 1865, page 86).

Lord Canning in introducing that Bill observed that it only declared the principle more formally upon which the grants were based and provided in detail for the manner in which the rule of primogeniture was to take effect (*Ibid.*, page 91). But a reference to the Bill shows that clause (2) gave power to the holder of the *sanad* or grantee to vary the rule of succession laid down in the grant by the express terms and conditions of his transfer or bequest, and clause (4), which described the rule of descent according to the law of primogeniture, was declared to be applicable only to cases in which the holder of the *sanad* had died without having transferred or bequeathed his estate. It is significant that before the Bill was introduced, the question of succession according to the rule of primogeniture was considered by the Secretary of State, Sir Charles Wood, who had meanwhile an opportunity of discussing the

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matter personally with Sir Charles Wingfield. He communicated his views to Lord Canning by a despatch dated the 17th August 1861. The Secretary of State, after referring to the difference of opinion which appeared to have arisen between the Chief Commissioner and the Government of India, observed that he was unable to perceive why His Excellency's Government desired to give the *talukdars* a more absolute control over their estates than would have been the case if they had inherited them from their ancestors, and pointed out that this latitude of disposal, against which the Chief Commissioner had respectfully protested, might prove an obstacle to the accomplishment of the object which His Excellency must desire to realise, namely, the preservation of property in the hands of the lineal representatives of the great families of Oudh.—(Oudh Papers for 1861, page 150). How far that despatch affected the policy of Lord Canning in framing the details which he embodied in his Bill, it is difficult to say, but it is obvious that the same weight cannot be attached to the Bill as a contemporaneous exposition of the intentions of the author of the grant as the correspondence preceding the grant, to which reference has already been made. Lord Canning admitted in his speech on the Bill that in working out the details, the aim was to combine the principle of primogeniture with other principles and usages traditional in this country and dear to the people.—(Oudh Papers, for 1865, page 92). The Bill was dropped after Lord Canning left India, and in the amended Bill which subsequently became law, it was expressly provided that the rule of succession laid down in the Act was not to be applied, if the transfer or bequest was made by a *talukdar* or grantee or his heir or legatee to a person who would not have succeeded according to the provisions of that Act if the transferor or testator had died intestate, without having made the transfer or bequest. The *talukdars* desired that sections 14 and 15 should be omitted from the Act, but Mr. Strachey pointed out that that was not a question falling within the engagements of Lord Canning. Those engagements, he observed, "were made for special political purposes, and they were intended to give certain exceptional privileges to certain selected individuals; not only did Lord Canning not desire, but

it would have been contrary to his policy to make these privileges separable from the families of the *talukdars* themselves. If these sections had been omitted and a *talukdar* to whose family the rule of primogeniture was applicable, had sold a patch of land to a shop-keeper, the succession to that field would have been forever governed by the rule of primogeniture, though the succession to all the rest of the owner's landed and other property would be governed by a different rule" (Sykes' Compendium, page 261). Mr. Strachey averred that his Bill differed in no essential particular from that which had been introduced by Lord Canning in 1862. But whether that was so or not, it is obvious that the rule of primogeniture was never intended to be applied at the time, when the *sanads* were granted, to persons to whom the estate might be alienated in whole or in part by sale, mortgage, gift or bequest, and the provision that it should be applied to persons of that class if they answered a certain description, was not introduced until Act I of 1869 came into force. The Act does not, however, apply in this case to the estate held by Akbar Ali Khan or his widow, Bibi Ilahi Khanam, in whose favour alienations had been effected in pursuance of the power derived from the *sanad*. The rule of descent laid down in the *sanad* also does not apply, because the intestate succession referred to in that rule, implies succession to the intestate or undisposed of residue, and the word "successors" contemplates persons who had succeeded on death to the intestate or undisposed of remainder. In the hands of Akbar Ali Khan and Bibi Ilahi Khanam, the estate was, therefore, governed by the Muhammadan Law, and the plaintiffs, as the sons of the daughters of Bibi Ilahi Khanam, are not entitled to the estate in preference to the daughters.

It is unnecessary under the circumstances to consider the other points raised at the hearing, but in consideration of the view taken by my learned colleague, which, if adopted, would necessitate the determination of the other points involved in the case, I would indicate briefly the principles which, to my mind, should guide the decision of the rights of the rival parties according to the rule of primogeniture.

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Where a person has died leaving several daughters, who are excluded by inheritance by reason of their sex under the terms of the grant, and each of these daughters has several male issues, the seniority is determined by the age of the claimants representing the senior line. In *Debi Baksh Singh v. Chandabhan Singh* (5), their Lordships of the Privy Council held that the rule of primogeniture, referred to in the *sanad*, was the rule of lineal primogeniture, but the adoption of the rule of lineal primogeniture did not imply the adoption of the English Law of real property. The entire correspondence reproduced in the Oudh Papers between Lord Canning and the Chief Commissioner of Oudh reveals that the rules of primogeniture and *gaddi-nashini* were treated loosely in those days as convertible terms. The rule of *gaddi-nashini* did not, however, conflict in any way with the rule of lineal primogeniture, for, as shown by Act I of 1869, lineal descendants had in any case the preference. There are references in the Oudh Papers in some places to the exclusion of females under the *gaddi-nashini* rule, but whether that theory was true or not, the limitation that the estate was to descend on the nearest male heir according to the rule of primogeniture, probably owes its origin to that idea.

Where a person has left daughters, but no sons, and no paternal relations, the exclusion of daughters by reason of their sex would not necessarily indicate the exclusion of their lines. The disability attaches to the sex, and not to the line, and among sons by different daughters, the preference is determined by the seniority of the line and the age of persons representing the senior line.

The plaintiff, Ghulam Abbas Khan, is not, therefore, entitled to the estate, even if the rule of descent laid down in the *sanad* be applied because, though he is older in age than Agha Muhammad Jafar, he does not represent the senior line. There is no question of age where the persons claiming an estate are not of the same line. The word "eldest" implies eldest in the order of primogeniture, not eldest in personal age—*Thellusson v. Rendlesham* (13) and (14) 11 Eng. Rep. 172; 7 H. L. Cas. 429; 25 L. J. Q. 948; 5 Jur. (N. S.) 1031; 7 W. R. 563; 115 R. R. 229.

1010 v. Strickland (14). As Mr. Justice Cranston pointed out: "Taking hold of a particular word and giving it the meaning which it most often bears will lead into great mistakes, if we do not remember that the rule must refer to the meaning it bears with reference to the subject-matter. Construing 'eldest' in a disposition like the present, in the sense of oldest in years *inter se*, appears to me to resemble the observation of the clown in the old play, who, in answer to the enquiry, 'Which is the Queen's high constable?' replies, 'Why the tallest man, to be sure,' and numerous illustrations might be given of the use of epithets generally bearing a particular meaning, which in reference to another subject have always what may be called in one sense, a secondary or derivative meaning, but which, when applied to a particular subject-matter, can only be understood in such secondary or derivative sense".—*Thellusson v. Rendlesham* (13). When sex is preferred priority of line is not to be disregarded—*Strickland v. Apap* (15). Agha Muhammad Jafar is the eldest son of the eldest daughter of Akbar Ali Khan and Bibi Ilahi Khanam, and, though his mother was excluded from inheritance by the rule of descent laid down in the *sanad*, no disability to inherit the estate attaches to him.

A daughter, being excluded from succession by a *sanad*, her sons would be the nearest heirs to the estate of their maternal grandmother under the Shia Law, and if the rule of descent laid down in the *sanad* be held to apply, a selection would have to be made from among them of the nearest male heir according to the rule of primogeniture. A daughter, who is excluded from inheritance, is not necessarily disqualified from transmitting blood, and the rule contained in the *sanad*, excluding females, cannot be read as implying an exclusion of every male of their line. An excluded heir is not in a worse position than a disqualified heir under the personal law, and an impediment which attaches to a person by reason of her sex, would not necessarily attach to one born of her if he did not belong to that sex and was otherwise qualified. The diversion of property to persons belonging to the daughters'

(14) (1891) 7 A. C. 156.

(15) (1893) 8 A. C. 106; 52 L. J. P. C. 1.

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line is not worse than its diversion by alienation, and if alienation was permitted, there is no ground for thinking that the entire line of females was intended to be excluded. A clause which disqualifies or disinherits persons otherwise entitled requires to be interpreted very strictly, and though the question is not free from difficulty, an interpretation which does not harmonise with equity and reason and favours escheat or forfeiture in the presence of an heir of the required sex recognized by the personal law ought not to be accepted. The rule of primogeniture determines the right to inherit with reference to the line and also priority where the claimants are persons of equal degree. The *sanad* controls the personal law but is not controlled by it, and the declaration and condition of the *sanad*, being part of the original title to the property, is, as pointed out by Lord Shaw in *Debi Bakhsh Singh v. Chandrabhan Singh* (5), an essential part of the regulation of the ordinary law of the religion and tribe.

The appeals, therefore, fail and are dismissed with costs. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 767 OF 1913.

June 14, 1915.

Present:—Mr. Justice Shadi Lal and
Mr. Justice Leslie Jones.

MUIN-UD-DIN AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

MUHAMMAD AHMAD AND OTHERS—
DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Saving of limitation—Payment of interest—Proof necessary—Debiting interest in account book, if sufficient—Payment in reduction of debt, if saves limitation.

To avoid the bar of limitation in a suit for the recovery of money due on a mortgage-deed, a plaintiff must establish, not only that there was payment within 12 years prior to the date of the institution of the suit, but also that there was either an express intimation by the debtor, or proof of the existence of circumstances going to show, that the payment was on account of the interest on the particular debt sued on. [p. 782, col. 2.]

In the absence of express agreement, debiting to interest in the books of account, cannot be regarded as payment of interest. [p. 783, col. 1.]

Kollipara Pullamma v. Maddula Tatayya, 19 M. 340 at p. 342; 6 M. L. J. 177 *Dharam Das v. Ganga Devi*, 29 A. 773; A. W. N. (1907) 263; 4 A. L. J. 628, referred to.

Payments made by the debtor in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt, do not amount to a payment of interest as such to save the bar of limitation. [p. 783, col. 1.]

Hanmantlal Motichand v. Rombabai, 3 B. 198; *Sarju Prasad Singh v. Khawahish Ali*, 4 A. 512; A. W. N. (1882) 114; *Maheswar Paul v. Baidya Nath Jena*, 7 Ind. Cas. 7, referred to.

Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 6th January 1913, affirming that of the Subordinate Judge, 2nd Class, Delhi, dated the 28th March 1912, dismissing the suit.

Mr. Morrison, for the Appellants.

Rai Sahib Lala Moli Sagar, for the Respondents.

JUDGMENT.—This is a suit for the recovery of a sum of money upon a mortgage-deed executed on the 30th of October 1895, and the sole question for determination is whether the suit is or is not barred by time. It is not disputed that the cause of action arose in January 1896, when there was a default in payment of interest for three successive months and the action which was brought on the 16th June 1911, is *prima facie* barred by limitation. The sole ground upon which the learned Counsel for the plaintiffs seeks to bring it within time, is that the mortgagor paid interest within the purview of section 20 of the Indian Limitation Act, and that a fresh period of limitation began to run from the date of such payment.

Now it is a well-recognised proposition of law that a plaintiff must establish not only that there was payment within 12 years prior to the date of the institution of the suit, but also that there was either an express intimation by the debtor, or proof of the existence of circumstances going to show, that the payment was on account of the interest on the particular debt sued on. In the present case, the accounts between the parties have been examined by the lower Courts and we agree with the learned Divisional Judge that the plaintiffs have failed to prove the payment of interest within the

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meaning of section 20. It appears that in the books of the plaintiffs, there is a general account of the defendants in which the items due on the mortgage and also those relating to other transactions were debited to them. Periodically, there were book debits on account of interest which, we observe, was not paid in cash. It further appears that certain sums of money were paid by the debtors at different dates and that the plaintiffs gave them credit therefor in the general account.

Upon these facts, we are quite clear that the mere debiting of interest in the books cannot be regarded as payment of interest [vide *inter alia* *Kollipara Pullamma v. Maddula Tatayya* (1) and *Dharam Das v. Ganga Devi* (2)]. Further, payments made by the debtor in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt, do not amount to a payment of interest as such to save the bar of limitation [see *Hanmantlal Motichand v. Ramabai* (3), *Surju Prasad Singh v. Khawarish Ali* (4), and *Maheswar Pundia v. Baidya Nath Jana* (5)].

For the aforesaid reasons, we uphold the decision of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

- (1) 19 M. 340 at p. 342; 6 M. L. J. 177.
 (2) 29 A. 773; A. W. N. (1907) 263; 4 A. L. J. 628.
 (3) 3 B. 198.
 (4) 4 A. 512; A. W. N. (1892) 114.
 (5) 7 Ind. Cas. 7.

MADRAS HIGH COURT.

APPEAL SUIT NO. 119 OF 1914.

September 21, 1915.

Present:—Mr. Justice Coutts-Trotter and
 Mr. Justice Srinivasa Aiyangar.

S. V. A. R. VELLAYAM CHETTY AND

OTHERS—DEFENDANTS NOS. 1 TO 5—

APPELLANTS

versus

K. L. S. T. KULANDAVELUAPPA
 CHETTY—PLAINTIFF—

RESPONDENT.

Principal and agent—Nattukottai Chetty—Contract—Promise to reward, construction of—Collection of old debts—Remuneration, amount of.

A promise to pay extra to deserving persons will be construed according to the circumstances of each case, the principle being, whether there is an implied contract to give something or the option of giving anything at all is left to the discretion of the principal. [p. 785, col. 2.]

Where a Nattukottai Chetty impliedly agreed to give something extra to his agent as remuneration for the collection of outstandings left uncollected by the agent's predecessor, but did not fix a rate of percentage.

Held, that, in view of the nature of the business of Nattukottai Chetties, the contract was enforceable and the agent was entitled to a reasonable amount as remuneration. [p. 786, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 19 of 1912.

Mr. A. Krishnaswami Aiyar, for the Appellants.

Messrs. T. Rangachariar and A. Srinivasa Aiyangar, for the Respondent.

JUDGMENT.

COUTTS-TROTTER, J.—This was an action brought by a Chetty agent carrying on business on behalf of his principal in Lower Burma for something which may be described as commission. The circumstance in which this agent was appointed is in a document, dated 20th January 1907, which is what I understand to be an ordinary form of agreement between a Chetty agent and principal. He was to go to a place called Letpatam and transact business as the agent of his firm in that place for a period of three years for a fixed salary of Rs. 8,000. He was to remain there and transact business for a period of three years and hand over the balance of capital and profits left in his hands to his successor. These were the terms of the document. It would appear that in fact the principal's business in that place had been faring very ill for a few years previously, apparently because of the incapacity of the preceding agent, and it may very well be that the principal's mind was (as he swore) that he doubted his ability to enable the new agent to embark, at any rate with rapidity, on new transactions and always had in his mind that his duty would be to collect the outstandings left uncollected by his predecessor, if he could be got to do so—I say advisedly “if he could be got to do so,” because there is evidence in this case of

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the principal's agent at Rangoon who says: "It is the custom among Nattukottai Chettiars to transfer to the name of the successor such outstandings as he is agreeable to". The agent has said in the box and on paper contemporaneously over and over again that he went out with the expectation of doing ordinary money-lending business as a Chetty agent, which is quite evident from a letter dated 6th June 1907, which is the first letter that was written to the defendant by the agent in which he says: "You said you would keep Rs. 25,000 as capital for the place, but you have not as yet written about it even though I wrote a letter from this place. Therefore, you must write to this place to enter that sum in the accounts and send Rs. 75,000 over that amount so as to make the capital one lakh of rupees." What was that capital wanted for? Not to collect old debts, but for the purpose of doing business with new clients. In that letter, he also says: "We must have dealings with good persons who may be coming voluntarily at a cheap rate of interest and in small sums. We must also be carefully collecting the old dues." The next document is dated 3rd August 1907. It is from the principal to the agent in which he presses him to collect the old dues to the prejudice of other business. It is in effect an exhortation to the agent to get on as fast as he could with the collection of the sums due under old accounts.

The next letter is Exhibit IX, which is a very important letter, dated 17th June 1908, written by Udayappa to the plaintiff in which there is an allusion to the question of commission claimed by the agent. I think it is quite clear that at this time there was no binding agreement at all as between the principal and the agent as to whether there should be any or what rate of commission. He writes to the plaintiff alluding to his claims: "As you have now written severely I would send your letter home to the principal and make the necessary arrangements therefor. Our principal is not one who cannot realise the situation," and then he says: "You have now very severely written in your letter that you are very anxious about it and that you came here only for profits and good name and not in

consideration of the pay; therefore, I shall write to the principal as *per* your desire and have the thing settled as *per* your desire. Do not be anxious about it and make arrangements necessary for the collections." Does not that amount to an intention on the part of Udayappa to write to the principal for payment of the commission due to him? I certainly draw the conclusion that he did write such a letter. It is an undisputed fact that the principal has not chosen to produce it. Inasmuch as he has not produced any of the correspondence between himself and his agent at Rangoon, we are bound to draw adverse inference against him wherever it is clear that the production of that correspondence would throw light on the case. At that time, it is clear that no binding agreement had been come to and it was not come to until a considerable time later, because, as late as 3rd September 1903, plaintiff writes to the defendant and says: "We write to you with the intention that we may ask what we want. We are persons who have come depending on you. In many places in these days they are settling commission beforehand for making collections. Vai V. B. has arranged for commission for the partner of Pakke. As some provision has been made for all persons in this manner, we write to you often and often and request you will similarly make some provision for us who have been depending on you." In these circumstances, we may rightly draw the inference that as late as that date, there was no binding agreement between these parties, although pressure to induce the principal to agree to something had been going on for a certain period.

The next document is also an important one and is dated 12th November 1908. It is another letter from the plaintiff to the defendant. There are two requests in that letter. One was a request for *extra* help from the defendant on the ground that the work of collecting the outstandings had become so arduous that it was impossible for one man to cover the ground. The other request was to have his commission settled. He says: "You must consider well about the fact that I collected money after much difficulty, and write to me as to what I am to take

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for my commission. I write to you very much and request you to realise the fact that money has to be collected only after much hard work. If you have no mind to give commission, it will be a good thing for you to send a man for my place at the end of the second year. You must send a man like that." That is a statement on the part of the plaintiff that he was doing work which he had not contracted to do and that unless settlement was come to with regard to the rate of remuneration he would give up the business. The next communication we have, is Exhibit X, dated 1st December 1908, written by the principal in answer to this letter and also another which we have not got. He says he will send a person to help him. That is in answer to the first request. He says this: "You have been writing to me that I should write about your matters. You may discuss about this also with Udayappa of Rangoon. You may tell Udayappa about K. P.'s house matter." Beyond that, there is not a word said about his commission and not a word said about the plaintiff's threat that if he was not properly treated with regard to his commission, he would demand to be relieved at the end of the second year. After the date of that letter, the correspondence ceases right up to a period when the plaintiff was due to come home in the natural course of effluxion of the period of his contract. We may assume that the letters covering the intermediate period, have no bearing on the issue of this case. In the first letter, dated 14th July 1910, Exhibit B, written by the plaintiff to the defendant, he says this: "Much trouble has been taken from Peri accounts and things have been very satisfactorily brought to such an extent as this. It is you who should give, considering the pains taken, in accordance with what you wrote formerly that you would give liberally." In Exhibit D, on the 6th August 1910, he again writes: "You had written formerly that you would also (reward) me liberally for collecting amounts taking pains. You are the person who should reward well according to the pains taken; and I am a man who would receive the same. With that object, I have done all the work taking great pains." I infer from these two letters,

that the principal must have assented to reward the agent in general terms. At the trial, the case set up by plaintiff was thus:—That he had gone to Rangoon, that he had met Udayappa who had authority from the principal in the matter and that Udayappa settled with him that he should get 5 per cent. commission. The learned Subordinate Judge disbelieved this story and found that it was not proved that Udayappa and plaintiff ever entered into any such binding agreement; but he finds that there was some understanding between plaintiff and Udayappa that some commission would be paid. Udayappa in his deposition says that he wrote to his principal about the *sumans* due and he replied that he would not give *sumans* having regard to what people were talking about. What the principal meant, in my opinion, was that he would not give him a fixed rate of percentage, but would give him something as remuneration in respect of the sums collected from the old debtors.

That being so, the question arises whether this would constitute in law an enforceable contract. Reliance was placed for the appellants on two cases, *Taylor v. Brewer* (1) and *Roberts v. Smith* (2). In these cases, it was held that a promise to pay reward to deserving persons, may be construed in certain circumstances with certain form of words to mean: "I may or may not give anything. If I do give something, I will give exactly what I deem right." On the other hand, the other side relied on the case of *Bryant v. Flight* (3) where slightly different words were held to mean: "I will give you something, though that something must be determined later." The dividing line may be different in particular cases. The principle is quite clear. Is there an unqualified contract to give something or is the option of giving anything at all, left to the discretion of the proposed donor? I do not think there is much to be gained by a lengthy discussion of the cases. It is a matter of construction on which different Judges will take different views. The view I take of the contract

(1) (1813) 1 M. & S. 290; 21 R. R. 831.

(2) (1859) 4 H. & N. 315; 25 L. J. Ex. 164; 118 R. 462.

(3) (1839) 5 M. & W. 114; 2 H. & N. 84; 8 L. J. Ex. 189; 3 Jur. 681; 151 E. R. 49.

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in this case is that it can only be construed, having regard to the circumstances, as an undertaking to give something. I see no express contract in this case. Mr. Krishnaswami Iyer, Vakil for the appellants, contended that there cannot be a contract and that we cannot find it in the pleadings, issues, letters or depositions. I have already said that I think it can be found by diligent and patient study in the pleadings. It is rather disguised. It can be dug out. What I do find, is this. It is in terms of the judgment of the learned Subordinate Judge in paragraph 11 of the judgment, where he specifically finds an implied contract to pay something to the plaintiff. He is inclined to find it in the deposition of Udayappa which I read. He assumes that having heard from the 1st defendant that he was going to pay plaintiff a percentage in the profits, Udayappa must have told the plaintiff about it at his request and that that knowledge or conversation implies a contract. But I would base my inference as to the contract on a slightly different ground. The silence on the part of the defendant after he received the letter of the 12th November 1908, would itself constitute an implied agreement to pay some rate of commission to the plaintiff if he consented to go on with the work of collecting old debts. My inference as to the contract is also based on another ground, namely, from the uncontradicted letters, Exhibits D and E, in which the agent expressly states that the principal had given an undertaking to pay him handsomely, coupled with the fact that no letter is produced by the defendant of protest that this was not a true account of what he wrote. Mr. Krishnaswami Iyer argued that it is void for want of consideration, because by the terms of the original salary chit, the plaintiff was bound to know that there was no consideration for extra remuneration. I think his argument is fallacious, because though it may very well be that the expression "transacting business" would cover certain items of collections, they would only cover such items of collections as the agent agreed to take over. Transacting business in law, cannot be held to cover cases of collections only and no other business at all, especially having regard to the known facts of the business of Nattukottai

Chetties. In view of the very nature of the duties imposed upon the plaintiff, there was ample consideration for extra remuneration.

This disposes of the case and there is no need to go into the question of custom, as the only point urged is as to the contract. As to the quantum of remuneration, the Subordinate Judge has very rightly come to the conclusion that 5 per cent. is a reasonable amount and I think his decision should not be interfered with. The appeal fails and is dismissed. Each party shall pay his own costs.

SRINIVASA AIYANGAR, J.—I entirely agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL SUIT NO. 195 OF 1914.

October 6, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

A. BHARADWAJA MUDALIAR—

DEPENDANT NO. 1—APPELLANT

versus

KOLANDAVELU MUDALIAR *alias*
KOLANDAVELU NAICKER AND OTHERS—

PLAINTIFFS AND DEPENDANT NO. 2—

RESPONDENTS.

Will, construction of—Legacy of six acres out of 19.40 acres, whether void for uncertainty—English rules of construction, applicability of, to Wills of Hindu agriculturists—Will, uncertain, validity of.

A Hindu agriculturist bequeathed to his father's sister's second son "six acres of good irrigated nanja lands" and died leaving behind him 19.40 acres of land answering to that description. The legatee died before he got the bequest and his heirs sued the residuary legatee for possession of six acres and for mesne profits. The residuary legatee contended that the legacy of six acres was void on account of uncertainty.

Held, that the legacy was not void on account of uncertainty and that the intention of the testator, as gathered from the document, was that, in the absence of agreement, the lands in question should be partitioned by the Court and six acres out of the 19.40 acres allotted to the legatee who had a vested interest in them as a tenant-in-common along with the residuary legatee. [p. 788, col. 2; p. 788, col. 2.]

Per Wallis, C. J.—English rules of construction of Wills are too artificial to apply to the Wills of Hindu agriculturists. [p. 787, col. 2.]

Per Srinivasa Aiyangar, J.—A Will is not void for uncertainty unless it is utterly impossible to put a meaning upon it. [p. 788, col. 2.]

Appeal against the decree of the District Court of North Arcot, in Original Suit No. 9 of 1913.

Mr. G. S. Ramachandra Aiyar, for the Appellant.

Messrs. S. Srinivasa Aiyangar and C. V. Ananthakrishna Aiyar, for the Respondents.

JUDGMENT.

WALLIS, C. J.—The legacy in this case is of six acres of good irrigated *nanja* lands in the village of Pudur. Assuming that the legacy is out of the *nanja* lands owned by the testator, the Will does not say which of them the legatee is to have; and in England such a bequest would have been held void for uncertainty, but for the benevolent rule of construction that the testator is intended to have left the choice to the legatee: *Tapley v. Eagleton* (1), Bacon's Abridged Title, Election A, and the other authorities referred to in *Narayanasami Gramani v. Periakambi Gramani* (2), where the rule was applied and recognised. The reasons for reading into the Will something that is not there, *viz.*, that the legatee should himself make the selection, was that without such a provision, the legacy was regarded as bad for uncertainty. In the present case unfortunately, the legatee died without making the election, and the accepted view in England would appear to be that the Will cannot be read as intending that the heirs of the legatee should be allowed to make the election in the event of the legatee dying without having made it. See the old authorities cited in Bacon's Abridged Title, Election C. That would be equivalent to reading it as a bequest of six acres to be elected by the donee and his heirs. In *Earl of Brandon v. Merleland* (3), where under a settlement a power of election was given to the beneficiary, his heirs or assignees, it was held that this disposition offended against the rule against perpetuities, but that the powers of the beneficiary and of his heirs or assignees were severable, and that an election made by the beneficiary himself in his life-time would be supported. The same

rules were recognised and applied in *Savill Brothers Limited v. Bethell* (4). These are however, somewhat artificial rules to apply to the Will of a Hindu agriculturist who was no doubt familiar with the ordinary process of partitioning lands by the Court in a partition suit, and I think it much more likely that his intention was that in the absence of agreement, the lands in question should be partitioned by the Court than that the legatee should be left to make a selection for himself. In this view I see no sufficient reason why the Court should not give effect to the testator's intention by partitioning off and allotting to him land of the nature and extent indicated in the Will out of the land left by the testator and I concur in the order proposed by my learned brother, whose judgment I have had the advantage of reading.

SRINIVASA AIYANGAR, J.—This appeal raises a question of some difficulty on the construction of a clause in the Will of one Dhana-koti Mudaliar. The clause in question reads thus: "I give to my father's sister's second son, Murugesu Mudaliar, my big house at Tiruvannamalai and also six acres of good irrigated *nanja* lands in the village of Pudur in Arcot Taluk and also give him Rs. 3,000 without any restriction from me." No question arises now as to the bequest of the house or of the legacy of Rs. 3,000. Murugesu Mudaliar, the legatee, is dead and his sons are the plaintiffs in this suit. It appears from the evidence that the testator had, besides other lands, 19.40 acres of land in the village of Pudur which answer the description of good irrigated *nanja* lands, though all of them are not of quite the same quality. They are the lands described in Schedule B to the plaint. The plaintiffs' claim six out of the 19.40 acres and state that the 1st defendant, who is the residuary legatee and also executor by implication, has failed to put them in possession of the six acres and they ask for a decree directing the 1st defendant to deliver possession of six acres of good irrigated *nanja* lands out of the B Schedule lands in Pudur. In the Schedule, there is a note stating that items 1 to 15 measuring 9 acres 2 cents are good irrigated lands and that plaintiffs want 6 out of the 9 acres 2 cents. The 1st

(4) (1902) 2 Ch. 523; 7 L. J. Ch. 652; 87 L. T. 191; 50 W. R. 580.

(1) (1879) 12 Ch. D. 683; 28 W. R. 239.

(2) 18 M. 460.

(3) (1910) 1 Ir. R. 220; 11 Irish Law Report 471.

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defendant pleaded that he never objected to the plaintiffs' taking their portion of the *nannja* lands in Pudur bequeathed to their father and that he was not, therefore, liable for mesne profits; and also proceeded to state that the provision in the Will was vague, indefinite and uncertain, and that the plaintiffs had to make their selection from the whole of the lands in Pudur village possessed by the testator, and not solely from the 19.40 acres (paragraph 10 of the written statement). At the 1st hearing, the 1st defendant definitely gave up the contention that the devise of the six acres was void for uncertainty. Judge's Notes printed at page 12 of the printed book.) The only question then that required determination was whether the plaintiffs were entitled to 6 out of 19.40 acres or 6 out of the whole of the extent, the particular six acres being determined by division and not by selection. The District Judge in the Court below has, however, held that the plaintiffs were entitled to select six acres of land out of the lands belonging to the testator in the village of Pudur. The 1st defendant appeals against the decree and contends that the legacy of six acres was void for uncertainty, and the first question is whether there is any uncertainty as to the subject-matter of the legacy.

The Will is in English; but it is clear that the testator was not able to express himself accurately or clearly in that language. The lands which are given are ordinarily cultivable lands. Their extent is certain and their locality immaterial, as their value does not depend upon their situation as in the case of house sites. There is nothing in the Will to indicate that the testator intended the legatee to select any particular six acres he desired. It seems to me that the testator had no idea of any selection by the legatee. In cases, where out of a number of distinct articles or properties some are bequeathed, it is obvious that the testator must have intended the particular properties to be selected by some one, whether it is the legatee or the executor; as for example, one out of the several houses or so many out of the horses in the testator's stable. If again, the devise is of a certain quantity of land at or near a parti-

cular place, as for example, twenty acres of land near a house or surrounding a house, then presumably the testator leaves it to the legatee to select the particular twenty acres. So also when a testator is possessed of lands of different descriptions as pasture lands, building sites, garden lands, forest lands and cultivable lands and if he gives only a particular extent, a right of selection may be implied. In the case, for instance, of cash or commodities, there could be no doubt that a legacy of a particular quantity means a fraction of the whole. In the case of lands which may not be all of the same quality, the testator's intention may be to give to the legatee, a right to select a particular quantity from out of a particular locality; that is a matter of construction. In this case, the lands given are ordinary cultivable lands and there is no reason to suppose that the testator made any difference or had any idea of difference with reference to any particular place or locality. I think the reasonable interpretation of the words used by him is that he intended to give to the legatee that fraction out of the total quantity of land which would give him the extent specified in the Will. It is also clear that the testator intended the legatee to have the six acres of land immediately on his death. If the testator intended that the property should vest only on a selection made by the legatee, the language used by him would have been different. We should, I think, construe the Will so as, if possible, to give effect to the legacy. "The modern doctrine", as stated by Jessel, M. R., "is not to hold a Will void for uncertainty unless it is utterly impossible to put a meaning upon it." *In re Roberts; Repington v. Roberts* (5). I am, therefore, of opinion that the legatee had a vested interest in six out of the 19.40 acres as a tenant-in-common along with the residuary legatee, and is entitled to division by metes and bounds of the 19.40 acres, and have an allotment made to him of six acres. He is, I think, also entitled to mesne profits of the lands for three years prior to the suit as claimed in the plaint. Subject to this modification, the appeal is dismissed with costs.

The memorandum of objections is allowed. There will be no order as to costs.

Appeal dismissed.

(5) (1881) 19 Ch. D. 529; 50 L. J. Ch. 265; 45 L. T. 450.

KRISHNA NATH V. MUHAMMAD WAFIZ.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3649 OF 1913.

July 23, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

KRISHNA NATH CHAKRAVARTI—

DEFENDANT—APPELLANT

versus

MUHAMMAD WAFIZ—PLAINTIFF—

RESPONDENT.

Landlord and tenant—Lessor and lessee—Raiyat, essentials of—Lessee not getting juridical possession, whether raiyat—Criminal Procedure Code (Act V of 1898), s. 107—Criminal Court, findings of, whether admissible as evidence in Civil suit.

In order to make the principle, that 'an agricultural tenant who enters upon land and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as *raiya*, although the *de facto* proprietor is subsequently proved to be not the real owner,' available in the case of a lease, it is essential that the lessor should be in possession of the leased property as *de facto* landlord and that in good faith he should have inducted into the land a cultivator who has accepted the settlement in good faith. [p. 790, col. 2.]

Where, a lessee took his lease from a person who had no title to confer on him and he never obtained juridical possession of the leased property but was, on the other hand, in attempting to take possession, resisted by a person to whom the leased property had already been sold in execution of a decree against the lessor and where as the result of criminal proceedings taken by the purchaser-possessor under section 107, Criminal Procedure Code, the lessee not having been found in possession, was bound down to keep the peace so that he might not interfere with the possession of the purchaser though he had failed to establish his alleged title;

Held, that under the circumstances the lessee was not entitled to be treated as *raiya*. [p. 790, col. 2.]

The finding of a Criminal Court on the question of possession is admissible in evidence in a civil proceeding taken for the recovery of possession of the same land, to show what order had been made, who the parties to the dispute were, what the land in dispute was and who was held entitled to possession. [p. 790, col. 2.]

Dinamani Chowdhurani v. Brojo Mohini Chowdhurani, C. 187; 29 I. A. 24 (P. C.); 6 C. W. N. 386, followed.

Appeal against the decree of the Additional Subordinate Judge, Mymensingh, dated the 7th June 1913, reversing that of the Munsif, 3rd Court, Netrakona, dated the 20th of May 1912.

Babu Birendra Kumar Dey, for the Appellant.

Babu Jotindra Mohan Chowdhury, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit for recovery of possession of land on declaration of title. The disputed property belonged to one Parbaty Sankar Pandey whose interest therein was terminated by a sale in execution of a decree held on the 22nd September 1910. On the 24th November 1910, the plaintiff took a lease of the land from Parbaty Sankar Pandey and, in his own words, went to take possession. The result was a dispute with the defendant which culminated in a proceeding under section 107, Criminal Procedure Code. The Magistrate found on the 22nd March 1911, that the defendant (then complainant) was in possession and that the accused (now plaintiff) was likely to commit a breach of the peace. He consequently directed that the plaintiff should be bound down and should execute a bond to keep the peace for one year, on the 15th June 1911. The plaintiff instituted this suit for declaration of his title under the lease from Parbaty Sankar Pandey and for recovery of possession. The Courts below, have concurrently found that the lessor of the plaintiff had no subsisting title on the day the lease was granted to him. But while the Court of first instance held that the plaintiff had acquired no title under the lease, the Subordinate Judge has come to the conclusion that the principle of the decision of the Full Bench in *Binad Lal Pakashi v. Kalu Pramanik* (1), is applicable and that the plaintiff is entitled to a decree for possession as against the defendant, who has failed to establish any title to the property. The question for consideration consequently is, whether this case is governed by the principle of the decision of the Full Bench, namely, that an agricultural tenant who enters upon land, whether it be firm or alluvial [*Nundo Kumar Nasker v. Banomali Gyan* (2), *Rajendra Nath Roy v. Nanda Lal Guha* (3)], and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as *raiya*, although the *de facto* proprietor is subsequently proved to be not the real owner [*Ameer*

(1) 20 C. 708.

(2) 29 C. 871.

(3) 26 Ind. Cas. 977; 19 C. L. J. 595; 18 C. W. N. 1206.

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Hossein v. Shee Suhae (4), *Zoolfun Bibee v. Radhica Prosonno Chunder* (5)].

As was pointed out by this Court in the case of *Upendra Narain Bhattacharjee v. Pratap Chunder Pardhan* (6), this principle is an encroachment upon the ordinary rule of law that a grantor is not competent to confer upon the grantee a better title than what he himself possesses [*Durgi Nikurini v. Gobaridhan Bhose* (7)]; and the Courts have repeatedly ruled that the doctrine must be cautiously applied and is not to be extended. Thus in *Sharoop Dass Mondul v. Joggessur Roy* (8) and *Jouab Ali v. Rakibuddin* (9), the Court refused to apply this doctrine to *zerait* lands. In *Madan Mohan Singh v. Raj Kishori Kumari* (10), the Court refused to apply the principle in derogation of the rule of *lis pendens*. Again, in *Kazi Newaz Khoda v. Ram Jadu Dey* (11), *Peary Mohun Mondul v. Radhica Mohun Hazra* (12), *Upendra Narain Bhattacharjee v. Pratap Chunder Pardhan* (6) the Court refused to apply the doctrine to cases where the landlord was not in possession in good faith, and it cannot now be disputed that want of good faith either on the part of the lessor or the lessee, makes the rule inapplicable. This accords with the decision in *Tepu Mahammad v. Tefayit Muhammad* (13), that in order to make the principle applicable, the lessor must be the *de facto* landlord in possession and must have placed the lessee in possession of the land. This does not in any way conflict with the cases of *Atal Rishi v. Lakshmi Narain Ghose* (14) and *Golan Panja v. Hurish Chunder* (15), where the lessee was brought upon the land by an *ijaradar* for a term who had authority to settle the land with cultivators. We have consequently the position that in order to make the principle available, it is essential that the lessor should be in possession of the

disputed property as *de facto* landlord and that in good faith, he should have inducted into the land a cultivator who has accepted the settlement in good faith.

Tested in the light of this principle, the plaintiff has no case. It is clear that he took his lease from a person who had no title to confer on him, and he never obtained juridical possession of the disputed property. When he attempted to take possession, he was resisted; the result was a criminal case in which it was found that he was not in possession and that it was necessary to bind him down to keep the peace, so that he might not be free to interfere with the possession of the defendants. In a case of this description, the principle of the rule in *Binad Lal Pakrashi v. Kalu Pramanik* (1) can have no possible application.

We may add that it was jointly suggested that no reference was permissible to the finding of the Criminal Court on the question of possession. But in view of the decision of the Judicial Committee in *Dinmoni Chowdhurani v. Brojo Mohini Chowdhurani* (16), it is clear that the judgment, in the criminal case was admissible in evidence to show what order had been made, who the parties to the dispute were, what the land in dispute was, and who was held entitled to possession. But, even apart from that judgment, there is sufficient evidence on this record to show that the plaintiff never obtained such possession of the land as would entitle him to claim the status of a *raiyat* although he had taken settlement from a person who had no title to confer on him. Indeed the deposition of the plaintiff shows that it is not his case that he obtained the requisite possession. We must hold accordingly that the plaintiff has no enforceable claim even as against the defendant, who has failed to establish his alleged title.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

Appeal allowed.

(16) 29 C. 187; 29 L.A. 24 (P.C.); 6 C.W.N. 386.

(4) 19 W. R. 338.

(5) 3 C. 560; 1 C. L. R. 328.

(6) 8 C. W. N. 320; 31 C. 703.

(7) 24 Ind. Cas. 183; 20 C. L. J. 448; 19 C. W. N. 625.

(8) 26 C. 564; 3 C. W. N. 464.

(9) 1 C. L. J. 303; 9 C. W. N. 571.

(10) 17 Ind. Cas. 1; 17 C. L. J. 384.

(11) 34 C. 109; 5 C. L. J. 33; 11 C. W. N. 201.

(12) 5 C. L. J. 9; 8 C. W. N. 315.

(13) 29 Ind. Cas. 216; 19 C. W. N. 772.

(14) 2 Ind. Cas. 417; 10 C. L. J. 55.

(15) 17 W. R. 552.

KASTURI AIYANGAR V. GULAM GHOUSE SAHIB.

COURT OF THE BOARD OF REVENUE,
MADRAS.

SECOND APPEALS NOS. 53 TO 58 OF 1915.

November 3, 1915.

Present:—Mr. Clegg, F. M.

V. KASTURI AIYANGAR AND OTHERS—
PLAINTIFFS—APPELLANTS

VERSUS

SAYID GULAM GHOUSE SAHIB AND

ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3—"Estate"

—Grant of whole village as *inam*—Proof.

Where a village granted as an *inam* contains minor *inams* and *ryotwari* holdings and the question is whether the village as a whole was granted as an *inam* or only a portion of it, the fact that it was treated as a whole *inam* village at the *Inam* Settlement and the Revenue Authorities themselves subsequently recognized it as such, is a clear proof that the whole village was granted as an *inam* and is an "estate" within the meaning of Act I of 1908. [p. 722, col. 1.]

Second appeals against the decision of the Collector of Trichinopoly, in Appeal Suits Nos. 1 to 6 of 1915 (under Act I of 1908).

FACTS appear from the following Judgment of the lower Court:—

"The 1st issue in this suit is as follows:—

"Whether the plaint lands form an *estate* within the meaning of the Act I of 1908?"

The facts are that the village of Tennur which consisted originally of (i) 153 and odd *kawnies*—the major *inam* concerned in the present suit, (ii) 160 and odd *kawnies* made up of 21 minor *inams* held by various persons mutually unconnected and with distinct titles and original grants, and (iii) 33 and odd *kawnies* *ryotwari*, was constituted at the *Inam* Settlement an "entire *inam* village" by transferring the *ryotwari* area to an adjoining Government village. This obviously merely means that the village was one where all the tenures were *inam* in character. It is not the case that it was granted to the *inamdars* as a major or as an entire *inam*, subject to the claims of a series of minor *inamdars*. It was granted, or rather the existing grants were confirmed, to 22 different sets of persons, 1 major and 22 minor *inamdars*.

2. The Act defines an estate as any village of which the land revenue alone has been granted in *inam* to a person not owning the *kudivaram*, etc., etc. If it be conceded that the grant was of land revenue alone in this case, and if it be also conceded that the grantee was not the *kudivaramdar*, yet

although the whole village was granted in parcels to a number of sets of persons on this tenure, the village as a whole was not granted to the *inamdars* in this suit or his predecessor-in-title. He is only one among 22 people who are mutually unconnected. His holding is not, therefore, a *village*. Nor can he come in, by explaining "a person" to exclude persons, because that would be clearly only in the case of persons joint in interest or title, which is not the present case.

The definition goes on to speak of any separated part of such village. But that again is not the present case. That involves that there was at one time a whole village granted to one *inamdars* and that at any time subsequent to such grant there has been recognised alienation or division. That is not the present case. It is clear from the *inam* register that the numerous minor *inams* which go with the major *inam* in issue and form the village, have been always disconnected and originally conferred by distinct grants.

3. Accordingly, I find this issue against the respondent and the suit must fail because there is no *estate* under the Act.

4. This decision is the decision in all the suits by consent of parties and I am not prepared to deprive the appellants of their costs in this appeal."

Mr. R. Kuppuswami Aiyar, for the Appellants.

The Hon'ble Mr. T. Richmond, for the Respondents.

JUDGMENT.—This is a second appeal against the Collector's finding on appeal in respect of the first issue in the suit, *viz.*, whether the plaint lands form an estate within the meaning of Act I of 1908.

2. The only point raised before me is, whether the plaint lands form part of a whole *inam* village or of a minor *inam*, or in other words, whether Tennur is a whole *inam* village or one of a congeries of minor *inams*.

3. An examination of the *inam* and quit-rent registers relating to Tennur shows that it was treated at the *Inam* Settlement exactly as other whole *inam* villages. Neither the original grant nor the *inam* title-deed are forthcoming. In the *inam* register the whole *gudicat* is first entered and deductions are made of *porambok* portions transferred

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to other villages and old *inams*. The remainder, 108-14 acres, besides *poramboke* is entered in the quit-rent register as the *inam*. In the *inam* register reference is also made to this entry in Mr. Wallace Traver's Register of the entire village as *inam*. The other *inams* of the village were separately settled at the *Inam* Settlement and particulars are given in the *inam* register of the village. No deductions on account of *poramboke*, etc., were made, and they were settled as minor *inams*.

4. It is represented on behalf of the respondent that the existence of *ryotwari* lands in the village is against the theory that it was a whole *inam* village. A remark against title-deed No. 147 shows that at the time of the *Inam* Settlement some lands in the village were fully assessed. They were presumably resumed and became *ryotwari*. This will account for the existence of the *ryotwari* lands referred to in this instance. It does not follow, therefore, that the original grant was not of the village as a whole.

5. It is further argued that it is impossible that there should be in this village, which was assigned for the support of a *durga*, other *inams* for the support of a Hindu temple, *pallan* and another mosque. The register regarding these minor *inams* shows that with one exception the minor *inams* came into existence before the grant of the village. The excepted item was itself a re-grant of an older *inam* by the act of the Ruling Power.

The above shows that the grant of the village was subject to the rights of the minor *inamdar* in respect of the minor *inam* situated in it.

There is thus no force in this argument.

6. There is a clear distinction between the grant of the village in question and the grant of the old *inams* situated in it at the *Inam* Settlement. Besides it has always been treated by the Revenue Authorities as a whole *inam* village. From the above considerations I decide that the grant was of a whole *inam* village and that the village of Tennur is 'an estate' within the meaning of the Act.

7. The appeal is allowed and the Collector's decision and decree reversed and the costs in this and the lower Appellate Court will be borne by the respondent.

S. The Collector will now dispose of the appeal in respect of the second issue in the suit, whether commutation should be allowed.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 32 OF 1915.

November 5, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

MUNNI KOER—PLAINTIFF—APPELLANT

versus

MADAN GOPAL—DEFENDANT—

RESPONDENT.

Transfer of Property Act (IV of 1882), s. 54—Sale in favour of minor, validity of—Contract Act (IX of 1872), s. 11.

A sale-deed of a house executed in favour of a minor is a valid transaction and the minor can sue for possession of the same after the transaction is complete. [p. 793, col. 2.]

Mohori Bibee v. Dharmodas Ghose, 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421 *Navakoti Narayana Chetty v. Loyalinga Chetty*, 4 Ind. Cas. 353; 19 M. L. J. 752; 7 M. L. T. 233; 33 M. 312; *Ulfat Rai v. Gauri Shankar*, 11 Ind. Cas. 20; 8 A. L. J. 670; 33 A. 657, referred to.

Letters Patent Appeal from the decree of Mr. Justice Piggott in Second Appeal No. 698 of 1913, dated the 6th January 1915.

Dr. S. M. Suleman, for the Appellant.

Mr. A. P. Dube, for the Respondent.

JUDGMENT.—By our order, dated July 9th 1915, we referred an issue to the Court below. The finding on this issue has now been returned. We think it desirable very shortly to refer to the nature of the suit. The plaintiff is the daughter-in-law of the defendant. The suit is a suit to recover possession of a house. The house admittedly belonged at one time to the defendant. The house was under attachment in execution of a decree against the defendant. Before the sale, a deed of transfer was executed by the defendant in favour of the plaintiff. She was his daughter-in law and her husband

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(the son of the defendant) was then alive. It was alleged on behalf of the plaintiff that she paid the purchase-money of the house and became the purchaser. It was alleged on behalf of the defendant that the whole transaction was fictitious and that no consideration of any kind ever passed. As the result of the finding of the Court below upon the issue we referred, it is now established that the money was really paid by the father of the plaintiff at the time of the attachment and was duly received by the defendant. There can be no doubt (whether the money actually belonged to the plaintiff or belonged to her father) that the purchase was intended for her benefit. The question is whether under these circumstances, the plaintiff was entitled to recover possession of the property, it being borne in mind that at the date of the deed of transfer she was under age. It is contended on behalf of the defendant that the contract for sale of the house was absolutely null and void and the decision of their Lordships of the Privy Council in the case of *Mohori Bibi v. Dharmodas Ghose* (1) and also the case of *Narakoti Narayana Chetty v. Loyalinga Chetty* (2) are relied upon. On the other side the case of *Ulfat Rai v. Gauri Shankar* (3) and also the case of *Raghunath Bakhsh v. Haji Sheikh Muhammad Bakhsh* (4) are relied upon. Section 5 of the Transfer of Property Act defines 'transfer of property' as an act by which a living person conveys property to one or more other living persons, or to himself and one or more living persons. Section 6, clause (h), of the same Act sets forth the class of transfers of property which cannot be made. It does not state that a transfer cannot be made to a minor. Section 7 provides that every person competent to contract and entitled to transferable property is competent to transfer such property. Nowhere in the Act is it provided that a minor is incapable of being a transferee of property, and as a matter of practice we are well aware that transfers of immoveable property are every day made to minors. Section 127 by necessary

implication shows that a person who is not competent to contract, may be the donee of immoveable property, and that even in the case of property burdened with an obligation, if after he has become competent to contract and aware of the obligation, retains the property he becomes bound. It seems to us that the argument on behalf of the defendant amounts to this, that the present suit to recover possession of the house must be regarded in exactly the same way as if the plaintiff was bringing a suit for specific performance of a contract. In our opinion, it ought not to be so regarded. It could hardly be said, if it was shown beyond all doubt that the father of the plaintiff entered into a contract for the sale of this property and instead of taking the conveyance himself had directed the vendor to execute the conveyance in favour of his daughter, that she would not be entitled to recover possession of the property. This in all probability was exactly what happened in the present case; but even if we assume on behalf of the defendant that it was the girl herself who entered into the contract and that it was her money which was paid to the defendant, it can make no difference. As soon as the defendant received the purchase-money and executed the conveyance, she became entitled to the possession of the property. Very different considerations would arise if after having agreed to sell the property, the defendant before receiving the price had refused to execute a conveyance and the plaintiff was driven to a suit for specific performance. In such a case, the plaintiff would have to set up the contract. In our opinion, the decision of the Court below and also of the learned Judge of this Court were not correct. We accordingly allow the appeal, set aside both the decrees of the Courts below and also the decree of the learned Judge of this Court and decree the plaintiff's claim with costs in all Courts, including both hearings in this Court.

Appeal allowed.

(1) 30 C. 539 (P. C.); 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421.

(2) 4 Ind. Cas. 383; 33 M. 312; 19 M. L. J. 752; M. L. T. 233.

(3) 11 Ind. Cas. 20; 33 A. 657; 8 A. L. J. 670.

(4) 30 Ind. Cas. 200; 18 O. C. 115; 2 O. L. J. 200.

SHIVA TAHAL AHIR v. JAWAHIR LAL.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION NO. 35 OF 1912-13 OF
ALLAHABAD DISTRICT.
December 13, 1913.Present:—Mr. Baillie, S. M., and
M. Tweedy, J. M.SHIVA TAHAL AHIR—PLAINTIFF—
APPELLANT
versusJAWAHIR LAL AND OTHERS—DEFENDANTS
—RESPONDENTS.*Agia Tenancy Act (II of 1901), s. 79—Relinquish-
ment—Surrender of possession—Contract of relinquish-
ment, if enforceable—Dispossession—Remedy.*A relinquishment of the holding, whether oral or
written, unless coupled with the surrender of possession
is no valid relinquishment under the law.A contract of relinquishment cannot be specifically
enforced.Where, therefore, a tenant agreed in writing
to relinquish but did not surrender possession and the
zemindar let the land to other tenants who took up
cultivation:*Held*, that the action of the zemindar amounted to an
illegal dispossession of the original tenant for which
an action under section 79 would lie.Second appeal from the order of the
Commissioner, Allahabad Division, dated
the 5th June 1913, reversing that
of the Assistant Collector of Allahabad Dis-
trict, in a case of possession.

JUDGMENT.

BAILLIE, S. M.—(December 4th, 1913.)—The
suit was for possession of a holding from
which appellant alleges that he was
illegally ejected. The facts as found by
the Commissioner are, that the appellant
agreed in writing to relinquish this land
in 1319 but did not do so, that he sub-
sequently during the currency of 1319
agreed verbally to give up at the commence-
ment of 1320. Now these relinquishments,
written or oral, are according to law in
themselves nothing. The landholder is not
entitled in any way to enforce these agree-
ments. Surrender under section 83, means
the actual surrender of the land itself and
unless a tenant himself deliberately relin-
quishes possession, the landholder is not
entitled to take possession except by means
of a suit for ejectment. The evidence in
regard to the alleged relinquishments, oral
and written, is relevant only as evidencing
the intention of the appellant to sur-
render. They were regarded by the
Commissioner as having a more direct

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effect on the question before him. The
question really comes to this: Did the
landholder's tenants cultivate in 1320 with
the consent of the appellant? I do not
think that this can be considered to be in
any way proved. The suit was promptly
brought after cultivation had been com-
menced by the landholder's tenants.

In my opinion, the view of the case
taken by the Commissioner, was wrong in
law. His decision should be reversed and
the decision of the Court of first instance
restored. Costs on respondent.

TWEEDY, J. M.—I entirely agree. *Pem
Raj v. Ram Kishen* (1) was not published
when the Commissioner gave this decision. If
it had been before him, then his conclusions
would have been different.

Appeal allowed.

(1) Selected Decision No. 9 of 1913.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1013 OF 1909.

November 1, 1915.

Present:—Sir Donald Johnstone, Kt., Chief
Judge and Mr. Justice Chevis.Musammal PARTAPI—PLAINTIFF—
APPELLANT

versus

HAZARA SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.*Custom—Alienation by widow—Daughter, power of,
to contest—Burden of proof—Jat Sikhs of Jullundur
District—Remand, technically permissible but useless,
whether allowed—Practice.*The power to contest an alienation by a widow is
usually vested in agnates, which a daughter is not.
[p. 795, col. 1.]Where, therefore, a daughter claims the power by
custom to contest an alienation by her widowed
mother, of property formerly belonging to her father,
the onus lies on the daughter to prove such custom.
[p. 795, col. 2.]A remand which is technically permissible but is
not expected to serve any useful purpose is not to be
allowed. [p. 796, col. 1.]

Second appeal from the decree of the
Divisional Judge, Jullundur Division, dated
the 12th July 1909, varying that of the
District Judge, Jullundur, dated the 17th
November 1908, decreeing the claim.

Rai Bahadur Paudit Sheo Narain and Mr.
Sewaram Singh, for the Appellant.

Mr. Gokal Chand Narang, for the Respond-
ents.

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JUDGMENT.—The orders of a Division Bench of this Court of 8th and 10th November 1913 referring to a Full Court certain questions therein set forth give the facts of this case. We had two connected appeals before us, whereof one (No. 1014 of 1909) has been compromised and the other remains for decision, very much the same questions being involved in both cases. It is unnecessary for us to repeat what has already been written. Put briefly, the first question we have to decide is whether plaintiff, daughter of Jaura and Musammal Mano, has the power by custom to contest an alienation by the latter of the property formerly belonging to Jaura and his brother Jit, both deceased, the alienation being by Will and in favour of the sons and grandson of another daughter. The question of *onus* is easily disposed of. The first Court—see issues 3 and 4—clearly laid upon defendants Nos. 3 to 6 the burden of proving that the Will was valid and that plaintiffs had not the power to contest it, and it found on both points in favour of plaintiffs. The lower Appellate Court did not directly decide this question, but, taking up issue 2, found that Sundar Singh, father of defendants Nos. 3 to 6, was legally *khana-damad* and appointed heir to Jaura and thus the alienation by Will was unassailable. We have examined the evidence regarding *khana-damadship* and appointment as heir and our conclusion is that these things are not proved. We think the facts are more consistent with the theory that Sundar Singh and his wife merely came from time to time and helped the old man and that the relations between them and him never went any further. But we need not discuss this matter in detail, for we think plaintiff fails on the question of power to contest. It is a power of a very unusual kind, usually found invested in agnates, which a daughter is not; and there can be no doubt that the burden of proof in issue 4 should have been laid initially on plaintiff.

In consequence of the views expressed by the Full Court aforesaid, which declined to deal directly with the questions referred to it by the Division Bench, we do not get much help from the rulings quoted before us and discussed at length in the aforesaid referring order. They are noted in the

foot-note.* We must now take it that the *dictum* of Roe, S. J., in *Sher Muhammad Khan v. Muhammad Khan* (1) beginning "It must be remembered" and ending "present holder of the estate," is little better than a pious opinion and *obiter dictum*; that the expressions of opinion and the findings in *Chiragh Bibi v. Hassan* (2), apply only to cases among the *Qhelua Arains* of Lahore, where daughters occupy a very strong position, and must not be treated as implying any inherent connection universally existing between the fact of heirship and the right to contest an alienation by the holder for the time being; that the *dictum* in *Lahori v. Radho* (3) that where a widow of a reversioner might succeed collaterally to the widow of the last male holder and, therefore, had a right to control that widow's acts, is one applicable solely to the *Girths* of the Kangra District and is not of general application; that a similar remark applies *mutatis mutandis* to the *dictum* in *Musammal Kokan v. Lakhoo* (4) that a sister among *Girths* of Kangra, can control the widow of the last male holder. These rulings, then, being of no use to us in the present case, which is concerned with *Jat* Sikhs of Jullundur, we have left *Nur-ul-Nissa v. Gauhar-ul-Nissa* (5), in which it was pointed out that there is no necessary connection between A being heir to B and A's having the power to control B's dealings with the property A may some day inherit, a point also emphasized in *Ali Muhammad v. Suraj-ul-din* (6). With that view, we express concurrence, and it follows that the *onus* should have been laid on plaintiff.

(1) 5 P. R. 1895.

(2) 19 P. R. 1906; 70 P. L. R. 1906.

(3) 72 P. R. 1906; 108 P. L. R. 1907.

(4) 7 Ind. Cas. 470; 60 P. R. 1910; 92 P. W. R. 1910; 109 P. L. R. 1910.

(5) 61 P. R. 1906.

(6) 10 Ind. Cas. 236; 13 P. R. 1912; 162 P. L. R. 1911; 199 P. W. R. 1911.

**Sher Muhammad Khan v. Muhammad Khan*, 5 P. R. 1895; *Chiragh Bibi v. Hassan*, 19 P. R. 1906; 70 P. L. R. 1906; *Nur-ul-Nissa v. Gauhar-ul-Nissa*, 61 P. R. 1906; *Lahori v. Radho*, 72 P. R. 1906; 108 P. L. R. 1907; *Musammal Kokan v. Lakhoo*, 7 Ind. Cas. 470; 92 P. W. R. 1910; 109 P. L. R. 1910; 60 P. R. 1910; *Ali Muhammad v. Suraj-ul-Din*, 10 Ind. Cas. 236; 13 P. R. 1912; 162 P. L. R. 1911; *Zenab v. Shah Nawaz Khan*, 13 Ind. Cas. 526; 47 P. R. 1912; 102 P. L. R. 1912; 145 P. W. R. 1912.

DEVARASETTI NARASIMHAM v. DEVARASETTI VENKIAH.

This being so, plaintiff's Counsel urges—quoting *Gobind Ram v. Rani Suraj Kaur* (7), a case of this Court—that the case should be remanded to the lower Courts to enable him to produce evidence in support of his contention that his client has, by custom, the power to control the acts of her mother. Asked what he has to say now in favour of that contention, he points to cases of succession by daughters in the Jullundur District—*Musammal Fatima v. Ghulam Muhammad Shah* (8); *Bhadhawa v. Gandhella* (9) *Jalahas*; *Wazir Ali Khan v. Musammal Asmat Bibi* (10) *Pathans*; and also to paragraph 23, Rattigan's Digest. He admits that his client is aware, and he is aware, of no *Jat Sikh* case in Jullundur District of a daughter's even succeeding against any collateral; much less of her contesting an alienation made either by a male or a female. In these circumstances, we think it would be contrary to the practice of this Court to allow the parties to waste their time and money by a remand, albeit technically permissible.

The question of acquiescence was also argued before us, and, if a finding was necessary, we would find it in favour of plaintiff. As matters stand, we need not discuss it. We hold that plaintiff has no *locus standi* to sue and we dismiss the appeal with costs.

Appeal dismissed.

(7) 24 Ind. Cas. 470; 131 P. L. R. 1914; 111 P. W. R. 1914.

(8) 172 P. R. 1889.

(9) 68 P. R. 1878.

(10) 61 P. R. 1902; 72 P. L. R. 1902.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 553 OF 1914.

November 17, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

DEVARASETTI NARASIMHAM AND

ANOTHER—DEFENDANTS—PETITIONERS

versus

DEVARASETTI VENKIAH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art. 29—Suit to recover value of standing crops cut and carried away—Standing crops, whether moveable property—Civil Procedure Code (Act V of 1908), s. 2 (13)—Immoveable property, definition of—General Clauses Act (X of 1897), s. 3 (25)

The definition of "moveable property" given in section 2 (13) of the Civil Procedure Code does not govern the provisions of the Limitation Act. [p. 796, col. 2.]

"Immoveable property" as defined in section 3 (25) of the General Clauses Act, 1897, includes standing crops. A suit, therefore, to recover the value of such crops wrongfully cut and carried away is not a suit for the recovery of compensation within the meaning of Article 29 of the Limitation Act. [p. 796, col. 2.]

Pandah Gazi v. Jennuddi, 4 C. 635; 2 C. L. R. 526; *Sadu v. Sambhu*, 6 B. 592; *Katagiri Venkataramanujam v. Patihanda Basavayya*, 21 Ind. Cas. 213; 25 M. L. J. 447; (1913) M. W. N. 869; 14 M. L. T. 225, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Guntur, in Small Cause Suit No. 2123 of 1913.

Mr. P. Somasundaram, for the Petitioners.

Mr. V. Rameswami, for the Respondents.

JUDGMENT.—The only question for determination is whether standing crops are to be treated as moveable or immoveable property for the purposes of the Indian Limitation Act.

It is argued for the petitioners that section 2, clause 13, of the Civil Procedure Code defines moveable property as including standing crops and that a suit for recovery of the value of standing crops wrongfully cut and carried away is a suit for the recovery of compensation in respect of moveable property governed by Article 29 of the second Schedule to the Limitation Act.

I do not think that the definition in the Civil Procedure Code can govern the provisions of the Limitation Act. There is no definition of moveable property in the Limitation Act and reference must be had to the General Clauses Act, X of 1897, which enacts that the definitions given in the Act shall govern all enactments passed subsequent thereto. Immoveable property is defined by clause 25 of section 3 as including things attached to the earth or permanently fastened to anything attached to the earth. This will clearly include standing crops. *Pandah Gazi v. Jennuddi* (1); *Sadu v. Sambhu* (2).

Though standing crops were included in the term 'moveable property' for the

(1) 4 C. 635; 2 C. L. R. 526.

(2) 6 B. 592.

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purposes of the Civil Procedure Code, a similar change which was proposed when the Limitation Act was drafted in 1908 was for some reason or other given up.

If standing crops are immoveable property, the case is governed by the Full Bench decision in *K. tagiri Venkataswami v. Patibanda Basavayya* (3).

The decision of the District Munsif is correct and the petition fails and is dismissed with costs.

Petition dismissed.

(3) 21 Ind. Cas. 213; 14 M. L. T. 225; 25 M. L. J. 447; 1913 M. W. N. 869.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1935 OF 1912.

October 21, 1915.

[Present:—Mr. Justice Shah Din.

Musammāt TARA DEVI—PLAINTIFF—

APPELLANT

versus

DHANPAT RAI AND OTHERS,

REPRESENTATIVES OF DHILLU MAL, DECEASED

—DEFENDANTS—RESPONDENTS.

Maintenance—Agreement, construction of—Hindu widow agreeing with her husband's reversioner to lead chaste life—Maintenance, forfeiture of—Second appeal—Finding of fact—Punjab Courts Act (XVIII of 1884), s. 41

Where a Hindu widow who executed an agreement in favour of her husband's reversioner to the effect that she would lead a chaste life throughout the period of her residence in her deceased husband's house and receive maintenance allowance so long as she remained chaste, has taken to a life of immorality, she forfeits the right to maintenance.

A finding that the woman has taken to a life of immorality, cannot be interfered with in second appeal.

Second appeal from the decree of the District Judge, Lahore, dated the 30th August 1912, affirming that of the Munsif, 1st Class, Lahore, dated the 3rd April 1912, dismissing the claim.

Mr. Taj-ul-din, for the Appellant.

Mr. Nand Lal, for the Respondent.

JUDGMENT. I have read the agreements, dated the 21st July 1908, which were executed by Musammāt Tara Devi and Dhilla Mal respectively in favour of each other, and I entirely agree with the Courts below that the proper construction of the two agreements, read together, is

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that the widow agreed to lead a chaste life throughout the period of her residence in her deceased husband's house and that she was entitled to reside in the house and to receive the maintenance allowance agreed upon between the parties only so long as she remained chaste. It is found as a fact that the woman has taken to a life of immorality; and that being the case, she has forfeited her right to maintenance.

I dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1537 OF 1914.

November 11, 1915.

Present:—Mr. Justice Piggott.

NARAIN DAS AND OTHERS—DEFENDANTS—

APPELLANTS

versus

HARAKH NARAIN LAL AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sec. II, Act. 31—Suit of Small Cause Court nature—Right of fish—Second appeal.

Where the plaintiff brought a suit to recover a certain sum of money on the allegation that a particular tank was the joint property of the parties and that the defendant had caught fish from the said tank and appropriated the entire fish by selling them for his own benefit:

Held, that the suit was one of the nature cognizable by the Small Cause Court and that, therefore, no second appeal lay. [p. 798, col. 1.]

Second appeal from the decision of the District Judge of Ghazipur, dated the 30th June 1914.

Mr. Gokul Prasad, for the Appellants.

Mr. Haribans Sahai, for the Respondents.

JUDGMENT.—A preliminary objection has been taken to this appeal, on the ground that the suit is one of the nature cognizable by a Court of Small Causes and could not properly be brought before this Court in second appeal. On behalf of the defendants-appellants reference is made to Article 31 of the Second Schedule to the Provincial Small Cause Courts Act (Act IX of 1887). The question is whether the suit as framed, was one for profits of immoveable property belonging to the plaintiffs alleged to have been wrongfully

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received by the defendants. The case seems to me very much on the boundary line. It is almost covered by the ruling in *Rameshar Singh v. Durga Das* (1), but there remains a doubt to my mind whether the money claimed in the present case was alleged in the plaint to have been "wrongfully received" by the defendants. The plaintiffs' case was that the defendants caught and sold certain fish under such circumstances that the plaintiffs were entitled to a rateable share in the sale-proceeds, which share the defendants withheld and wrongfully appropriated to themselves. I am not clear on the wording of the plaint that there was any allegation that the catching of the fish or selling of the same constituted any infringement of the plaintiffs' right. I incline, therefore, to the opinion that the objection is well founded and that as a matter of law, no second appeal lay in this case. I have thought it expedient, however, to hear the appeal on the merits. The point raised by the appeal can only be determined by a careful examination of the pleadings in the Courts below. The plaintiffs alleged that they were part-owners of a certain tank which had been divided on partition between themselves and other co-sharers, including some of the defendants. The dispute was with regard to fishery rights. In the third paragraph of the plaint, it is alleged that the fish were ordinarily to be found in abundance in a portion of the tank situated in the share of the plaintiffs' alone. Indeed it was alleged that "at the time of fishing"—by which I understand, immediately any attempt was made to net the tank—all fish therein always collected together in a deep pool mentioned in the first portion of the said paragraph, which the plaintiffs alleged to be situated in the portion of the tank belonging to themselves alone. Nevertheless the plaint goes on to state that whatever fish were captured out of this pool (presumably also any fish which might by some accident be captured in any other portion of the tank), were always disposed of for the benefit of all co-sharers. It is expressly pleaded that those defendants who were co-sharers in the proprietary rights over the tank had

received their shares in the price of the fish caught in the plaintiffs' portion of the tank. The cause of action put forward was that during the year in suit, the defendants having colluded together fished the tank and appropriated whatever fish they caught, selling the same for their own benefit and withholding the plaintiffs' share. There is certainly no allegation in the plaint that fish were taken by the defendants from one part of the tank rather than from another. The case set up for the defendants, seems to me clear enough. They agree with the plaintiffs that there was a deep pool in the tank in suit in which fish ordinarily collected and in which alone they could be captured in any quantity. This deep pool, they allege, is situated in the portion of the tank allotted to them. They claim that this allotment entitles them to net this pool and appropriate any fish which they might find therein for their own benefit. Both expressly and by implication, they deny the plea of the plaintiffs that fish taken from the tank, were dealt with for the benefit of all the co-sharers in whatsoever part of the tank they might be captured. I do not say that the Court of first instance altogether misapprehended the point in issue; but it is clear that the attention of the learned Munsif was concentrated to a large extent on a question of fact which was only incidentally raised by the pleadings, namely, the question whether the deep pool, the existence of which both parties admitted, was situated in the portion of the tank allotted on partition to the plaintiffs or in the portion allotted to the defendants. In substance, however, the learned Munsif upheld the case set up by the defendants. He held it proved that they had only caught fish in the portion of the tank allotted to them on partition and that they were entitled to appropriate to themselves any fish so caught. The plaintiffs went on appeal to the Court of the District Judge. In their memorandum of appeal to that Court, they again raised the issue of fact which had been decided against them, by contending that the evidence on the record proved that the defendants had caught fish in the portion of the tank allotted to the plaintiffs' share. Nevertheless the fifth paragraph of their

(1) 23 A. 437; A. W. N. (1901) 128.

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memorandum of appeal seems to me to raise clearly enough the plea upon which the plaint was originally based. The learned District Judge proceeded to state the question for determination in very general terms and I must confess to having found it somewhat difficult to follow portions of the argument on which he has based his decision. He points out that the case set up for the defendants might involve serious practical difficulties in the event of each co-sharer attempting simultaneously with others to capture fish in the particular portion of the tank allotted to him on partition. He repudiates the contention that the particular deep pool in which fish ordinarily collected, can be regarded as the property of a particular co-sharer, so as to give that co-sharer exclusive right to any fish which he might capture therein. In substance, he seems to me to have affirmed the case set up by the plaintiffs, that any fish captured from the tank were dealt with as the property of all the co-sharers in whatever portion of the tank any particular fish might be captured. If this is a correct view of the judgment of the lower Appellate Court, there is obviously no force in this appeal, which is based on the plea that there should have been a specific finding as to the portion of the tank in which, or from which the defendants had captured the fish which formed the subject-matter of the suit. For these reasons I dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 277 OF 1914.

November 3, 1915.

Present:—Mr. Justice Sadasiva Aiyar.
THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—COUNTER-PETITIONER
—PETITIONER

versus

CHERUKARA NARAYANANUNNI

PISHARODI—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, cc. 98, 99—Court, when can direct possession.

Order XXI, rule 98, of the Civil Procedure Code gives jurisdiction to the Court to direct possession only if it is satisfied that the obstruction was by the judgment-debtor or by some other person at his instigation. [p. 799, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Manjeri, in Civil Miscellaneous Petition No. 471 of 1913, on its file.

Mr. C. Madhavan Nair, for the Government.

Mr. K. V. Madhavan Nair for Mr. T. Eromun Unni, for the Respondent.

JUDGMENT.—Order XXI, rule 99, Civil Procedure Code, says that where the obstruction was by a person claiming in good faith to be in possession on his own account, the Court "shall" make an order dismissing the application (that is, the application under Order XXI, rule 97). Here the Government is found to have obstructed delivery because it claimed the land to be river *poramboke* belonging to them. There can be no doubt that the claim was a claim made in good faith.

By an almost culpable carelessness, the counter-petition signed by the Acting Collector of Malabar, does not expressly state that the Government is in possession or claims possession in good faith, and it only states that the Government obstructed delivery because it is the owner of the land.

But I think it is clear that their possession was not denied, as the respondent wanted to get possession after removing their obstruction.

Order XXI, rule 98, gives jurisdiction to the Court to direct possession only if it is satisfied that the obstruction was by the judgment-debtor or by some other person at his instigation. Even if there is no question of jurisdiction involved,

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and section 115, Civil Procedure Code, does not, therefore, apply, this is a fit case for interference under the Charter Act.

The order of the District Munsif is set aside and the decree-holder's Petition No. 471 of 1913 will stand dismissed.

In view of the carelessness above pointed out and under the circumstances, there will be no order as to costs.

Petition allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2250 OF 1913.

July 30, 1915.

Present:—Mr. Justice Shah Din and

Mr. Justice LeRossignol.

FAZL AHMAD—DEPENDANT—APPELLANT

versus

JIWAN MAL AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Evidence—Inadmissibility in evidence of documents when not material—Finding of fact—Second appeal—Punjab Courts Act (III of 1914), s. 41.

The inadmissibility of a document supporting a debt is not material where the defendant has admitted having received the money borrowed by him. [p. 801, col. 1.]

A finding that defendant has not made any repayments, cannot be disturbed in second appeal. [p. 801, col. 1.]

Second appeal against the decree of the Divisional Judge, Shahpur Division, dated 24th June 1913, confirming that of the District Judge, Shahpur, dated the 11th July 1912, dismissing the claim.

Mr. Fazl-i Hussain, for the Appellant.

Mr. Nand Lal, for the Respondents.

JUDGMENT.—The plaintiffs-respondents brought a suit against the defendants-appellants to recover Rs. 2,453-3-6, principal and interest, alleged to be due to them on *bahi* account. In answer to the plaintiffs' claim, the defendant pleaded that he had had no dealings with the plaintiffs and that he did not owe them on the account sued for. When the statements of the parties were taken down by the Court, it was alleged by the plaintiffs that the defendant had had dealings with Ram Chand, father of plaintiffs Nos. 1 and 2 and grandfather of plaintiffs No. 3 and 5, that the plaintiffs and Ram Chand were members of a joint Hindu family which carried on money-lending business, and that the plaintiffs were, therefore,

entitled to sue the defendant to recover the money due by him to the joint family. The defendant in his statement admitted that he had had dealings with Ram Chand and that he had had contracted debts to the amount of Rs. 1,944-6-0, but he went on to say that he had repaid the whole amount and that nothing was due by him to the plaintiffs. He added that Ram Chand deceased and the plaintiffs did not form a joint Hindu family and that he had never agreed to pay interest on the loans raised by him from time to time.

The District Judge drew four issues and held that the plaintiffs were members of the joint Hindu family, that they were competent to sue for the debt due to the family of which Ram Chand deceased was also a member, that the repayments pleaded by the defendant had not been proved and that the plaintiffs were entitled to charge interest on the principal money advanced at the rate of one per cent. per mensem. Upon these findings the District Judge decreed the plaintiffs' claim in full.

On appeal, the learned Divisional Judge agreed in the findings arrived at by the District Judge upon all the issues and dismissed the appeal.

One of the points urged before the Divisional Judge was that in some of the entries which occur in the plaintiffs' *bahi* on the debit side of the account between the parties, there is no mention of a promise to pay interest at a certain rate on the amount advanced as a loan to the defendant, and that each of these entries is a bond "within the meaning of section 2 (5) of the Indian Stamp Act and as such was liable to stamp duty; and that since it was not stamped, it was not admissible in evidence." The learned Divisional Judge held that none of these entries amounted to a bond on which stamp duty was payable and that the entries in question were admissible in evidence.

From the decree of the Divisional Judge, a second appeal has been preferred to this Court by the defendant, and the only question of law urged before us, is the one relating to the inadmissibility of some of the entries in the plaintiffs' *bahi* upon that ground taken before the learned

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Divisional Judge and to which we have just referred. It is also urged by the defendant's learned Counsel that several of the entries in the plaintiffs' *baki*, on which the suit is based, amount to receipts as defined by the Stamp Act and that since they are not stamped they are inadmissible in evidence. In the view that we take of the case, it is unnecessary for us to go into these points. In the Courts below, it was admitted by the defendant that he had raised from Ram Chand (who was the manager of the business of the plaintiffs' joint family) loans amounting to Rs. 1,944-6-0, but he pleaded that he had paid their amount and that nothing was due by him to the plaintiffs. The defendant having admitted that the aggregate amount of the debts contracted by him amounted to Rs. 1,944-6-0, no question of the admissibility or otherwise of the items constituting this amount, arises in the case; and the only question which requires decision is as to whether the defendant has succeeded in proving that he had repaid this amount, as pleaded by him. Both the Courts have fully considered the question of the repayments relied upon by the defendant and have come to the conclusion that no repayments are established. This is a finding of fact and we cannot go behind it in second appeal.

We maintain the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2119 OF 1912.

November 26, 1915.

Present:—Mr. Justice Richardson and Mr. Justice Imam.

PRASANNA KUMAR DUTT PURKAYASTHA PLAINTIFF NO. 1—

APPELLANT

versus

JANANENDRA KUMAR DUTTA AND

OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 121—Encumbrance, meaning of—Adverse possession for statutory period before sale, if encumbrance—Assam Land and Revenue Regulation (I of 1886), s. 70.

An interest acquired in an estate by adverse possession for the statutory period before its sale under section 70 of the Assam Land and Revenue Regulation, 1886, is an encumbrance within the meaning of Article 121 of the First Schedule to the Limitation Act, 1908. [p. 802, col. 1.]

Karmi Khan v. Brojo Nath Das, 22 C. 244, *Nuffer Chandra Pal Chowdhury v. Rajendra Lal Goswami*, 25 C. 167, followed.

Kumar Kabanul Singh v. Syed Saifur Hussain, 12 C. W. N. 528; *Rahimullah Munshi v. Nafai Khatun Lathi*, 1 Ind. Cas. 81; 13 C. W. N. 407, distinguished.

Appeal against the decree of the Subordinate Judge, 2nd Court, Sylhet, dated the 15th April 1912, affirming that of the Officiating Mansif, Additional Court, Sunamgunge, dated the 10th July 1911.

Babus Jadunath Kunjal and Birendra Kumar Das, for the Appellant.

Babu Hemendra Kumar Das, for the Respondents.

JUDGMENT—In this case, it is conceded that the revenue sale of 1897 under which the plaintiff-appellant claims, became final and conclusive more than twelve years before the date on which the suit was instituted. That being so, we may accept the contention of the appellant's learned Pleader that the finding in the judgment of the lower Appellate Court that the principal defendants have been in occupation of the lands in suit as trespassers for more than twelve years before the institution of the suit, refers to adverse possession before the sale. Assuming this in the appellant's favour, the appeal may be decided on a very short ground. The question is one of limitation. Is or is not Article 121 of the first Schedule to the Limitation Act applicable to this case? It is applicable if the nature of the interest acquired by the principal defendants by adverse possession is an "encumbrance" within the meaning of the word as it is there used. It is a question of terminology. Is such an interest properly described as an encumbrance? It seems to us that in view of the decisions of this Court in *Karmi Khan v. Brojo Nath Das* (1) and *Nuffer Chandra Pal Chowdhury v. Rajendra Lal Goswami* (2) and of the earlier authorities which were cited and followed in those cases, the questions which

(1) 22 C. 244.

(2) 25 C. 167.

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we have stated, can admit only of an affirmative answer. The learned Pleader for the appellant contends that the interest is not an encumbrance and cannot properly be described as such. He refers to the cases of *Kumar Kalanand Singh v. Syed Sarafat Hossein* (3) and *Rahimuddi Munshi v. Nalini Kanta Lahiri* (4). No doubt in those cases, it seems to have been held in regard to section 54 of the Bengal Land Revenue Sales Act (XI of 1859) that in the expression "subject to all encumbrances" which there occurs, the word "encumbrances" does not include an interest acquired before the date of the sale by adverse possession for the statutory period. On the other hand, it has always been held that the word as used in section 37 where the expression is "free from all encumbrances," includes such an interest at any rate for the purposes of limitation, and this point as to the meaning of the word in Article 121 was not considered in the cases of *Kumar Kalanand Singh v. Syed Sarafat Hossein* (3) and *Rahimuddi Munshi v. Nalini Kanta Lahiri* (4).

In the present case, the sale took place not under Article XI of 1859, but under the Assam Land and Revenue Regulation of 1884. We assume again in the appellant's favour that the learned Subordinate Judge misapplied section 71 of the Regulation and that the sale was the sale of an estate under section 70. But the interest which the defendants acquired, is in our opinion on the authorities an encumbrance within the meaning of Article 121 and the suit is barred by limitation. The contention of the learned Pleader for the appellant that under Article 142 or 144, the period of limitation was twelve years from the date when possession was formally given to the purchaser at the sale, cannot be accepted.

We may mention that there are two plots in dispute in this suit. The plaintiff's title to the first plot fails on the facts found by the Subordinate Judge, which cannot be now successfully assailed. His title to the one-half share of the second plot fails on the ground we have indicated.

The result is that the appeal must be dismissed with costs.

Appeal dismissed.

(3) 12 C. W. N. 528.

(4) 1 Ind. Cas. 81; 13 C. W. N. 407.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 702 OF 1912.

May 31, 1915.

Present:—Mr. Justice Shah Din and
Mr. Justice LeRossignol.

DITTA RAM AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

RUP CHAND AND OTHERS—DEFENDANTS—
RESPONDENTS.

Will—Executor—Death of executor—Heir of executor, Locus standi of, to enforce agreements—Letters of Administration—Probate.

An heir of an executor, who has taken the Probate of the Will of a deceased testator and who has died without administering the whole estate, has no *locus standi* after his death to enforce an agreement entered into by him as such executor with a third person with a view to carry out the intention of the testator. [p. 803, cols. 1 & 2.]

When such an executor dies, the estate of the testator remains unrepresented until some one takes out Letters of Administration or Probate from the Court. [p. 803, col. 1.]

Second appeal from the decree of the Court of the Divisional Judge, Multan Division, dated the 5th February 1912, affirming that of the District Judge, Muzaffargarh, dated the 28th April 1911, dismissing plaintiffs' claim.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellants.

Lala Hargopal, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgments of the lower Courts, and it is not necessary to repeat them here. It is not disputed that Santu Ram, uncle of the plaintiffs, was appointed an executor by the Will of Tulsu Ram, dated 8th March 1893, he took out Probate of the Will and during his life-time administered the estate of the testator according to the directions contained in the Will. He retained one-half of the estate in his own hands, and sold the other half to Dattu Ram, father of the defendants, for Rs. 2,250. This sum of Rs. 2,250 was allowed to remain in the hands of Dattu Ram, and he entered into an agreement, Exhibit P-1, dated 24th November 1894, with Santa Ram whereby he undertook to spend the money in his hands in charity as directed in the Will of Tulsu Das. The agreement of the 24th November 1894 was renewed on the 24th November 1897, Exhibit P-2, the terms of the later agreement being substantially the same as those of the earlier one.

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Santu Ram, the executor named in the Will of Tulsi Das, is dead, and the pre-ent suit has been brought by the plaintiffs, who are heirs of Santu Ram, to recover from the sons of Dattu Ram, who is also dead, Rs. 2,138-6-0 made up of two items of Rs. 1,055 and 1,083-6-0 alleged to be due to the plaintiffs as heirs of Santu Ram from Dattu Ram, deceased, under the agreement, Exhibit 2, dated 24th November 1897. The grounds upon which the said two sums are alleged to be due to the plaintiffs, are explained in the lower Courts' judgments, and the sole question for decision before us, is whether the plaintiffs, as the heirs of Santu Ram, can sue the heirs of Dattu Ram to recover the sums in question, aggregating Rs. 2,138-6-0, on the strength of the agreement, dated the 24th November 1897, as if these sums were due to Santu Ram as a private creditor and had nothing whatever to do with the administration of the estate of Tulsi Das, deceased, in accordance with the Will, dated 8th March 1893.

Both the Courts below have dismissed the suit, holding that Santu Ram, the sole executor under the Will of Tulsi Das, being dead, the estate of Tulsi Das is now unrepresented, and that until another person is duly appointed under Act V of 1881 to administer the estate of Tulsi Das, the defendants as heirs of Dattu Ram are not liable to account for the moneys belonging to the estate of Tulsi Das, which are in their hands under the agreement dated 24th November 1897. After hearing the learned Counsel for the appellants in support of the appeal, we are of opinion that the lower Courts' decision is perfectly correct. Plaintiffs' suit comprises two reliefs: (1) They sue to recover Rs. 1,055, which is said to have been spent by the plaintiffs in accordance with the directions of the testator, but which, under the agreement of the 24th November 1897, should have been spent by Dattu Ram; and (2) they demand that a fresh agreement in respect of the balance of Rs. 1,083-6-0 alleged to be in the hands of the defendants, be executed by them in terms of the agreement of the 24th November 1897. Both these reliefs are directly connected with the administration of the estate of Tulsi Das, and we fail to understand what *locus standi* the plaintiffs, as the heirs of Santu Ram, have to obtain these reliefs

against the defendants, heirs of Dattu Ram, it being admitted that the plaintiffs have not been empowered by a competent Court to administer the estate of Tulsi Das in accordance with his Will of the 8th March 1893. Admittedly, the plaintiffs have still in their hands funds belonging to the estate of Tulsi Das, and it is out of those funds that they have spent the sum of Rs. 750 which together with interest amounts to Rs. 1,055, and which, they say, should have been contributed by Dattu Ram according to the agreement of 1897. The plaintiffs have spent nothing, or at any rate, should have spent nothing, out of their own pockets; and no ground for contribution from the defendants on the basis of a personal undertaking on the part of Dattu Ram is made out. The agreement of 24th November 1897, must be read with the Will of Tulsi Das; and reading the two together, it is clear that Dattu Ram or his heirs could be called to account, so far as the sum of Rs. 2,250 in his hands was concerned, only by a person duly authorised to administer the estate of the testator. The plaintiffs do not occupy this status, and their suit has rightly been dismissed by both the Courts. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 78 OF 1912.
CIVIL MISCELLANEOUS PETITION NO. 2177
OF 1912.

October 28, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

KRISHNASWAMI NAIDU—PETITIONER,
PLAINTIFF—APPELLANT IN S. A. NO. 78 AND
RESPONDENT IN C. M. P. NO. 2177

versus

SEETHALAKSHMI AMMAL—PETITIONER,
DEFENDANT—RESPONDENT IN S. A. NO. 78 AND
PETITIONER IN C. M. P. NO. 2177.

Hindu Law—Property given for maintenance to illegitimate son of deceased co-parcener—Son of illegitimate son, whether can claim vested right of inheritance.

Property given for maintenance to an illegitimate son of an undivided deceased co-parcener cannot be treated as the ancestral property of the illegitimate son in which a son of that illegitimate son gets a right by birth. [p. 804, col. 1.]

Nagalingam Pillai v. Ramachandra Teeru, 24 M. 429; 11 M. L. J. 210; *Hazurimal Babu v. Abani Nath*, 18 Ind. Cns. 625; 17 C. W. N. 280; 17 C. L. J. 38, distinguished.

NIRBHAI SINHA v. TULSI RAM.

Second appeal against the decree of the Court of the Subordinate Judge of Negapatam, in Appeal Suit No. 706 of 1909, preferred against that of the Court of the District Munsif of Negapatam, in Original Suit No. 188 of 1908.

Civil Miscellaneous Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order to take off from the file of the High Court the said Second Appeal No. 78 of 1912.

Mr. T. V. Muthukrishna Aiyar, for the Appellant.

Mr. T. R. Venkatarama Sastri, for the Respondent.

JUDGMENT.—Property given for maintenance to the illegitimate son of an undivided deceased co-parcener cannot be treated as the ancestral property of the illegitimate son in which the son of that illegitimate son gets a right by birth. The case of *Nagalingam Pillai v. Ramachandra Tevar* (1) quoted by the appellant's learned Vakil was the case of a gift by a father to his son of property which would have, but for the gift, on such descent, descended to the son and been ancestral property in the son's hands, the learned Judges holding that a father making such a gift, might be presumed to have intended his son to take it as if the son had inherited it. The case of *Hazarimal Babu v. Abani Nath* (2), was a case of gift again by a father for the maintenance of his sons and sons' descendants.

Without expressing an opinion as to whether the case of *Nagalingam Pillai v. Ramachandra Tevar* (1), was rightly decided, the two cases above noted, are clearly distinguishable from the present case.

The lower Courts were, therefore, right in holding that the son of the illegitimate son did not obtain any right by birth in property given to his father for maintenance, when that gift was not made by the father's father. The second appeal is dismissed with costs. The petition put in by the respondent is also dismissed with costs.

Appeal and petition both dismissed.

- (1) 24 M. 429; 11 M. L. J. 20
(2) 18 Ind. Cas. 625; 17 C. L. J. 38; 17 C. W. N. 280.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1532 OF 1914.

November 13, 1915.

Present:—Mr. Justice Piggott.

NIRBHAI SINHA AND OTHERS DEFENDANTS
— APPELLANTS

VERSUS

TULSI RAM—PLAINTIFF RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 116, 109—Mortgage, usufructuary—Possession not delivered—Suit for profits and possession of mortgaged property Limitation

Where a usufructuary mortgagee sued for possession of the mortgaged property within six years of the date from which he was to have received possession and also claimed mesne profits for the same period on the allegation that the mortgagor had never given him possession in accordance with the terms of the deed, the mortgage deed being a registered one:

Held, that the claim for profits was in substance one for compensation for breach of a contract in writing registered and was governed by Article 116, and not by Article 109, of the Limitation Act. [p. 804, col. 2.]

Balgobind Das v. Barkat Ali, A. W. N. (1888) 15; *Collector of Mirzapur v. Dewan Singh*, 30 A. 400; A. W. N. (1908) 160; 5 A. L. J. 486, referred to.

Second appeal from the decision of the District Judge of Bareilly, dated the 2nd July 1914.

Mr. S. D. Sinha, for the Appellants.

Mr. Sital Prasad Ghose, for the Respondent.

JUDGMENT.—This was a suit by a usufructuary mortgagee to recover possession on the allegation that the defendants-mortgagors had never given him possession over the mortgaged property in accordance with the terms of the contract. The suit was brought within six years of the date from which the mortgagee was to have received possession. Profits were claimed for the entire period of six years. The only question discussed in the Courts below was as to the amount of the said profits. A point of limitation is raised in second appeal to this Court, it being contended that the suit was governed, so far as the claim for profits was concerned, by Article 109 of the First Schedule to the Limitation Act (Act IX of 1908). The mortgage-deed is registered and in my opinion, the claim for profits was in substance one for compensation for breach of a contract in writing registered and subject to the period of limitation prescribed by Article 116. I can find no authority to the contrary and the view which I have taken, seems to have been assumed in the cases of *Balgobind Das v.*

MATHURA PRASAD v. KARIM BAKSH.

Barkat Ali (1) and *Collector of Mirzapur v. Dewan Singh* (2). The only other plea taken in the memorandum of appeal, assails the finding of the lower Appellate Court as to the amount of the annual profits which the plaintiff was entitled to recover. I think the appellants are up against a finding of fact on this point with which I cannot interfere. The appeal, therefore, fails and I dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

(1) A. W. N. (1888) 5.

(2) 30 A. 400; A. W. N. (1908) 160; 5 A. L. J. 486.

FALLAHABAD HIGH COURT,
SECOND CIVIL APPEAL NO. 1434 OF 1915.
November 1, 1915.

Present:—Mr. Justice Piggott.

MATHURA PRASAD—DEFENDANT—
—APPELLANT

versus

KARIM BAKSH AND ANOTHER—PLAINTIFFS
RESPONDENTS.

Easement—Customary right in nature of easement—Right of burial.

Where a particular grove land was used by the family of the Muhammadan residents of a village as burial ground:

Held, that the right claimed by them was not an easement but a "customary right in the nature of an easement." [p. 806, col. 2.]

Second appeal from a decree of the Subordinate Judge of Meerut.

Messrs. M. L. Agarwala and Ben y Kumar Mukerji, for the Appellant.

Mr. Percy Lal Banerji, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises, may be stated as follows:—

The plaintiffs and the *pro forma* defendants are Muhammadan residents of a certain village. The defendant-appellant is a Hindu, a *mahajan* of the same village. The dispute relates to a certain plot of grove land therein situated.

The ancestors of the plaintiffs and of the *pro forma* defendants held this grove as tenants. They executed a series of deeds purporting to transfer whatever rights they possessed therein, to the defendant. A dispute having broken out between the parties, the present suit has been brought by the plaintiffs to enforce a right, alleged to exist in favour of the family of which the plaintiffs and the *pro forma* defendants

are members, to bury their dead in the said grove.

The Court of first instance apparently found that such a right did exist in favour of the family to which the plaintiffs belong, but that this right extended only to a small portion of the grove in dispute. The learned Munsif, however, proceeded to grant the plaintiffs a declaration which was so cautiously worded that it is difficult to conceive of what use it could have been to them; it is consequently not surprising that the defendant did not appeal against it. The plaintiffs appealed, and there was no cross-objection filed by the contesting defendant. It is only by reference to the judgment of the lower Appellate Court that one can ascertain whether he sought to support the decree of the Court of first instance on any of the points which had been decided against him. It does not appear to me that he did so.

The first issue as framed by the learned Subordinate Judge in appeal, was in these terms:—"Have the plaintiffs a right to bury their dead in the whole area of the disputed grove, or only in the particular portion of it specified in the lower Court's decree?"

The point has not been taken in second appeal that the frame of this issue begs the questions in dispute, or any of them, in favour of the plaintiffs. The learned Subordinate Judge, in spite of the curious frame of the first Court's decree, apparently understood the learned Munsif to have found in favour of the plaintiffs that they had a right to bury their dead in a certain portion of the disputed area, and he considered only whether that right did or did not extend over the whole area in dispute. If exception had been taken to this in the memorandum of appeal, I should have felt strongly disposed to remit an issue for a further finding. As the case for the appellant was put to me in argument the notion that the lower Appellate Court had assumed any point against him without deciding it, was expressly disclaimed. I was invited to consider that, in spite of the frame of the issue, the learned Subordinate Judge had in fact decided both points, *viz.* that there existed in favour of the plaintiffs, a right to bury their

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dead in the land in dispute and, *secondly*, that this right extended over and applied to the whole of the disputed area.

Of the pleas taken in the memorandum of appeal before me, those embodied in the 2nd, 3rd and 4th paragraphs, may at once be rejected. In the 4th paragraph, a point of law is sought to be raised which was not taken in either of the Courts below, and I do not think it is a question which I should permit to be raised at this stage.

The contention put forward in the second paragraph would seem to be that a right to use land for the burial of the dead can only exist to the extent of placing one dead body on the top of another, i. e., to a specific area already occupied by corpses previously interred. This seems to me obviously unsustainable. Nor does the fact put forward in the third paragraph, that the greater portion of the plot in dispute has been kept under cultivation by the appellant, seems to me in itself any reason for interfering with the decree of the Court below. It is quite conceivable that the plaintiffs might have a right to bury a deceased member of their family on a particular spot, even though the surface of the ground at that point might be under cultivation by the defendant so long as it was not required by the plaintiffs for purposes of burial. The main contention in support of this appeal is that embodied in the first paragraph of the appellant's memorandum. As stated, the plea taken is that there cannot be any easement in law "for burying the dead in a case like this;" I do not altogether understand what is meant by the words "in a case like this," but the argument as laid before me, is based on the provisions of the Indian Easements Act, V of 1882, and in so far as it rests upon that Act, it is unanswerable. The finding of the lower Appellate Court is that there exists in favour of the plaintiffs, or more strictly speaking in favour of the family to which the plaintiffs and the *pro forma* defendants belong, a customary easement of burying their dead in the entire area of the disputed grove. There certainly cannot be a "customary easement" within the meaning of the definition in section 18 of Act

V of 1882, for the simple reason that the right set up is not within the definition of an easement in section 4 of the same Act. It is not claimed by the plaintiffs, and has not been found in their favour in virtue of their ownership or occupation of any land other than the grove in dispute. There being no dominant heritage, there can be no easement at all within the meaning of Act V of 1882. What I really have to decide, is whether I ought on this ground to set aside the findings of the lower Appellate Court, and either reverse the decree of the learned Subordinate Judge or call for a fresh finding, or whether, on the other hand, I can regard the finding in favour of the existence of a customary easement as a finding that there exists a customary right of the nature of an easement, independently of the provisions of the Indian Easements Act, such as is safeguarded by the saving provisions of section 2 of the Act itself. That there can be a customary right of burial under circumstances which obviously exclude the application of the provisions of Act V of 1882, for the reason already noted, i. e., the absence of any dominant heritage, I take to be settled law, as is apparent from such decisions as that in *Mohidin v. Shivelingappa* (1), which rests in part upon a decision of this Court in *Kuar Sen v. Mamman* (2). There is no specific reference to the provisions of the Indian Easements Act in the judgment of the Court below, and it seems more reasonable to suppose that the learned Subordinate Judge used the expression "customary easement" loosely, instead of the words "customary right in the nature of an easement," than to assume that he was entirely ignorant of the provisions of the Indian Easements Act. Accepting the findings of the lower Appellate Court in this sense, it seems to me to be substantially a finding of fact, or at any rate to be one with which I ought not to interfere on any of the grounds put forward in this appeal. I am bound to say that I consider the case a somewhat unsatisfactory one. The

(1) 23 B. 666.

(2) 17 A. 87; A. W. N. (1895) 10.

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pleadings of the parties have been loose throughout, and it does seem to me to be open to argument whether the Courts below have held the plaintiffs as strictly as they might have done to the case set up in their written pleadings. I must, however, give effect to the conclusion at which I have arrived by dismissing this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL NO. 189 OF 1914.

November 30, 1915.

Present:—Mr. Justice Richardson and
Mr. Justice Imam.

KRISHNA KUMAR RAY CHOWDHURI
—PLAINTIFF—APPELLANT

VERSUS

CHANDRA KANTA MITRA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, cl. (4) (c)—Suits Valuation Act (VII of 1887), s. 8—Court-fee payable, when relief sought not valued in plaint—Valuation for purposes of jurisdiction given—Civil Procedure Code (Act V of 1908), O. VII, r. 11, cl. (c).

Where in a suit under section 7, clause (4) (c) of the Court Fees Act, 1870, the plaint contains no valuation of the relief sought but gives a valuation of the suit for the purposes of jurisdiction, the Court-fee is to be computed according to the valuation of the suit for the purposes of jurisdiction, though the actual value of the relief sought is less, unless the plaintiff with the Court's leave amends the plaint. [p. 807, col. 2; p. 808, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court of Backergunge, dated the 30th March 1914.

Babu Abinash Chandra Guha, for the Appellant.

JUDGMENT.—This is an appeal from a decree rejecting a plaint under the provisions of Order VII, rule 11, clause (c), Civil Procedure Code. We have not had the advantage of hearing any one for the respondent; but the facts appear to be as follows:—

The plaint is dated the 20th February 1914, and originally it bore a stamp of the value of Rs. 10. It is perfectly clear, however, as the learned Pleader for the

plaintiff-appellant now concedes, that the suit is much more than a suit for a mere declaratory decree. The learned Subordinate Judge, therefore, was perfectly correct when he decided by his order of the 7th March 1914, that the Court-fee paid was insufficient. That order, however, might have been to some extent misleading in regard to the amount of the Court fee that ought to have been paid. The suggestion then made was that the plaint should have been stamped as if it was a plaint for the recovery of the property to which the suit related. The plaintiff founding himself on that part of the order of the 7th March, put in an additional fee, the whole fee then paid being the proper *ad valorem* fee for a suit for the recovery of possession of the property. There is no doubt, however, that the fee payable in the present suit, a suit under sub-clause (c), clause 4, of section 7 of the Court Fees Act, should have been computed under that section according to the amount at which the relief sought had been valued in the plaint. It is true that the plaint contains no valuation of the relief sought. In its paragraph 18 however, a valuation of that suit is made for the purpose of jurisdiction; and under section 8 of the Suits Valuation Act, the value for the computation of Court-fees and the value for the purposes of jurisdiction are to be the same. The learned Subordinate Judge, therefore, was again correct when by his order of the 21st March 1914 he refused to accept as sufficient, the additional fee which the plaintiff had put in. By that order, he gave the plaintiff a further week for the purpose of putting in the proper fee. The plaintiff failed to carry out that order and on the 30th March 1914, the suit was dismissed by the decree under appeal. The case is perhaps one of some hardship. In the first place, it may be that the plaintiff was originally misled by the form in which the order of the 7th March 1914 was drawn up. In the second place, the amount at which the suit was valued for the purposes of jurisdiction was possibly greater than the actual value of the relief sought. If that be so, however, the plaintiff should not have contented himself with a simple failure to carry out the Subordinate Judge's order, but should

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have asked for leave to amend the plaint. In the circumstances, the conclusions at which we have arrived is that we should set aside the decree of the learned Subordinate Judge and direct that the plaint be accepted, provided that plaintiff pays the Court-fee computed on the footing that the value of the relief sought is six thousand rupees, within fourteen days of the receipt of the record by the Court below. If the deficit fee is not paid within that time, this appeal will stand dismissed.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 952 OF 1912.

April 2, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Chevis.

SHAM SUNDAR—DEFENDANT—APPELLANT
versus

ABDUL AHAD—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage-deed—Option of mortgagee to sue on failure to pay interest or at his pleasure Starting point of limitation.

A mortgage-deed dated 8th December 1895 provided that the mortgage could be foreclosed at the end of three years, that the mortgage debt was to carry Rs. 31-8-0 interest half-yearly to be paid half-yearly and that if two periods of six months elapsed without interest being paid, the mortgagee was to have the option of maintaining the period of the mortgage and suing only for the interest or of cutting short the mortgage (*miyad-i-rahn fishk karkar*) and suing for the whole debt, principal and interest. No interest was ever paid. The suit was instituted on 17th April 1909. The defendant pleaded limitation:

Held, that under Article 132 of the Limitation Act, the period began to run from the time when the money sued for became due, viz. 8th December 1896, and that, therefore, the suit was barred by time. [p. 509, col. 1.]

Khair-ud-Din v. Abu Mal, 188 P. R. 1883 (F. B.), followed.

Nettakuruppa Goundan v. Kumarasami Goundan, 22 M. 20; 8 M. L. J. 107; *Prem Singh v. Mula Mal*, 10 P. R. 1883; and *Maharaja of Benares v. Nand Ram*, 29 A. 431; A. W. N. (1907) 39; 4 A. L. J. 336, distinguished. *Ajudhia v. Kunjal*, 30 A. 123; A. W. N. (1908) 36; 5 A. L. J. 72, not approved.

Second appeal from the decree of the Divisional Judge, Delhi Division, dated the 11th March 1912.

Mr. Beechey, for the Appellant.

Rai Bahadur Pandit Shoo Narain, for the Respondent.

JUDGMENT.—The facts of this case, so far as they are necessary for the purpose of deciding the appeal before us, are as follows:—Muhammad Ibrahim held a piece of *nazul* land on lease from the Municipal Committee of Delhi. On this, he erected a building which he mortgaged to the plaintiff. As Muhammad Ibrahim fell into arrears with his rent, the Municipal Committee turned him out, and gave the land on lease to Abdul Ahad, who pulled down the old building which was in a dilapidated condition and partly on the site in question and partly on an adjoining site, erected a large substantial building. The plaintiff now seeks to recover his mortgage-money with interest from Muhammad Ibrahim and Abdul Ahad. Plaintiff's claim comes to Rs. 2,234-8-0. The first Court gave plaintiff a decree for Rs. 103 only—this being the estimated value of the materials in the old building—against Abdul Ahad, and for the rest of the claim against Muhammad Ibrahim. Plaintiff, having appealed in vain against Abdul Ahad to the Divisional Judge, has lodged a further appeal against him in this Court.

The only question which it will be necessary for us to discuss is the question of limitation. In both the lower Courts, it was unsuccessfully urged on behalf of Abdul Ahad that the claim was time-barred. The plea is again urged in this Court, and we think it must be allowed.

The mortgage on which plaintiff sues, was executed on 8th December 1895. The deed provided that the mortgage could be foreclosed at the end of three years, also that the mortgage-debt was to carry Rs. 31-8-0 interest half-yearly, to be paid half-yearly, also that if two periods of six months elapsed without interest being paid, the mortgagee was to have the option of maintaining the period of the mortgage and suing only for the interest due or of cutting short the mortgage (*miyad-i-rahn fishk karkar*) and suing for the whole debt, principal and interest. No interest was ever paid, so that the mortgagee could, had he so chosen, have sued for the whole mortgage-debt anywhere after the 8th December 1896. If limitation be counted from the

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8th December 1896, this suit, instituted on 17th April 1909, is time-barred. If, however, limitation be counted from the end of the three years mentioned in the deed, the suit is within time. Article 132 of the first Schedule of the Limitation Act admittedly applies, and the period of limitation is twelve years counted from the time when the money sued for becomes due.

The learned Advocate for the respondent quotes the Full Bench ruling of *Khair-ud-din v. Atu Mal* (1). That was a case in which the plaintiff claimed under a bond payable by instalments with a clause that if default were made in payment of one or more instalments, the whole should be due at once. To such a case Article 75 applies, and the period of limitation runs from the date of the default, unless the payee waives the benefit of the provision for prompt payment in case of default. Article 132 simply lays down that limitation runs from the date "when the money sued for becomes due." Had the plaintiff sued on the 9th December 1895, how could the mortgagor have pleaded that the money had not become due?

The learned Counsel for the appellant urges that the plaintiff had the option. This no doubt is true. He was not bound to sue, but forbearance to sue would not stop limitation from beginning to run. It is useless, in the face of the Full Bench ruling above referred to, to speak of waiver, for that ruling distinctly lays down that mere forbearance to sue cannot be regarded as sufficient proof of waiver. Except the fact that plaintiff did not sue, there is nothing whatever in the present case which can be regarded as evidence of waiver. It is not a case where the plaintiff had to make any demand before suing, for the mortgage-deed says nothing whatever as to any demand being requisite before a suit is brought. This distinguishes the case from *Nettakarupa Goundan v. Kumarasami Goundan* (2) and *Prem Singh v. Mula Mal* (3), which are quoted on appellant's behalf. Mr. Beechey also quotes *Maharaja of Benares v. Nand Ram* (4), but this was a case where

acceptance of instalment after due date, was regarded as sufficient proof of an implied waiver. Mr. Beechey also quotes *Amalia v. Kunal* (5). This ruling no doubt is in his favour, but we note that the Calcutta High Court has taken a different view. We need not, however, discuss the matter further, as we see no reason whatever why we should not follow the Full Bench ruling of our own Court.

Lastly, Mr. Beechey urges that the words *inqad-i-rakn ush karkar* show that the plaintiff had to do something else besides bringing a suit if he wished to enforce the penalty clause. We cannot agree. We are of opinion that all that plaintiff had to do, was to bring a suit which would have at once shown that the plaintiff was availing himself of the option. We hold that the whole mortgage-debt was due as soon as two successive defaults in the half-yearly instalments of interest occurred, and that the present suit should have been dismissed *in toto* as time-barred. But as there is no cross-appeal and no cross-objections have been lodged, the decree passed by the lower Courts will stand.

This appeal is dismissed with costs.

Appeal dismissed.

(5) 30 A. 123; A. W. N. (1909) 36; 5 A. L. J. 72.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 962 OF 1914.

November 4, 1915.

Present:—Justice Sir George Knox, Kt., and Mr. Justice Rafique.

Saiyid SAKHAWAT ALI SHAH—

DEFENDANT—APPELLANT

versus

Haji MUHAMMAD ABDUL KARIM KHAN—PLAINTIFF—RESPONDENT.

Execution—Sale of zemindari—Interest in building in zemindari, if also passes—Sale notification, value of.

Where an inventory of the property to be sold filed by a decree-holder with his application for execution, showed that only a zemindari was to be sold and not a building situated therein:

Held, that the sale did not pass the interest of the judgment-debtor in the building. [p. 810, col. 2.]

(1) 188 P. R. 1883.

(2) 22 M. 24; 8 M. L. J. 167.

(3) 10 P. R. 883.

(4) 20 A. 431; A. W. N. (1907) 39; 4 A. L. J. 336.

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Abu Hasan v. Ramzan Ali, 4 A. 381; *Banke Lal v. Jagat Narain*, A. W. N. (1900) 31; 22 A. 168, distinguished from.

Per Knox, J.—The sale-notification is a most important document when Court wishes to find out what was sold in an auction sale held in execution of a decree. [p. 811, col. 1.]

Second appeal from the decision of the Additional Judge of Aligarh, dated the 1st April 1914.

Mr. Shafiuzzaman, for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapru, for the Respondent.

JUDGMENT.

RAFIQUE, J.—The dispute between the parties to this appeal is between two rival purchasers at auction sales. It appears that several persons obtained decrees against one Syed Haider Shah who was one of the *zemindars* of the village Khanpur. In execution of the decree of one Lachhmi Narain, the *zemindari* share of Syed Haider Shah was sold and purchased by the plaintiff-respondent. In execution of another decree obtained by one Lakkhi Mal against the same Haider Shah, the property called the *kila* situate in Khanpur was sold and purchased by the defendant-appellant. The plaintiff-respondent objected to the attachment and sale of the said *kila* in execution of the decree of Lakkhi Mal, but his objection was disallowed. He then brought the suit out of which this appeal has arisen, for a declaration that the plaintiff-respondent by virtue of his purchase at auction sale is the owner of the share of Haider Shah in the *kila* situate in Khanpur. The defendant-appellant resisted the claim on the ground that all that the plaintiff-respondent had purchased at the auction sale, was the *zemindari* share of Haider Shah. The objection of the appellant was disallowed by the lower Courts and the claim decreed. In appeal, the defendant repeats his plea and contends that all that was sold to and purchased by the plaintiff-respondent at the auction sale of 21st March 1910, was the *zemindari* share of Haider Shah in Khanpur and that his interest in the *kila* was expressly excluded from the sale. The Courts below have relied upon the ruling of *Abu Hasan v. Ramzan Ali* (1). The facts of that

case were that the rights and interests of a *zemindar* in a certain *zemindari* village were sold in execution of a decree. At the time of the sale, a certain building stood on the property of the judgment debtor, i. e., in the village that was sold. The question was whether the sale of the *zemindari* included the sale of the building also. It was held that in the absence of evidence showing that the building was excluded from the sale, the sale of the rights and interests in the *zemindari* included the sale of the building also. The principle of the case of *Abu Hasan v. Ramzan Ali* (1), cannot be applied to the present case, for the reason that there is evidence upon the record to show that the sale of the rights and interests of Haider Shah in Khanpur did not include his interest in the *kila*. The inventory of the property to be sold, filed by Lachhmi Narayan with his application for execution of decree, mentioned nine lots of property, the first of which was the *zemindari* share of Haider Shah and the ninth the *kila* situate in Khanpur. It was in accordance with this application of the decree-holder that the *zemindari* share of Haider Shah was brought to sale. The order of attachment and the order of *dakhaldihani* were drawn up in accordance with the inventory filed by the decree-holder, vide papers Nos. 18C, 17D, 131, 141, 153. These documents show that the sale of 21st March 1910, did not pass the interest of Haider Shah in the *kila* to the plaintiff-respondent. I would, therefore, allow the appeal.

Knox, J.—I fully agree with my learned brother. Neither the precedent of *Abu Hasan v. Ramzan Ali* (1) nor that of *Banke Lal v. Jagat Narain* (2) are safe guides in the present case. In the properties which were put to sale, the *zemindari* share without any specification was sold in the former and in the latter the sale-notification distinctly described the property sold as being 20 *biswas* with gardens belonging to Ram Sarup and Piare Lal. The respondent cannot show in this case the sale-notification. This is unfortunate and as it was one of the documents upon

(1) 4 A. 381.

(2) A. W. N. (1900) 31; 22 A. 168.

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which his claim rests, if it had been in his favour, he should have taken pains to have it produced and placed before us. The *dakhalnama* and the sale-certificate upon which he relies, are vague in their terms. Even if we take them as they stand, they do not show that the *kila* was sold. The lower Courts should have seen to the production of this document. The sale-notification is a most important document, as I have repeatedly pointed out in several of my judgments, when a Court wishes to find out what was sold. I do not think that the lower Courts were justified in arriving at the finding at which they did.

By THE COURT.—Order of the Court is that this appeal is decreed with costs including fees in this Court on the higher scale.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1645 OF 1914.

November 9, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VELAYUDHAM PILLAI AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

PERUMAL NAICKER AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Minor—Mother executing mortgage of minor's property—Document not purporting to be executed by mother as guardian—Property described as belonging to minor and registered in mother's name as guardian—Construction of deed—Suit by minor to set aside mortgage-deed—Limitation Act (IX of 1908), Sch. I, Art. 44.

The mother and natural guardian of a Hindu minor executed a mortgage of immoveable properties belonging to him. The document did not purport to be executed by her as the guardian of her minor son, but the mortgaged property was described in the document as having been registered in her name as the guardian of her minor son.

Held, that the document was one executed by the mother not in her individual capacity but as the guardian of her minor son and that a suit brought by the minor more than three years after he attained his majority, to set aside the mortgage, was barred by limitation [p 812, col. 1]

Hunoomanpersaud Panday v. Musammatt Babooee Munraj Koonweree, 6 M. I. A. 393 at pp. 411, 412; 18 W. R. 81n.; *Sevestre* 263n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147; *Murari v. Toyana*, 20 B. 286 and *Sivavadevelu Pillay v. Ponnammal*, 15 Ind.

Cas. 365; 17 W. L. T. 198; (1912) M. W. N. 353; 22 M. L. J. 404, followed.

Kamakshi Nayakan v. Ramasami Nayakan, 7 M. I. J. 131, not followed.

Second appeal against the decree of the District Court of South Arcot in Appeal Suit No. 160 of 1913, preferred against that of the District Munsif of Mannargudi in Original Suit No. 144 of 1913.

FACTS.—Certain immoveable properties belonging to a Hindu minor were mortgaged by his mother and natural guardian during his minority. In the body of the document, she was not described as the guardian of the minor but in setting out the description of the mortgaged property, it was described as having been registered in the mother's name as the guardian of her minor son. More than three years after his attaining majority, the son sued to set aside the alienation. The lower Appellate Court held that the suit was barred by limitation and the plaintiff thereupon preferred this second appeal.

Mr. K. P. Shanmugam Pillai, for the Appellants:—The District Judge erred in holding that the suit was barred by limitation. Article 44 of the Limitation Act does not apply to this case. The suit is not to set aside an alienation by the guardian. The document does not purport to have been executed by the mother as the guardian of her minor son. It was executed in her individual capacity and is not, therefore, binding on the plaintiff. *Vide Kamakshi Nayakan v. Ramasami Nayakan* (1).

Mr. V. Visvanatha Sastriar, for the Respondents:—The decree of the District Judge is quite correct. The mother intended to execute and did execute the document as the guardian of her minor son. The description of the mortgaged property proves this beyond all doubt. There the property is described as belonging to the minor and registered in the mother's name as the guardian of her minor son. In the face of this, it is useless to contend that the mother executed the document in her individual capacity. *Vide Hunoomanpersaud Panday v. Musammatt Babooee Munraj Koonweree* (2), *Murari v. Toyana* (3). The case of *Kamakshi Nayakan*

(1) 7 M. I. J. 131.
(2) 6 M. I. A. 393 at pp. 411, 412; 18 W. R. 81n.; *Sevestre* 273n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(3) 20 B. 286.

GANGADHAR KARMAKAR v. SHEKHAR BASINI DASIA.

v. *Ramasami Nayakan* (1) has been dissented from in *Sivaradevelu Pillay v. Ponnammal* (4).

JUDGMENT.—Following *Ranomanvirsaul Panday v. Musammot Babooe Munrai Koonweree* (2) and *Murari v. Tayana* (3), we hold (especially having in view the description of the mortgaged property in Exhibit I as having been registered in the name of the mother as the guardian of her minor son) that that document was executed by her in her capacity as guardian of her son, though she is not so described in the body of the document. The case of *Kamakshi Nayakan v. Ramasami Nayakan* (1) quoted by the appellants' Counsel has been dissented from in *Sivaradevelu Pillay v. Ponnammal* (4), and we have no doubt that Article 44 of the Limitation Act applies to this suit and that it was rightly held barred by the District Court. The second appeal is dismissed with costs.

Appeal dismissed.

(4) 15 Ind. Cas. 367; 22 M. L. J. 404; 11 M. L. T. 109; (1912) M. W. N. 393.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1706 OF 1913

November 23, 1915.

Present:—Mr Justice Holmwood and
Mr Justice Mullick.

GANGADHAR KARMAKAR AND OTHERS—
DEFENDANTS—APPELLANTS

versus

SHEKHAR BASINI DASIA—PLAINTIFF,
AND ANOTHER—*Pro forma* DEFENDANT—

RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 153—Landlord and tenant—Suit for rent below Rs. 50—Conflicting claim set up—Suit dismissed as no relation of landlord and tenant found—Appeal, if maintainable—No appeal from first Court's decision maintainable—Second appeal, if maintainable—Revision—Jurisdiction—Civil Procedure Code (Act V of 1908), s. 115.

Where in a suit for rent under the Bengal Tenancy Act for an amount less than Rs. 50, the defendant set up the title in himself, but the suit was dismissed on the ground that no relation of landlord and tenant existed between the parties as no rent had ever been collected by the plaintiff:

Held, that the decision was not appealable. [p. 813, col. 1.]

No second appeal lies to the High Court from the decision in appeal of the lower Appellate Court when no appeal lay to the latter Court from the decision of the First Court. [p. 813, col. 1.]

Bhagabati Bosa v. Nanda Kumar Chuckerbutty, 12 C. W. N. 835, followed.

Where an appeal to the High Court is found to be incompetent, the High Court has jurisdiction in a proper case to deal with the matter on section 115, Civil Procedure Code of 1908, even without an application for that purpose. [p. 813, col. 1.]

Second appeal against the decree of the District Judge, Khulna dated the 5th April 1913, reversing that of the Munsif, 1st Court, Satkhira, dated the 26th of April 1912

Babu *Buranashihasi Mukerjee*, for the Appellants.

Babys *Sarat Chandra Roy Chelchury* and *Sasadhur Roy* (Junior), for the Respondent.

JUDGMENT.—This second appeal arises out of a rent suit brought under rather curious circumstances. The plaintiff, a lady, alleging that she purchased the land from the original proprietor, sued her father as a tenant for rent for the last two years of her vendor's incumbency and for the first two years of her possession. The father set up the title in himself and said that he purchased the holding *benami* in the name of his daughter and leased it out to his son in law—nominally for his daughter. The learned Munsif declined to have anything to do with these conflicting claims and decided that, because the plaintiff had not attempted to collect or collected any rents from her father, the relationship of landlord and tenant did not exist. The daughter went in appeal before the learned District Judge, and he held, on a preliminary objection, that the question of the conflicting title to or interest in the land had been decided by the Munsif and that it was competent to him to deal with the appeal and accordingly he dealt with it, and found clearly on the facts that the lady was speaking the truth and was supported up to the hilt by the necessary documents and that the story told by the father was a mere pretence to get rid of his liability.

In appeal before us, it is argued that the decision of the Munsif being simply that the relationship of landlord and tenant did not exist between the parties inasmuch as no rents had ever been collected, was a decision from which there was no appeal, the amount of rent claimed being under Rs. 50. In reply, the learned Vakil for the respondent strenuously argued that this case falls under those exceptional instances which are referred to in two cases reported in 8 Calcutta

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Wee'ly Notes, one case being *Sita Nath Pal v. Kartick Gharm* (1), and the other *Rani Kanai Dass v. Fakir Chand Dass* (2). We are, however, of opinion that the ruling in *Shilabati Debi v. Rodrigues* (3) which is perfectly general in its terms, applies equally to this case as to every other case in which there has been no actual decision of the conflicting claims or interest in the land.

The learned Vakil took a second point that the suit was for rent immediately after the lady's purchase and that the decision that no rent was collected, was no decision at all and the Munsif had, therefore, failed to exercise a jurisdiction vested in him by law and that as the plaintiff had, with the appeal to the District Judge, filed an application under the proviso to section 153 of the Bengal Tenancy Act for revision, the lower Appellate Court was perfectly competent to pass the decision he did. Here, again, we must rule against the respondent on the simple ground that the lower Appellate Court did not act under the proviso, but distinctly found that an appeal did lie and decided the appeal on the merits.

But there is a third ground upon which we are clearly of opinion that the respondent must succeed. It is laid down in the case of *Bhagabati Beva v. Nanda Kumar Chuckerbutty* (4) that if no appeal lies from a Munsif to a Subordinate Judge, no appeal lies from the Subordinate Judge to this Court and that dictum is expressed in the most general terms and obviously based upon common sense, for, if the first appeal is a nullity, *ex hypothesi* there cannot be a second appeal. The learned Vakil for the appellant asks us to deal with the matter under section 115 of the Code of Civil Procedure, as, no doubt, we are fully empowered to do, even though no application has up to date been made for that purpose. But when we are asked to exercise this extraordinary jurisdiction in revision *suo moto* it becomes necessary to consider the merits of the case, and on reading the learned Judge's judgment, it is perfectly plain that no good purpose whatever can be served by allowing this unfor-

tunate litigation between a father and daughter to continue. There is the clearest finding, as we have already said, that the lady's story is established both by oral and documentary evidence beyond any doubt, and it is not, in the least, likely that this Court would interfere in revision in the face of such findings of fact by a very experienced District Judge.

The result is that the appeal is dismissed. Under the circumstances, the parties will bear their own costs throughout, and the decree of the lower Court will be modified to that extent.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 126 OF 1915.

November 3, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

ADAPAKA BAPANNA—DEFENDANT NO. 2
—PETITIONER

versus

Sri Raja INUGANTI RAJAGOPALA
RAO BAHADUR GARU—PLAINTIFF—

RESPONDENT.

Madras Regulation XXV of 1802, s. 4—Inam—Jodi payable by inamdar to zemindar whether excluded in fixing jodishenah—Resumption and levy of full assessment by Government, if takes away liability to pay jodi.

Under section 4 of Madras Regulation XXV of 1802, what was excluded from consideration in fixing the permanent assessment payable by a zemindar, was not the jodi payable by an inamdar to a zemindar but the difference between the jodi and the proper assessment claimable from the lands if they had not been granted in inam. The Government reserved its powers to deal with this difference only and not with the jodi itself. The resumption of a service inam and the levy of full assessment by the Government thereon, does not take away the liability of the inamdar to pay jodi to the zemindar. [p. 814, cols. 1 & 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Rajam, in Small Cause Suit No. 341 of 1914.

FACTS—The suit was by the proprietor of the Gullapadu palace against the defendants, the inamdars of certain lands situated in Siripuram village belonging to the

(1) 8 C. W. N. 434.

(2) 8 C. W. N. 438.

(3) 35 C. 547; 12 C. W. N. 448.

(4) 12 C. W. N. 835.

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plaintiff's estate, for recovery of arrears of *kattubadi*, water-cess, and village-cess for *faslies* 1320 to 1322, on the ground that the 1st defendant was liable to pay the same for the lands in suit which were carpenter's service *inam*. The 2nd defendant was added as a mortgagee in possession. The 1st defendant was *ex parte*. The 2nd defendant contended *inter alia* that he was not liable to pay the amounts claimed, inasmuch as the lands had been resumed by the Government and granted on *patta* to the 1st defendant after levying full assessment thereon and that the previous payments, if any, were under a mistake as to the liability of the lands for the charges in dispute and could not give the plaintiff any rightful claim thereto. The District Munsif held, following *Sobhanadri Appa Rao v. Gopalkristnamma* (1), that the suit lands were liable to pay *kattubadi* and decreed the suit, reducing the amount of the claim by a few rupees. The 2nd defendant thereupon preferred this civil revision petition.

Mr. B. Somayya, for Mr. P. Narayanamurthi, for the Petitioner:—The decree of the District Munsif is opposed to law. Under section 4 of Madras Regulation XXV of 1802, *kattubadi* was excluded from consideration in fixing the *peishcush* payable by a *zemindar*. The decision in *Sobhanadri Appa Rao v. Gopalkristnamma* (1), was with reference to the terms of the particular permanent *sanad* put forward in that case and was not on a construction of section 4 of Madras Regulation XXV of 1802.

Mr. K. S. Aravamudan Iyengar, for the Hon'ble Mr. B. N. Sarma, for the Respondent, was not called upon.

JUDGMENT.—Section 4 of Regulation XXV of 1802 is very awkwardly worded. It speaks of "articles of revenue included . . . under the several heads of" (among other heads) "all other lands paying only favourable quit rents" and excludes those articles of revenue from consideration in fixing the permanent assessment on the basis of the true income of the *zemindar*. That what was excluded was not the *jodi* payable to the *zemindar* by an *inamdār* but the difference between the *jodi* and the proper assessment

claimable from the lands if they had not been granted in *inam*, seems to be clear. The Government was concerned only with and, therefore, reserved its powers to deal with this difference and not with the *jodi* itself. The argument of Mr. Somayya that in *Sobhanadri Appa Rao v. Gopalkristnamma* (1), the learned Judges decided upon the construction of the particular permanent *sanad* put forward in that case and not upon the construction of section 4 of the Regulation, cannot be accepted.

There is no other arguable point in this case which is dismissed with costs.

Petition dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1694 OF 1914.

November 12, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VELAMMAL *alias* THAYAMMAL—

DEFENDANT NO. 3—APPELLANT

versus

LAKSHMU AMMAL AND ANOTHER—

PLAINTIFF AND DEFENDANT NO. 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 107, cl. (2), O. I, r. 10—Duty of Appellate Court to implead all necessary parties—Necessary party omitted—Decree for sale, whether operative.

Before deciding an appeal, it is the duty of the Appellate Court to bring on the record all the necessary parties to the appeal. [p. 815, col. 1.]

Where, therefore, a decree for sale was passed in a suit in which a necessary party under Order XXXIV, rule 1, of the Civil Procedure Code was knowingly omitted from the array of parties in appeal:

Held, that the decree could not be allowed to stand. [p. 815, col. 1.]

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 494 of 1913, preferred against that of the District Munsif of Trichinopoly, in Original Suit No. 57 of 1912.

FACTS.—This was a suit for sale on a mortgage executed by a dancing girl, instituted after her death. Her three sons and a girl alleged to have been adopted by her, were made parties to the suit. Another girl claiming under a similar adoption was brought in as a supplemental defendant. The Court of first instance passed a decree

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against the adopted girl. The other girl who claimed under a similar adoption, appealed without making the sons parties to the appeal. The District Court confirmed the decree. This second appeal is by another dancing girl.

Mr. K. Jagannatha Aiyar, for the Appellant.

Mr. S. Ramachandra Aiyar, for Mr. S. Subramania Aiyar, for the Respondents.

JUDGMENT.—Under Order I, rule 10, and section 107, clause (2), of the Code of Civil Procedure, the lower Appellate Court ought to have made the defendants Nos. 1, 2 and 4 parties to the appeal preferred to it, before deciding that appeal. The question may then arise (if it is found that defendants Nos. 1 and 2 are co-owners of the equity of redemption with 3rd defendant) whether the appeal was barred. The decree for sale passed in a suit in which a necessary party under Order XXXIV, rule 1 (4th defendant, at any rate, being such a party) was knowingly omitted from the array of parties in appeal, cannot be allowed to stand.

We must set aside the judgment and decree of the lower Appellate Court and direct the appeal to that Court to be restored to file. The lower Appellate Court will dispose of it afresh after making defendants Nos. 1, 2 and 4 parties to that appeal. Costs will abide.

Appeal allowed; Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 31 OF 1914-15 OF
ALLAHABAD DISTRICT.

August 9, 1915.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

RAM BHAROS—DEFENDANT—APPELLANT
versus

Syed NAZIR HUSAIN AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 13 (a) and (b),
14 (1) (a), 168—Wrongful dispossession—Regaining
of possession—Limitation Act (IX of 1908), s. 28.

A mere attestation in a settlement *parcha* by a tenant that he is a non-occupancy tenant, does not mean that he gives up his claim to occupancy rights. [p. 816, col. 1.]

Query.—Whether for the application of section 13 (a) of the Tenancy Act, it is not necessary that the tenant should have regained possession within a year from the wrongful dispossession? * [p. 816, col. 1.]

Second appeal from the order of the Commissioner, Allahabad Division, dated the 15th January 1915, reversing that of the Assistant Collector, Allahabad District, in a case of ejectment under section 58-63 of Act II of 1901.

JUDGMENT.

HOLMS, S. M.—(August 3rd, 1915.)—Both the lower Courts and the parties hitherto seem to have proceeded on the assumption that section 13 (a) only applies to the case when a tenant who has been wrongfully dispossessed by his land-holder has regained possession thereto within a year from the wrongful dispossession. This is not the case: no limit is therein laid down, although in the similar case under section 14 (1) (a), there is a year's limit when the tenant has been admitted by the land-holder to the tenancy of some other land. It is argued by the respondent that, for reasons which I will discuss later, section 13 (a) only applies when the former tenant has regained possession of the land within six months from the date of his wrongful dispossession. The Assistant Collector has found that Sahai, the predecessor of the present appellant, was not really out of possession at all. The Additional Commissioner has come to no clear finding as to how long Sahai was out of possession although he has found that Gajadhar was given the land for some time or other. I have, therefore, looked into the evidence on this point. The *patwari* says nothing whatever as to Sahai's wrongful dispossession in 1308 *fasli* or 1309 *fasli* and Gajadhar's possession does not seem to have been questioned on this point by the respondent. Gajadhar himself is not very definite, but apparently his statement is that he was in possession for a year. The respondent gives evidence, but as he admits that he wrongfully dispossessed Sahai, his evidence may be disregarded as unworthy of credit.

The only other evidence relied on by the respondent is the attestation of the *parcha* at

* [See 31 Ind. Cas. 863—Ed.]

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the Settlement in which there is an attestation by the appellant that he has a non-occupancy tenant of the plot in question. I do not think he can be considered by this to give up claims to occupancy rights based on his predecessor's cultivation. On this evidence, I am not prepared to find that Sahai was six months out of possession.

Under section 168 of the Tenancy Act, section 28 of the Limitation Act of 1908 applies to suits under the Tenancy Act "subject to the provisions of" the latter Act. It is urged that under section 28 of the Limitation Act, six months after the wrongful dispossession the right of the former tenant to the property is extinguished and this is interpreted to mean that his occupancy right is extinguished. I feel some doubt as to whether the words "subject to the provisions of this Act" in section 168, do not bar this interpretation. Moreover if this interpretation is correct, there is a curious inconsistency between section 13 (b) and section 14 (1) (a), for if the former tenant be admitted to the tenancy of other lands, he would have greater privileges than if the former tenant were re-admitted to the possession of the land which he formerly held as tenant. On the other hand, it is pointed out that if there is no six months' limit, there are even greater anomalies, for section 13 (a) would apply even if the tenant re-gained possession of his land more than twelve years after his wrongful dispossession, in which case if there had been a tenant meanwhile, he would also have acquired occupancy rights. For present purposes, however, it is unnecessary for me to decide this question.

I would set aside the order of the Additional Commissioner and restore that of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 91 OF 1914.

November 2, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

MESSRS. M. SOMASUNDARAM CHETTY & CO., THROUGH THEIR AUTHORISED AGENT, W. T. TIRUVENKATACHARI—
DEFENDANTS—APPELLANTS

VERSUS

P. RANGASAMI IYANGAR AND ANOTHER
— PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Suit based on award.

A suit based on an award cannot be considered to be a suit on a contract and is governed by Article 120 of the Limitation Act.

Appeal from the judgment and decree of the Hon'ble Mr. Justice Bakewell, dated the 2nd October 1914, in the Ordinary Civil Jurisdiction of the High Court, in Civil Suit No. 294 of 1913.

Messrs. P. M. Sivagnana Mudaliar and O. V. Ananthakrishna Aiyar, for the Appellants.

Mr. V. V. Srinivasa Aiyangar, for the Respondents.

JUDGMENT.—We think the learned Judge was right and that the suit being based on an award, is not governed, as contended, either by Articles 53, Article 113 or Article 115 of the 1st Schedule to the Indian Limitation Act. As held in *Sornavalli Ammal v. Muthayya Sastrigal* (1), and in *Rajahah i Saha Banikya v. Behary Lal Basak* (2), a suit on an award cannot be considered to be a suit on a contract. As observed in the latter case, it operates to merge and extinguish all claims embraced in the submission, and gives rise to a fresh cause of action, which in the present case is governed by Article 120 of the 1st Schedule of the Indian Limitation Act as there is no other Article applicable. *Kuldip Dube v. Mahant Dube* (3) is to the same effect.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 23 M. 593; 10 M. L. J. 208.

(2) 53 C. 881; 4 C. L. J. 162.

11 Ind. Cas. 705; 34 A. 43; 8 A. L. J. 1135.

RUP LAL v. EMPEROR.

RUSTOM v. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION CASE No. 780 OF 1915.

October 29, 1915.

Present:—Sir Henry Richards, Kt.,
Chief Justice.

RUP LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

*Practice—Complaint by Magistrate—Magistrate, jurisdiction of, to pass order in that case.**A Magistrate ought not to make any order in any case in which he is even the nominal complainant.*

Revision against an order of the District Magistrate of Mainpuri.

Mr. Satya Chandra Mukerji, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision against the order of the District Magistrate. It appears that there was a suit in the Small Cause Court in 1912 in which Rup Lal was plaintiff. The suit was a suit on a bond. It is alleged that the bond was a forgery. Application was made by the then District Magistrate to the Judge of the Small Cause Court for sanction to prosecute. This sanction was granted and the case was taken cognizance of by the District Magistrate, who sent it on to a Magistrate of the first class. The result of his enquiry was that the accused Rup Lal was discharged. The prosecution considered it desirable that there should be further enquiry and that the propriety of the order of the Magistrate discharging Rup Lal should be considered. The application was made to the District Magistrate. He directed Rup Lal to show cause why the order discharging him should not be set aside. Counsel appeared on behalf of Rup Lal. No exception was taken to the District Magistrate hearing the case and he ordered that the order of discharge should be set aside. In the present application, it is urged that the District Magistrate has all along been the complainant and that the present District Magistrate is the complainant notwithstanding that the original complainant was his predecessor-in-office, and that a District Magistrate who is a complainant ought not to make any order in the case. It is further contended that the order of the

Magistrate, who discharged Rup Lal, is correct and ought not to be interfered with.

In my opinion, if the order discharging Rup Lal was wrong, there is no reason why it should not be set aside. But I do not desire to express any opinion on the correctness or incorrectness of the order of discharge. While I think it is to be regretted that the attention of the learned District Magistrate was not called to the fact that he was the nominal complainant, it is nevertheless clear that a Magistrate ought not to make an order in any case in which he is even the nominal complainant. I think that the order should be set aside and it will be for the Crown to consider whether it is expedient to move further in the matter. If it is considered expedient to move, an application can be made to the Sessions Judge who has jurisdiction in the matter. I accordingly set aside the order of the District Magistrate dated the 5th of August 1915.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 543 OF 1915.

August 3, 1915.

Present: Justice Sir P. C. Banerji, Kt., and
Mr. Justice Rafique.

RUSTOM—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 512—Accused absconding—No finding by Magistrate that there was no immediate prospect of his arrest—Arrest—Statements of witnesses examined in absence of accused, admissibility of—Conviction, legality of.

A murder was committed in 1897. The accused ran away at that time and was not heard of till he was arrested in 1915. The witnesses were examined in 1897 on behalf of the prosecution to prove the commission of the offence by the accused. The Magistrate, however, did not record any finding that in his opinion the accused had absconded and that there was no immediate prospect of his arrest. The accused was convicted on the evidence recorded in 1897.

Held, that the evidence given in 1897 was inadmissible to prove the guilt of the accused and that the conviction was bad. [p. 819, col. 1.]

Criminal appeal from an order of the Sessions Judge of Farrukhabad.

Mr. C. Ross Alston, for the Appellant.

Mr. R. Malcomson, Assistant Government Advocate, for the Crown.

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JUDGMENT.

RAFIQUE, J.—The appellant in this case is one Rustom, who was committed to the Court of Session on the charge of murder under section 302 of the Indian Penal Code. During his trial, the learned Sessions Judge added a further charge under section 307, that is, an attempt at murder, and convicting him under that section sentenced him to transportation for life. The murder was committed as long ago as the 3rd of December 1897. The case for the prosecution is that on the night of the 3rd of December 1897, the appellant was driving a camel cart from Farrukhabad. On his arrival at Nandsa, he had to change the camel and asked Sadullah, who was in charge of the camel that was relieved, to help him in the harnessing of the other camel and also to accompany him to the next stage. Sadullah refused to go with the appellant any further, upon which the appellant took up an axe and attacked him with it and inflicted blows on the head which resulted in almost instantaneous death. Rustom, the appellant, then ran away and was not heard of till he was arrested this year, and put on his trial. Soon after the murder, the *chaukidar* of the place reported the occurrence and the Sub-Inspector proceeded to the spot at once. The case was sent up to the Court on the 24th of December 1897, and on the same date evidence purporting to be taken under section 512 was recorded. Subsequently it was discovered that the proceedings which were taken in 1897 were incomplete and an order was issued to the Police to furnish proper evidence. This was in 1898. A proclamation under section 87 was issued as also a warrant for the arrest of Rustom, both of which were sent to the district of Mainpuri of which district he was a resident. One Ataullah, a constable of the Mainpuri district, was examined on the 16th of August 1898, who deposed to having made a search for the appellant and to having failed to find him. On the 3rd of September 1898, the witnesses who were examined in 1897 were re-examined. Sometime in April 1911, the prosecuting Inspector of Farrukhabad, presumably on going through the old files, came upon the file of this case. He reported that the evidence which purported to have been taken under section 512 of the Code of Criminal

Procedure, was not legally correct and recommended that fresh proceedings should be taken. In accordance with his suggestion, the case was again taken up by a Magistrate of the district and formal evidence of the appellant having absconded was recorded and the only surviving witness, *Musammât Vilayatan*, was examined. These facts we have discovered by going carefully through the files of 1897, 1898 and 1911, which are in the record of this case. The only evidence against the appellant on his trial in the present case consists of the deposition of *Musammât Vilayatan* who is alive and was examined before the learned Sessions Judge, and the depositions of four other witnesses who were examined in 1897, namely, *Imtiazan*, *Husaini*, *Mohan* and *Ram Singh*. The learned Sessions Judge, by a formal order dated the 21st of June 1915, brought the statements of the said four witnesses on the record as evidence on behalf of the prosecution. We also find the evidence of the said four witnesses recorded in 1898 on the file of the Sessions Court, though no order appears on the file showing how and when and under what circumstances were those statements brought on the record. The evidence of *Musammât Vilayatan* as recorded by the learned Sessions Judge at the present trial was rejected by him. The conviction of the appellant rests on the statements of the other witnesses recorded in 1897. The learned Counsel for the appellant contends that the said evidence is inadmissible, inasmuch as no proof of the absconding of the accused had been formally received and recorded prior to the examination of the said witnesses. We think that this objection is valid and must prevail. In section 512, it is distinctly laid down that if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. It is clear from the language of the section that the Court which records the proceedings under it, must first of all record an order that in its opinion, it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. No

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such finding appears on the file of 1897, in fact no evidence was taken in that year to show that the present appellant was absconding and that there was no immediate prospect of his arrest. The evidence of 1897 being inadmissible, the conviction of the appellant on the basis of such evidence cannot stand. But it is suggested on behalf of the Crown that the case should be sent back for re-trial with a direction to the learned Sessions Judge to admit the evidence taken in 1898, inasmuch as that evidence was taken after proof had been received of the absconding of the accused. We find that the only statement in 1898 with regard to the absconding of the accused is that of one Ataulah, a constable of the Mainpuri district. He does not say that there is no immediate prospect of the arrest of the accused, nor is there any finding by the Magistrate that he is satisfied that the accused is absconding and that there is no immediate prospect of his arrest. Moreover, we have considered the evidence of the other witnesses who were examined in 1898 and are of opinion that their evidence is insufficient to bring the charge home to the appellant. Of the witnesses examined in 1898, Musamat Vilayatani cannot be relied upon. Mohan Chamar and Mahomed Yusuf distinctly say that they did not see Rustom, the appellant, strike the deceased. The other witnesses Imtiazan, Ram Singh and Husaini do say that they recognised Rustom as the assailant of the deceased. It should be observed here that none of the witnesses was present actually on the spot when the assault on Sadullah is said to have taken place. All the witnesses say that they ran upon hearing the cries of Sadullah. Imtiazan and Husaini also ran up. It was a dark night and according to Mahomed Yusuf, it was not possible to recognise any person at any distance. There is, therefore, room for doubt as to the evidence of Imtiazan, Husaini and Ram Singh. In our opinion, it would serve no useful purpose to send back the case for re-trial with the direction to admit the evidence taken in 1898. We, therefore, accept the appeal, set aside the conviction and sentence passed upon the appellant and acquit him of the offence of which he has been convicted, and direct his immediate release.

BANERJI, J.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 448 OF 1915.
(CRIMINAL REVISION PETITION NO. 361
OF 1915)

November 17, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Abdur Rahim.

MAHOMED KANNI ROWTHER—
COMPLAINANT—PETITIONER

versus

PATTANI INAYATHULLA SAHIB AND
OTHERS—ACCUSED NOS. 4 TO 7, 9 AND 10—
RESPONDENTS.

*Criminal Procedure Code (Act V of 1898), s. 345—
Composition outside Court—Dispute between parties at
time of hearing—Power of Court to take evidence—
Monetary consideration, whether necessary.*

A composition of a criminal case arrived at by the parties outside the Court comes within the terms of section 345 of the Criminal Procedure Code, and has the effect of an acquittal. [p. 810, col. 2.]

Where an offence has been compounded outside the Court, but subsequently at the time of hearing one of the parties resiles from the agreement, it is competent to the Court to take evidence as to the factum of the agreement and give effect to it if it be found to have been entered into. [p. 820, col. 1.]

Murray v. Queen-Empress, 21 C. 103, followed.

No monetary consideration is necessary to make the composition valid; it is enough if there is a *quid pro quo* between the parties to support it. [p. 820, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the 1st Class Sub-Divisional Magistrate of Kumbakonam, in Criminal Appeal No. 38 of 1915, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Papanasani, in Calendar Case No. 249 of 1914.

Messrs. Mir Sultan Mohideen and V. R. Ponnuswami Aiyangar, for the Petitioner.

Mr. T. Rangachariar, for the Accused.

Mr. P. R. Grant, for the Government.

ORDER.

ABDUR RAHIM, J.—In this case it has been found upon the evidence that the parties compounded their disputes out of Court. There were three cases which arose out of the disputes between the petitioner and the respondents. In the first of these cases, the petitioner was the accused and in the second case, which was a counter case to the first, the petitioner was the complainant. In the third case, that is, the one in question, the petitioner was the complainant. In the other two cases, the accused were convicted and

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sentenced to three months' rigorous imprisonment each. Then they appealed to the Joint Magistrate and while the appeals were pending, the parties entered into an agreement that all the disputes between them should be settled. The Joint Magistrate has found that the arrangement settling the disputes extended to the case which was then pending in the Sub-Magistrate's Court. As a result of the compromise, the two appeals in the Appellate Court were compounded with the permission of the Court, and the accused acquitted. When, however, the accused in the present case submitted a petition to the Sub-Magistrate saying that this case also was the subject of the compromise, the complainant, who is the present petitioner, resiled from his former position and denied the composition. The Sub-Magistrate found that as a matter of fact, the present case was not settled. The Appellate Court has, however, taken a different view, and we have no doubt that this view, so far as the finding of fact is concerned, is correct. The question of law then arises, whether the composition or arrangement which was arrived at outside the Sub-Magistrate's Court comes within the terms of section 345, Criminal Procedure Code. Clause 6 of that section says: "The composition of an offence under this section shall have the effect of an acquittal of the accused". It does not say as to what should be the procedure if one of the parties, after they settled their disputes outside the Court, refused to abide by it when the case comes on afterwards for hearing. There is only one precedent which covers this case and it is *Murray v. Queen-Empress* (1). There the learned Judges held, or rather assumed as if the matter admitted of no doubt, that it was competent for the Court in which the charge is pending to take evidence as to whether there was in fact a composition outside the Court. In that case, there was a dispute whether, if there was a composition, it was a valid one or not, having regard to the allegation whether the complainants acted freely and understood what they were doing. The section itself does not throw much light on the question raised before us. I am, however, inclined to take the same view as was taken in *Murray v. Queen-Empress* (1). Section 345, Criminal

(1) 21 C. 103.

Procedure Code, lays down that certain offences, of which the offence of hurt is one, can be compounded by the parties and no leave of the Court is necessary for this purpose, while of certain other offences such as grievous hurt, there can be no composition without the permission of the Court before which they are pending. Where the parties have actually composed their disputes in the former class of cases, it is not clear on principle, why it should be necessary for the validity of a composition that any petition should be presented or why the parties should afterwards be allowed to withdraw from it. The composition spoken of in section 345 is in the nature of a contract, but I do not think it requires monetary consideration. I may point out, however, in this case there was some consideration, because, there were cases between the parties pending and if there was an arrangement, the consideration was that each party should refrain from pursuing the case or cases in which the other party was the accused. It is true that if a Court is bound to take cognizance of a composition arrived at outside the Court but which has been resiled from by one of the parties when the case came to be tried, the Court will be obliged to take evidence and that will necessarily result in the prolongation of proceedings. But if the Legislature contemplated that a composition should be made in Court, or that a composition arrived at should not be considered to be complete until both parties have expressed their assent in Court whether by means of a petition or otherwise, one would expect that they would have said so. In the absence of any such express provision, the natural interpretation will be that the composition is not limited to acts done in Court, nor to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court.

I would hold that there was a valid composition in this case and it had the effect of acquittal.

AYLING, J.—The abstract question as to the effect of an agreement to compound come to by the parties out of Court from which one subsequently resiles, is a somewhat difficult one on which my mind is not free from doubt. The wording of section 345, Criminal Procedure Code, throws little, if any, light on it

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and I should be loth to express a final opinion on the somewhat one-sided argument that has been addressed to us. The only authority quoted certainly supports the view contended for by Mr. Rangachari. But on the facts found by the Joint Magistrate, I am clearly of opinion that the case is one in which, in the exercise of our discretion, we may very properly decline to interfere. I concur in the order proposed by my learned brother.

Petition dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION NO. 645 OF 1915.

September 6, 1915.

Present:—Sir Henry Richards, Kt.,
Chief Justice.

MIHARBAN SINGH—APPLICANT
versus

EMPEROR—(OPPOSITE PARTY).

Criminal Procedure Code (Act V of 1898), s. 110—Zemindar not actively opposing gang of dacoits, if to be bound over—Witnesses, evidence of, weight of—High Court, power of—Duty of lower Courts.

A zemindar of a village cannot be bound over under section 110 of the Criminal Procedure Code merely because he did not actively oppose a gang of dacoits. [p. 821, col. 2.]

Where a zemindar, who is also a money-lender, is prosecuted under section 110 and in defence he produces a number of respectable witnesses besides his castemen and tenants, it is not proper for the Magistrate to disbelieve all the witnesses so produced merely on the ground that the accused could by the influence of his position in life produce any number of them. [p. 822 col. 2.]

A High Court is not a Court of appeal in cases under section 110 and the responsibility of administering that section does not rest with it. It is nevertheless, a section which Magistrates ought to administer with the most scrupulous care, both as the Court of first instance and the Appellate Court. A High Court ought not to take upon itself to weigh the evidence given on behalf of one side or the other. It ought only to see whether the Court below has approached the consideration of the appeal in a fair way having regard to the interest not only of the prosecution but also of the accused. [p. 822, col. 1.]

Criminal revision from an order of the District Magistrate of Etah.

Mr. W. Wallach, for the Applicant.

Mr. R. Malcomson, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision against an order of the District Magistrate of Etah, dismissing an appeal of Miharban

Singh against an order of a Magistrate of the first class, directing him to give security to be of good behaviour under section 110 of the Code of Criminal Procedure. Applicant is a zemindar and money-lender. It appears that a band of very desperate dacoits had as their rendezvous, a place on the banks of the Kali Nadi on the boundaries of Etah and Mainpuri. The gist of the evidence of the Police and unofficial witnesses against the applicant, was that he harboured this band of dacoits. It would rather seem as if it was intended at one time actually to charge the applicant as being a member of the gang; presumably because the necessary evidence was not forthcoming, no substantive proceedings were taken against him. Section 110 of the Code of Criminal Procedure defines the class of persons against whom an order for security may be made:—

(a) A man who is by habit a robber, house-breaker, or thief, or (b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or

(d) habitually commits mischief, extortion or cheating or counterfeiting coin, currency notes or stamps, or attempts so to do, or

(e) habitually commits or attempts to commit, or abets the commission of offences involving a breach of the peace, or

(f) is so desperate or dangerous as to render his being at large without security hazardous to the community.

There is not a particle of evidence that the applicant comes under any part of this section except a portion of (c), namely, that he habitually protects or harbours thieves. There is not even any allegation that he was in the habit of concealing or disposing of stolen property. The evidence, such as it is, is confined to his alleged association with a particular gang which had made, as I said before, its rendezvous in the neighbourhood of his village. It must be borne in mind that neither the applicant nor any of his villagers could be bound over under this section merely because they did not actively oppose the dacoits. It would be very well if zemindars and others recognised their duty and had the courage to give assistance to

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the Police when gangs of dacoits settled in their neighbourhood, but their omission to do so, does not render them liable under section 110. There is no evidence that the applicant was in the "habit" of harbouring or protecting thieves. There is a good deal of evidence from which, if unrebutted, it might well be inferred that he assisted the gang in question. The prosecution examined a number of witnesses who said that the accused harboured these particular dacoits. One witness said that he had seen them at the house of the applicant, and one witness said that he had fed them. One of the prosecution witnesses, namely, Thamman Singh, while deposing against the accused, said that he had heard that he was a man of good character. No witness was produced on behalf of the prosecution from the accused's own village. The accused produced 46 witnesses, most of them from his own village including the headman and *patwari* and the headman of a neighbouring village.

This Court is not a Court of Appeal in cases under section 110 and the responsibility of administering that section does not rest with the High Court. It is nevertheless a section which Magistrates ought to administer with the most scrupulous care, both the Court of first instance and the Appellate Court. Magistrates ought always to bear in mind that the indirect results of binding a man over under section 110 may be very terrible and that there is always the possibility of the section being abused. In the present appeal I do not think that I ought to take upon myself to weigh the evidence given on behalf of one side or the other. I ought only to see whether the Court below has approached the consideration of the appeal in a fair way having regard to the interest not only of the prosecution but also of the applicant. The learned District Magistrate has discarded the evidence of all the witnesses produced by the accused who were his tenants or his fellow-castemen. It may perhaps be urged that when the question at issue is the good or bad character of an individual, the evidence of his fellow castemen ought not to be discarded *solely* on the ground that the witnesses are his fellow-castemen. The learned District Magistrate proceeds:—"There still remains a large number of others against whom no allegation can be made. The easy course in such cases is simply

to say that there is no reason to distrust them and that they must, therefore, be believed. I do not, however, think it is right to do so. The evidence for the prosecution has raised a very strong *prima facie* case against the appellant and he has to rebut it. As the Deputy Magistrate observes: 'It is never a matter of difficulty for a man who has the influence of a gang of dacoits at his back and is at the same time a *zemindar* and money-lender to produce as much evidence as he wants, and the production of 46 witnesses by the appellant does not, therefore, mean that he is of good character. The forces of evil are by no means to be ignored. If they were, we should not be troubled with an outbreak of crime like dacoity.' Appellant has, I think, made full use of his influence to bring up evidence, and has had the help of his position and also no doubt of the aforementioned Misri Lal, whose election to the post of *lambardar* he was instrumental in securing. This influence has probably prevented the production of purely local evidence, the absence of which is one of the points made by the appellant." It seems to me that this was not a fair way of dealing with the evidence of witnesses whom no reason could be given for disbelieving. The only reason suggested by the learned District Magistrate is that the applicant had a gang of dacoits at his back. It seems to me that this means that he disbelieved the evidence adduced by the accused because he was guilty. In other words, he convicted the man first. The learned Magistrate said that the accused had to rebut "the strong *prima facie* case made against him." How could he rebut the case otherwise than by producing a large number of witnesses "against whom no allegation could be made." The learned District Magistrate has, in my opinion, given no legitimate reason for disbelieving the evidence of a large number of persons who deposed to the good character of the applicant, persons residing in his own village and in the immediate neighbourhood. I cannot help feeling that where a person is of a notoriously bad character, he will as a *general rule* find difficulty in producing respectable honest persons to depose to his good character. It may possibly be that the applicant in the present case and all his

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fellow-villagers are little better than the gang of dacoits who made the neighbourhood their meeting place, but this was not the case made either by the Police or by any of the witnesses for the prosecution and it is not the reason which the learned District Magistrate gives for disbelieving a large number of witnesses produced by the applicant and who were not shown to be in any way under his influence either as tenants or even as fellow-castemen. In my opinion the learned District Magistrate did not approach the consideration of the appeal from a proper point of view, and on this account I think the order ought to be set aside. I accordingly allow the application, set aside the order of both the Courts below and direct the bail bond to be cancelled.

Application allowed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 459 OF 1915.

August 4, 1915.

Present:—Mr. Justice Tudball.

BHOLE SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Judicial proceeding—Statement made to District Magistrate in his executive capacity, if complaint—Oath, administration of.

P, a village headman made a petition to the District Magistrate in which he stated that he wished to resign his post as the headman. On enquiry by the District Magistrate as to the reason of his resignation, he stated that during the course of a Police investigation in a dacoity case, the Police were forcing a large number of people to pay money to them. The Magistrate reduced his statement to writing and sent for the persons named by him. The Magistrate recorded the statements of all of them on oath and sent the case to the Police Superintendent to take action under paragraph 283 of the Police Regulations. The Superintendent reported that the allegations were entirely false. The District Magistrate then ordered the prosecution of P and other persons whom he had examined on oath for giving false evidence.

Held, that the statement made by P to the District Magistrate was not a complaint, nor the action taken by the Magistrate was in the course of a judicial proceeding, in the course of which he was legally empowered to administer an oath, and that, therefore, the Magistrate had no power to take action under section 476 of the Criminal Procedure Code. [p. 824, col. 2.]

Criminal revision from an order of the District Magistrate of Jalaun,

Mr. Pease Lal Banerji, for the Applicant.

Mr. R. Malcomson, Assistant Government Advocate, for the Crown.

JUDGMENT.—The present application has arisen from the following facts:—One Paras Ram, a village headman, on the 17th of February last filed before the District Magistrate a petition in which he stated that he wished to resign his post as village headman as he was too old and unable to do his work. The District Magistrate apparently doubted the correctness of the reason given and questioned the man. In reply to questions put to him, the man stated that the Police of a certain Police station were investigating a dacoity case and in the course of their investigation they were forcing a large number of people to pay money to them, that he was afraid of getting into trouble through this matter and he, therefore, wished to resign. The District Magistrate in his explanation states that he treated this as a complaint and he thereupon put Paras Ram on oath and examined him again. What he stated was then reduced to writing. On completion of his statement, the Magistrate gave a *rukarto* to a *chaprasi* of his Court, which contained the names of 12 persons, and in this he directed the aforesaid *chaprasi* to produce the persons named therein before him at once. Apparently the *chaprasi* obeyed orders and produced all these persons. These persons are those whose names were mentioned by Paras Ram in the course of his statement as being connected in some way or other with the alleged extortion. The District Magistrate then recorded the evidence of all these persons on oath. Having proceeded so far, he then sent the papers to the Superintendent of Police with directions to him to take action under paragraph 383 of the Police Regulations. This paragraph lays down that before a Superintendent punishes any Police officer departmentally or prosecutes him criminally, he must make an enquiry, reduce the substance of the accusation to the form of a charge and record the officer's explanation using a certain form. After completing these proceedings, if he considers that further steps should be taken, he should decide whether the officer ought to be criminally prosecuted or departmentally

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punished. If he decides to institute a prosecution, he must send the papers to the District Magistrate, and obtain his concurrence before taking further action, whatever the rank of the officer accused may be. The Superintendent of Police made an enquiry and submitted a report to the District Magistrate to the effect that the allegations of extortion were entirely false and suggested that the person who had made them and reported them, should be criminally prosecuted. Thereupon the District Magistrate passed an order purporting to be one under section 476, directing the prosecution of the present applicants and certain others including Paras Ram, the latter to be prosecuted for an offence under section 211, the others to be prosecuted for offences under section 193 of the Indian Penal Code. It is against this action of the District Magistrate that the present revision has been presented. It is contended, and I must say with considerable force, that Paras Ram made no complaint; that he did not intend to make any complaint; that he called no witnesses and the proceeding before the District Magistrate was not a judicial proceeding in the course of which he was legally empowered to administer an oath. The explanation of the District Magistrate is that he treated what Paras Ram said, as a complaint and that the enquiry that he made, was under section 202 of the Code of Criminal Procedure. The only unfortunate point in this explanation is that a complaint means an allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person has committed an offence. It is not open to the District Magistrate to treat this petition and statement of Paras Ram as a complaint whether Paras Ram liked or not. It may be of course that Paras Ram wished to make a complaint in such a form that if subsequently it was found to be false, he should be able to save himself from a criminal prosecution. If there was evidence in the case to indicate that Paras Ram intended the Magistrate to take action under the Code against the Police officers, I should not hesitate for an instant in holding that the Magistrate had power to treat the petition as a complaint and that

he was justified in sending for the witnesses and examining them on oath. But an examination of the record shows that Paras Ram's petition was simply a petition tendering his resignation; that even in his statement taken on oath, which statement was made in reply to questions put by the District Magistrate, he made allegations of fact and at the end, stated that these were his reasons for resigning his post. He nowhere asked for the witnesses to be summoned. He nowhere asked for an enquiry to be made and I may add that if the Magistrate was knowingly acting under section 202, it is curious that on completion of his enquiry, he should send the complaint to the Superintendent of Police with a view to the latter officer taking action under paragraph 383 of the Police Regulations. It is also curious that up to the present time the District Magistrate has passed no order dismissing the complaint. Looking at the circumstances of the case, I find it impossible to hold that Paras Ram made a complaint to the District Magistrate; that is to say, that the allegation was made with a view to the Magistrate taking action under the Criminal Procedure Code against the Police officers who were said to have committed the extortion. Paras Ram may perhaps have given false information to the District Magistrate in reply to his questions. The point which I have to decide is whether or not there was a complaint, within the true meaning of the word, before the District Magistrate. In my opinion there was no such complaint. The action of the Magistrate was not action taken under section 202 of the Code. It was apparently executive action in the form of a departmental enquiry which was continued by the further enquiry made under paragraph 383 of the Police Regulations. There was no judicial proceedings before the District Magistrate and, therefore, he had no power to take action under section 476, and the present applicant is one of those whose prosecution for perjury has been directed, and it cannot be said that he committed perjury in the course of a departmental enquiry. No oath ought to have been administered to him at all. I would point out that throughout the enquiry made by the District Magistrate, he nowhere mentioned that he was

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taking action under any specific section. If, as the District Magistrate says, the unfortunate Police officers will not have an opportunity of clearing their character, they will have only the District Magistrate to blame for their unfortunate position, though perhaps it is still open to the District Magistrate to prosecute Paras Ram for giving false information. I allow the application, set aside the order of the District Magistrate and quash the proceedings.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 384 OF 1915.

CRIMINAL REVISION PETITION No. 305
OF 1915.

November 16, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re RAMASAMY NAIDU AND OTHERS —

ACCUSED NOS. 1 TO 9 AND 11 AND 12—

PETITIONERS.

Penal Code (Act XLV of 1860), s. 147—Rioting, charge of—Evidence against each accused, separate discussion of—Practice—Common object, mention of.

In a charge of rioting where a number of men are accused, the Magistrate should deal with the case of each of the accused separately or discuss the evidence against each of the accused, especially when the evidence against each of the accused is by no means equally strong. [p. 825, col. 2.]

In cases of rioting, the common object should be clearly and specifically set out in the charge. [p. 825, col. 2.]

Behari Mahton v. Queen-Empress, 11 C. 106; *Sabir v. Queen-Empress*, 22 C. 276; *Poresh Nath Sircar v. Emperor*, 33 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Melar, in Calendar Case No. 7 of 1915.

Mr. T. Arumainatham, for the Petitioner.

Mr. P. R. Grant, for the Government.

ORDER.—This petition was admitted by Mr. Justice Napier on the ground that he was unable to find any evidence set out against any of the accused.

The judgment though long is very unsatisfactory. Though 12 persons were

charged with offences under sections 147 and 504 of the Indian Penal Code, there has not been the slightest attempt made by the Magistrate to view the case of each separately or to discuss the evidence as against each of the accused. This was all the more necessary as the evidence against each of the accused is by no means equally strong. The whole judgment is a detailed criticism of the defence case and seems to proceed on the view that it was for the accused to establish their innocence.

Though the accused were charged with rioting, the common object is not set out in the charge and it is by no means clear from the evidence what the common object was. According to the complainant, the accused threatened him with injury in the evening. Accused Nos. 1 to 9 then went at about 10 p. m. to his house in order to take away the petition which he had written to the District Superintendent of Police. They could not have known that he was going to write the petition when they threatened him. The immediate cause of the assault in this case was his abuse of the accused and their assaulting each other.

There can be little doubt that in cases of rioting the common object should be clearly and specifically set out in the charge. I need only refer to *Behari Mahton v. Queen-Empress* (1), *Sabir v. Queen-Empress* (2) and *Poresh Nath Sircar v. Emperor* (3).

In the present case, the charge simply states that the accused were guilty of rioting. The accused complained during the trial that the charge did not state what the common object was and I cannot say that they were not prejudiced by the omission in the charge. The accused are not charged with having trespassed upon complainant's property and taken away his complaint or with having assaulted his wife. If after all this took place, the complainant abused first accused as they were assaulting each other and the other accused with a view to rescue first accused intervened, it is difficult to see how they can be guilty of rioting. The question of the common object is not "clear as crystal" as the Magistrate supposes.

(1) 11 C. 106.

(2) 22 C. 276.

(3) 33 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153.

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I set aside the conviction and sentence. As regards accused Nos. 7 to 9, 11 and 12, I do not think it necessary to order a re-trial. The evidence is satisfactory and the Public Prosecutor does not press the case. Accused Nos. 1 to 6 will be re-tried before such other Magistrate as the District Magistrate might direct.

Petition partly allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 633 OF 1915.

August 10, 1915.

Present:—Sir Henry Richards, Kt.,
Chief Justice.

HAKIM SINGH AND OTHERS—APPLICANTS
versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 110—
Witnesses of good character, evidence of, consideration
of—Rule to be observed.*

Where proceedings under section 110 are taken against a person and he is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention to such evidence. It should not necessarily be believed but the Court should find substantial reason for not believing the evidence before it makes an order. [p. 827, col. 1.]

Criminal revision from an order of the District Magistrate of Mainpuri.

Mr. Sital Prasad Ghose and Uma Shalker Bajpai, for the Applicants.

Mr. R. Malcomson, Assistant Government Advocate, for the Crown.

JUDGMENT.—The five appellants Hakim Singh, Dal Singh, Gandharp Singh, Hukam Singh, and Khem Singh have been ordered to furnish security under section 110 of the Code of Criminal Procedure. All five are *thakurs*. Hukam Singh and Dal Singh reside in one village, the other three in another village. Hukam Singh and Dal Singh have been represented by Mr. Bajpai, whilst the other three applicants have been represented by Mr. Sital Prasad Ghose. They were separately represented in the Court below also. I have gone carefully through the evidence on both sides. The learned District Magistrate in confirming the order of the Court below

says:—"There is no doubt that the Magistrate has admitted a great deal of evidence which was quite inadmissible, for instance, the evidence of suspicions without any tangible ground having been stated for these suspicions, also second hand evidence or mere hearsay about what some person told another person and that person not being produced as a witness and so forth." He then proceeds to say that in dealing with the evidence for the prosecution, he will eliminate all such evidence. All the applicants are possessed of some *zemindari* and cultivation. Of course, it by no means follows that because a man is the owner of some *zemindari*, he is not a *badmash*. At the same time the fact that he has some property and position ought to be taken into consideration when dealing with a person under the provisions of section 110. The evidence, in my opinion, given in the Court of first instance, was very unsatisfactory and very vague. The statements were made against all seven persons who were then charged in a "lump." Witness after witness says "all these persons are bad characters." The Magistrate ought to see that the witness is really speaking and has reason for speaking against each. If I were trying the case as a Court of first instance, I hardly think that I would feel justified, on the evidence, in binding the accused over under section 110; at the same time I must bear in mind that this is not the Court upon whom rests the responsibility of administering the provisions of section 110, I can only deal with the case in revision. Accordingly unless I can find some substantial grounds for thinking that the Court below has gone astray, I ought not to interfere. In the present case, I think such grounds do exist. The Court below has wiped out all the evidence that was given on behalf of Hukam Singh and Dal Singh simply because it was of opinion that the *thakurs* had held a *panchayat* in connection with this case. It seems to have thought that it necessarily follows that the evidence given in support of the good character of the applicants was false because it was the result of a *panchayat*. No doubt it might happen that the *thakurs* would take up the case of the accused and come to a decision to support them at all hazards, quite irrespective of the merits. On the other hand, it might very well be that the

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thakurs of the neighbourhood might have reason to think that their fellow-castemen were not being fairly treated and that all that they did, was to lend support to witnesses ready to come forward and to speak the truth. I have a great dislike to lay down any hard and fast rule as to how cases under section 110 should be dealt with. Each case should be dealt with on its own facts and circumstances. I think, however, one rule may very safely be laid down, and that is this. Where proceedings under section 110 are taken against a person and he is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention to such evidence. I do not mean to say that it should necessarily be believed, but the Court should find substantial reason for not believing the evidence before it makes an order. *Badmashes* who happen to be rich or influential may, of course, be able to procure false evidence as to their character. But speaking generally, I think a person who really is a notorious bad character would find considerable difficulty in getting a large number of his neighbours to come forward and speak to his good character. In the present case, after carefully reading the judgments of both the Courts of first instance and of the District Magistrate, I am of opinion that proper attention has not been paid to the evidence which all of the five applicants adduced. Under the special circumstances of this case, I think that the order both of the Magistrate and of the District Magistrate should be set aside. I accordingly allow the application, set aside the order of both of the Courts below and the accused will be released if in custody. If they have given security, such security will be cancelled.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 570 OF 1915.
(TAKEN UP NO. 51 OF 1915.)

November 16, 1915.

Present:—Mr. Justice Abdur Rahim and
Sir William Ayling, Kt.

In re GOVINDARAJA PADAYACHI—

ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 517
(1)—*Order as to disposal of property, when to be made*
—*Order, whether justifiable when no offence committed.*

A Court can pass an order under section 517 (1) of the Code of Criminal Procedure as regards the disposal of property only if it appears that an offence has been committed with respect to it, or that it has been used for the commission of an offence. [p. 827, col. 2; p. 828, col. 1.]

Where, therefore, an accused was found to be a habitual thief and was bound down for good behaviour, but it did not appear that any offence had been committed with respect to the property in dispute which the accused claimed as his own:

Held, that no order could be passed under section 517 (1) of the Criminal Procedure Code as to the property. [p. 828, col. 1.]

Application for revision of an order in Criminal Appeal No. 23 of 1915 on the file of the District Magistrate, Tanjore, from an order in Miscellaneous Case No. 8 of 1915 on the file of the first Class Magistrate of Mayavaram.

Mr. P. R. Grant, for the Government.

ORDER.

ABDUR RAHIM, J.—In this case, the accused is found to be a habitual thief and has been bound down for good behaviour. Certain properties, a sum of Rs. 32-2-0, some jewels and a silk towel were found in his possession. The Magistrate who originally tried the case, ordered that the property should be returned to the accused, as it did not appear to him that any offence had been committed with respect to the property and as the accused claimed the property as his own. The District Magistrate, however, ordered that the property should be confiscated to the Government, acting under section 517 (1) of the Criminal Procedure Code. But that section empowers him to pass an order as regards the disposal of the property if it appears that any offence has been committed with respect to it or that it has been used for the commission of an offence. There is no finding here that an offence has been committed or that it appeared from the record that an offence has been committed with respect to

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it. Therefore, section 517 (1) has no application in the case and the District Magistrate's order is not covered by that section. His order must, therefore, be set aside and the Sub-Divisional Magistrate's order should be restored, directing that the property be returned to the accused.

AYLING, J. —The accused claims the property as his own. There is no evidence as to ownership. I do not think that this is a case in which it can be said that it appears that an offence has been committed in respect of the property; and it is only on that ground that the District Magistrate would be justified in passing the order he did. I agree with my learned brother in the order proposed.

Petition allowed; Order set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE NO. 757 OF 1915.

September 9, 1915.

Present:—Sir Henry Richards, Kt.,
Chief Justice.

EMPEROR—APPLICANT

versus

RAM DAYAL AND OTHERS—OPPOSITE PARTY.
Penal Code (Act XLV of 1860), s. 379—Theft—Dishonest removal of property out of another man's possession to be proved.

Before an accused can be found to be guilty of the offence of theft, it must be found that he dishonestly took some property out of the possession of another person.

Where a tenant believing that a legal distraint had been made by his landlord of the crops of his holding which had been previously attached in execution of a decree against him cut and removed the crops:

Held, that the tenant was not guilty of theft inasmuch as he could not be said to have dishonestly taken the property out of the possession of any other person.

Criminal reference made by the Sessions Judge of Budaun.

Mr. R. Malcomson, Assistant Government Advocate, for the Crown.

JUDGMENT.—It appears that a decree was obtained against certain tenants. The *karinda* of the landlord purported to distraint the crops which had been attached in execution of the decree. The cultivators then cut and carried away the crops. They were charged under section 379 with having committed theft and sentenced to one month's rigorous imprisonment each. The

learned Sessions Judge, on the matter coming up before him in revision, thought that the fact that the landlord had distrained the crops, made this subsequent cutting and taking away of the crops by the accused lawful. He considered that this would be so, notwithstanding that the distraint might have been more or less collusive between the landlord and his tenants. He, therefore, thought that the accused were wrongly convicted. The learned Magistrate has explained that in his opinion, distraint having been made by an agent who was not authorised in writing, was illegal, and that, therefore, the illegal distraint could not justify the removal of the crops. The learned Sessions Judge points out that the distress was held to be lawful by the Revenue Court. In my opinion, it is unnecessary to decide whether or not the distress was lawful. A landlord who has rent due to him is entitled to distraint notwithstanding that the result of the distraint may be in whole or in part to defeat the execution of the decree. Before the accused could be found to be guilty of the offence of theft, it must be found that they dishonestly took the property out of the possession of another person. If the present accused believed that a legal distraint had been made by their landlord and in such belief cut and removed the crops, I do not think that they could be said to have "dishonestly" taken the property out of the possession of any other person. The accused, of course, are entitled to the benefit of any reasonable doubt and I think it may very well have been that the accused in the present case honestly believed that the distraint had been made by their landlord. I set aside the convictions and sentences passed upon the accused. If they are in prison, they will be released. If they are on bail, they and their sureties will be released.

Conviction set aside.

RAMAMANI V. KANAKASABAI.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 274 OF 1915.

CRIMINAL REVISION PETITION NO. 240
OF 1915.

November 16, 1915.

Present:—Mr. Justice Abdur Rahim and
Justice Sir William Ayling, Kt.

RAMAMANI—ACCUSED NO. 2—

PETITIONER

versus

KANAKASABAI—COMPLAINANT—

RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 520—
Powers of High Court as to disposal of property.*Section 520 of the Criminal Procedure Code gives
a High Court ample powers to pass any order as
to disposal of property which may be just on the
facts of the case.Petition, under sections 435 and 449 of the
Code of Criminal Procedure, 1898, praying
the High Court to revise the order of the
Court of Session of Ramnad Division at
Madura, in Criminal Miscellaneous Petition
No. 79 of 1914, presented against that of the
Sub-Divisional First Class Magistrate of
Devakottai, in Miscellaneous Case No. 57 of
1914.

Mr. T. Rangachariar, for the Petitioner.

Mr. K. Pandalai, for the Respondent.

The Public Prosecutor, for the Government.

ORDER. - It is unnecessary for us to
decide whether the Deputy Magistrate could
have reviewed his order directing that the
jewels should be given over on the joint
receipt of the mother and the daughter, who
are the disputants in this case. After that
order was passed, a competent Civil Court
has decided in a suit instituted by the
mother that the jewels belonged to the
daughter, who is the petitioner before us.
That being so, there is no merit in support of
the application made to the learned Sessions
Judge asking him to set aside the Deputy
Magistrate's order, who in conformity to the
decision of the Civil Court had passed the
second order directing that the jewels be
returned to the petitioner. We have got
ample powers under section 520 of the
Criminal Procedure Code to pass any order
which may be just on the facts of the case.
There can be no doubt that justice requires
that the jewels should be returned to the
petitioner. That being so, the order of the

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learned Sessions Judge will be set aside and
the jewels will be returned to the petitioner.*Petition allowed; Order set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 635 OF 1915.

September 23, 1915.

Present:—Sir Henry Richards, Kt.,
Chief Justice.

KALKA PRASAD—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 222
(2), 223—Misjoinder of different charges at one trial,
legality of—Penal Code (Act XLV of 1860), ss. 409,
477A.*The charge against the accused was that he, being
the *tahsildar*, embezzled a certain sum of money
and further that he omitted to enter 120 *acchials*
with intent to defraud, and wrote on three of
such *acchials* false numbers with like intent. He
was tried at one trial, for all these counts and con-
victed under sections 409 and 477 A, Indian Penal
Code.*Held*, that there was misjoinder of the various
charges amounting to an illegality which vitiated the
trial. [p. 830, col. 2.]Criminal appeal from an order of the
Sessions Judge of Banda.Mr. Peary Lal Banerji (with him Mr. K.
N. Agate), for the Appellant.

Mr. Lalit Mohan Banerjee, for the Crown.

JUDGMENT.—Kalka Prasad was charged
with offences under sections 409 and
477A of the Indian Penal Code. He was
sentenced to seven years' rigorous imprison-
ment under section 409 and to three years'
rigorous imprisonment under section 477A
together with a fine of Rs. 4,000, the sen-
tences to run concurrently. Kalka Prasad has
appealed and it has been argued on his
behalf that there was a misjoinder of char-
ges, contravening the provisions of section
223 of the Code of Criminal Procedure,
which provides that (save as therein
mentioned) there shall be a separate charge
for every offence and that every such charge
should be tried separately. The charge in
the Court below against the accused was

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that he being the *tahvildar* embezzled a sum of Rs. 3,991-7-11 and further that he omitted to enter *arzrisals* Nos. 1-120 with intent to defraud, and wrote on three of such *arzrisals* false numbers with like intent. The allegation is that it was his duty when receiving money, to take a form of tender from the person paying him the money. This document is called an *arzrisal*. He has to enter in his book the particulars contained in the *arzrisal*. It is alleged that in order to cover his defalcations he omitted to make these entries in respect of *arzrisals* Nos. 1-120, and that with like intent, he put false numbers on three of these documents. It is contended on behalf of the accused that while having regard to the provisions of section 222 (clause 2) of the Code of Criminal Procedure, it is allowable in the charge to state the gross sum which has been misappropriated, there is no similar provision which permits more than three charges under section 477A to be joined together. It is contended that the accused (if the allegations of the prosecution are true) committed a separate offence every time he omitted to enter the particulars of each one of the *arzrisals* in his book. It is further contended that the joinder of the count for misappropriation with the count for falsification, is contrary to law inasmuch as the charge or charges under section 477A are connected with alleged defalcations more extensive than the charge under section 409. Reliance is placed upon the recent ruling of their Lordships of the Privy Council, in which it was held that the joinder of charges in contravention of the provisions of section 233, is something more than an irregularity and vitiates the trial. I think the contention has force. Supposing in the present case there had only been charges under section 477A, it seems to me that there would have been a misjoinder of charges. The omission to enter the particulars of the *arzrisals* in the book of the accused, was for the purpose of concealing the alleged misappropriation of a distinct sum in each case. As the law stands, only three such offences can be joined and tried at the same trial. In this respect charges under section 477A, differ from charges under section 409. I do not think that section 235 applies. The case was not that of making a number of false entries in

various books, etc., to conceal one misappropriation. No doubt there was a similarity in the acts alleged to have been committed by the accused, and it is alleged that the transactions all took place within three days. Nevertheless, it seems to me that if the accused did what he was charged with, he committed a separate offence on each occasion for which he was liable to a separate conviction and sentence. Notwithstanding that I consider that the accused was in no way prejudiced by the way in which the charges were framed, nevertheless, there was in my opinion an illegality which vitiates the trial. I accordingly allow the appeal, set aside the conviction and sentence and direct that there be a new trial after charges have been framed according to law.

Appeal allowed; Re-trial ordered.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 585 OF 1915.

(CRIMINAL REVISION PETITION NO. 468 OF 1915.)

November 26, 1915.

Present:—Mr. Justice Phillips.

PAMPALLI SUBBAREDDI AND OTHERS—
ACCUSED—PETITIONERS

versus

CHAUDUBOYIGARI KAMAL SAIB—

COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 203—Order dismissing complaint not set aside—Subsequent complaint on same facts, whether can be entertained by another Magistrate.

The fact that an order dismissing a complaint under section 203 of the Criminal Procedure Code has not been set aside, is no bar to another Magistrate entertaining a subsequent complaint on the same facts. [p. 831, col. 1.]

Queen-Empress v. Dolegobind Das, 28 C. 211; 5 C. W. N. 169, followed.

Emperor v. Chinna Kaliappa Gounden, 3 Cr. L. J. 274 (F. B.); 1 M. L. T. 31; 16 M. L. J. 79; 29 M. 126; *Mahomed Abdul Mennon v. Panduranga Row*, 28 M. 255; 2 Weir 247; 2 Cr. L. J. 752 referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the

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Court of the Deputy Magistrate of Jammalmadugu, in Calendar Case No. 52 of 1915, entertaining the complaint against the petitioners which was originally dismissed by the Stationary Sub-Magistrate of Jammalmadugu, in Calendar Case No. 113 of 1915.

Mr. K. Subba Reddy, for the Petitioners.

The Public Prosecutor, for the Government.

Mr. K. Kotti Reddi, for the Respondent.

ORDER.—The ruling in *Mahomed Abdul Menon v. Panduranga Row* (1), is in favour of petitioners' contention that when a complaint has been dismissed under section 203, Code of Criminal Procedure, no Magistrate can entertain the same complaint until the order of dismissal is set aside by a competent authority. This view was overruled in *Emperor v. Chinna Kaliappa Gounden* (2) so far as entertainment of a complaint a second time by the same Magistrate is concerned, and the principle on which the case in *Emperor v. Chinna Kaliappa Gounden* (2), was decided is applicable also to a case taken up a second time by a different Magistrate. It is clearly explained by Sir Francis W. Macleann, C. J., in *Queen-Empress v. Dolegobind Das* (3) and I entirely agree with the reasoning.

In this case, therefore, I hold that the Sub-Divisional Magistrate had jurisdiction to entertain the complaint and dismiss this petition.

Petition dismissed.

(1) 28 M. 255; 2 Weir 247; 2 Cr. L. J. 732.

(2) 3 Cr. L. J. 274; 29 M. 126 (F. B.); 1 M. L. T. 81; 16 M. L. J. 79.

(3) 28 C. 211; 5 C. W. N. 169.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 461 OF 1915.

November 10, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Scott-Smith.

KHUSHI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 24—Statement made

under promise of pardon retracted—Want of corroborative evidence—Conviction, whether legal—Criminal Procedure Code (Act V of 1898), s. 339 (2).

In the absence of corroboration in material particulars, it is not safe to convict on a retracted confession, unless, from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine. [p. 832, col. 2.]

Where, therefore, an accused retracted a statement made by him under promise of pardon, which so far from being corroborated by any other evidence whatsoever, was contradicted in important particulars by other prosecution evidence, and where the accused was convicted on such a statement

Held, that the conviction was bad. [p. 832, col. 2.]

Appeal from the order of the Sessions Judge, Gujranwala, dated the 30th April 1915, convicting the appellant.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellant.

Mr. Jai Gopal Sethi, for the Government Advocate, for the Respondent.

JUDGMENT.—This is an appeal by Khushi who has been convicted by the Sessions Judge, Gujranwala, of the murder of Ghulam Muhammad, *lambardar* of Ghagoki, on the 16th December 1913 and has been sentenced to transportation for life. Allah Jowaya and Hayat were also tried along with the appellant, but were acquitted by the Court below.

In this case, a conditional pardon was given to Khushi by the District Magistrate, Major Coldstream, who recorded his statement on the 23rd December 1913. In that statement, Khushi gave a full account of how the murder was committed and implicated Allah Jowaya, Hayat and Rahman, son of Mehra. When the case came before the Committing Magistrate on the 7th January 1914, Khushi retracted his previous statement and said that he made it on account of having been ill-treated by the Police. His pardon was accordingly revoked and the statement made by him on the 23rd December 1913, has now been taken in evidence against him under section 339 (2), Criminal Procedure Code.

It is unnecessary for us to recapitulate the facts which are fully set forth in the

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judgment of the learned Sessions Judge. It is sufficient to say that the main evidence against the appellant and his co-accused was (1) track evidence, (2) evidence as to the finding of the body, and (3) the presence of blood on the clothes of Allah Jowaya and Hayat. As to the track evidence, there is a conflict and the Sessions Judge remarked that he could attach but the slightest value to that evidence. As to the finding of the body, it has been pointed out in the judgment of the Sessions Judge that it is not clearly proved that any of the accused gave the clue which led to the recovery of the body. On the contrary, it appears that Fazal Dad and Rahman, son of Massu, who are said to have disposed of the body after the murder, gave the clue which led to its discovery. The final result arrived at by the Sessions Judge is that there is no reliable evidence against Khushi, except the statement recorded by Major Coldstream on the 23rd December 1913 which was retracted by him at the earliest opportunity thereafter. The Sessions Judge remarks towards the end of his judgment that "the onus lies heavily on Khushi to show why his retracted statement should not be accepted as true". We are not prepared to accept this view of the law. It has been held by several High Courts that such a retracted statement should not be accepted unless there is something to show that it is true.

Mr. Shafi on behalf of the appellant has cited numerous rulings which show how reluctant the High Courts in India and this Court are to convict an accused person upon a retracted confession which is uncorroborated by other evidence, and argues that *a fortiori* the Court should not convict upon a statement made by an accused person under a promise of pardon subsequently retracted, a statement which would not be admissible as a confession by reason of section 24 of the Indian Evidence Act inasmuch as it was induced by a promise of pardon. In *Jawan v. Emperor* (1), the previous rulings as to the value of retracted confessions were examined and certain propositions were laid down.

The 4th of these is that "experience and common sense show that, in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless, from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine". We accept this proposition and think it would be very unsafe in the present case to maintain the conviction of Khushi, which is based upon his retracted statement uncorroborated by any other evidence whatsoever.

Not only is his statement not corroborated, but the evidence of Fazal Dad, Rahman, son of Massu, Pira and Umra, who were called as witnesses by the Court, contradicts it in important particulars. We find ourselves quite unable to say whether Khushi actually took part in this murder or not. He does not appear to have had any strong motive such as Allah Jowaya and Hayat are said to have had, but he was suspected from the very beginning and may have known something about it. Under the circumstances, he may have thought that the making of such a statement was the best way to ensure freedom from Police annoyance and from a long detention in the lock-up pending a judicial investigation.

We, therefore, accept the appeal and setting aside the conviction and sentence acquit Khushi and direct that he be released from custody.

Appeal accepted; Accused acquitted.

(1) 25 Ind. Cas. 634; 30 P. R. 1914 Cr.; 261 P. L. R. 1914; 15 Cr. L. J. 626; 50 P. W. R. 1914 Cr.

VISWANATHASWAMI NAIKER v. KAMULU AMMAL.

MADRAS HIGH COURT.

CIVIL APPEAL No. 118 of 1906.

October 26, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Srinivasa Aiyangar.T. B. K. VISWANATHASWAMI NAIKER
—PLANTIFF—APPELLANT

versus

KAMULU AMMAL AND OTHERS—DEFEND-
ANTS Nos 1, 3 to 7, 9 to 13, 15 to 22,

AND LEGAL REPRESENTATIVE OF THE

DECEASED DEFENDANT No. 14—RESPONDENTS.

Custom, allegation as to, nature of—Issue as to custom, contents of—Pleadings in India—Practice—Issue, ambiguity as to, when can be raised—Hindu Law—Joint family—Impartible zemindari—Members living separately in different houses in same compound, how far evidence of division—Separate possession and enjoyment of property and discontinuance of allowances by zemindar, if evidence of partition—Inheritance—Succession to impartible zemindari—Illegitimate son, widow and step-brother of deceased, contest between—Preference—Separate property of zemindar—Illegitimate son and widow, if share equally—Release by mother of Hindu minor—Consideration inadequate—No independent advice—Absence of dispute—Validity of release—Family settlement—Custom—Gandharva form of marriage, if valid among Kambala caste—Illegitimate son, right of, to share in his father's property in Kambala caste—Illegitimate son, share of, measure of.

Though, as a general rule, a party who relies upon a custom, must allege it with distinctness and certainty, it is not possible or desirable in India in all cases to pin down the parties to the precise form of their pleadings. [p. 834, col. 2.]

The mere fact that a defendant did not object to witnesses for the plaintiff giving evidence in support of a custom set up in a case, does not estop him from objecting to similar evidence being given by another witness on a subsequent date on the ground that it was "beyond the scope of the case in the face of the wording" of the issue on the point. [p. 834, col. 2.]

As a matter of scientific pleading, an issue in a case regarding a custom set up therein and the allegations in the plaint on which the issue is based, ought to contain particulars of the custom upon which the plaintiff seeks to rely at the trial. [p. 835, col. 1.]

Though in cases where an issue is ambiguous and capable of a wider as well as a narrower interpretation and the parties have, in their conduct of the case in its earlier stages, interpreted it in the narrower sense, they will not afterwards be permitted to contend at the latest stage of the case that the wider interpretation ought to be followed; yet where the contention is raised at an earlier stage, it is desirable to give the parties an opportunity of contesting the case upon the wider interpretation of the issue. [p. 835, cols. 1 & 2.]

Ma Wun Di v. Ma Kin, 35 C. 232; 3 M. L. T. 93 (P. C.); 10 Bom. L. R. 41; 18 M. L. J. 3; 12 C. W. N. 220; 7 O. L. J. 12; 5 A. L. J. 63; 14 Bur. L. R. 3; 4 L. B. R. 175; 35 I. A. 41, distinguished.

Separate living of different branches of a joint Hindu family in different houses in the same compound is no evidence of division among the branches. It does not inevitably follow from separate possession and enjoyment of property that the family is divided, nor does discontinuance of allowances which have been paid to members of his family by a zemindar justify that conclusion. [p. 838, cols. 1 & 2; p. 843, cols. 1 & 2.]

Where the last holder of an impartible zemindari belonging to a joint Hindu *Sadri* family died leaving behind him a widow, an illegitimate son and his step-brother:

Held, that so far as the zemindari was concerned the illegitimate son was excluded by the brother of the deceased zemindar but that as regards the separate property of the zemindar not forming part of the zemindari, the illegitimate son was entitled to share equally with the widow. [p. 840, col. 1; p. 841, cols. 1 & 2; p. 849, col. 2.]

Pacithi v. Thiruvallai, 10 M. 334, followed.

The mother of a Hindu minor, purporting to act as his guardian, relinquished his claim to a zemindari which was of considerable value, on receipt of comparatively insignificant properties. It did not appear that she had obtained any legal advice as to the right of the minor to the zemindari. At the time this arrangement was made, there was no active dispute or question raised as to the minor's title to the zemindari.

Held, that the release was not binding on the minor as it was beyond the powers of the guardian and that it was not valid even as a family settlement. [p. 840, col. 1; p. 844, col. 2.]

There is no custom obtaining among the Kambala caste excluding an illegitimate son from inheriting property which would devolve upon him under the ordinary law. [p. 848, col. 2.]

A plaintiff suing for exclusive possession of a zemindari can be given a decree for the share he may be found entitled to in the separate property of the zemindar. [p. 840, col. 2; p. 845, col. 1.]

(Per Miller, J.) *Quere*.—Whether the *gandharva* form of marriage is regarded as legal by the custom obtaining among the people belonging to the Kambala caste? [p. 837, col. 1.]

Ramasami Kamaga Naik v. Sundaralingasami Kamaga Naik, 17 M. 422, referred to.

Per Abdul Rahim, J.—The *gandharva* form of marriage is not valid among the Kambala caste people. [p. 842, col. 2.]

Where a certain caste among the Hindus has long given up a particular irregular form of marriage and has been consistently adopting other more regular forms, the Courts are not obliged to recognise the validity of the obsolete form in that caste. [p. 842, col. 2; p. 843, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Madura (West), dated the 14th day of October 1905, in Original Suit No. 31 of 1902.

FACTS.—The suit was for the recovery of possession of the zemindari of Bodinayakanur with all its appurtenances,

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on the ground that the plaintiff, as the son of the late *zemindar* by a woman who was married to him in the *gandharva* form (which form of marriage was customary among the *Kambala* caste to which the *zemindar* belonged), was entitled to succeed thereto in preference to the widow and the step-brother of the deceased. The claim was resisted *inter alia* on the grounds that the plaintiff's mother was not legally married by the late *zemindar* but was only kept as his concubine, that she belonged to quite a different caste, that it was not customary in the caste to marry a woman in the *gandharva* form, that the plaintiff was only an illegitimate son of the late *zemindar* and as such, was not entitled to succeed to the *zemindari* and its appurtenances, that the late *zemindar*, by his last Will and testament, had bequeathed the *zemindari* and his other properties to the 1st defendant, that during the plaintiff's minority, his (the plaintiff's) mother, acting as his guardian and in consideration of certain properties received by her on his behalf, had released whatever rights he might have had in the *zemindari* in favour of the widow and that the suit was in consequence not sustainable. The Subordinate Judge of Madura, who tried the case, dismissed the suit. The plaintiff appealed.

[This appeal was first heard by Sir Charles Arnold White, Chief Justice, and Ayling, J.].

JUDGMENT.

WHITE, C. J.—We have had some doubt as to what is the proper course for us to adopt in this case. But we have come to the conclusion that it is desirable that we should have before us, in dealing with the appeal, the evidence which the learned Subordinate Judge thought he ought to exclude with reference to the custom which the plaintiff sought to establish at the trial of this suit. Now it may well be, as Mr. Visvanadhier, the learned Subordinate Judge before whom the case came in its earlier stages, observed in his order of the 22nd July 1904, that the custom referred to in paragraph 4 of the plaint, could not be construed as referring to the custom which the Judge describes in the

earlier part of his order. If we turn to the plaint, we find certain allegations of fact in paragraph 3, but no allegation as to the legal results that flow from these facts if the facts were established by evidence. We have no reference to the custom in paragraph 3. In paragraph 4, we have a reference to an alleged custom obtaining among the caste and to an alleged custom obtaining in the *zemindari*. And, as I have said, it may very well be that the custom which was present to the mind of the Pleader who drafted this plaint, was a custom as alleged in paragraph 4, and not a custom in connection with the allegations made in paragraph 3.

No doubt, as a general rule, a party who relies upon a custom must allege it with distinctness and certainty. Speaking for myself, however, I do not think it is possible or desirable in all cases in this country to pin the parties down to the precise form of their pleadings. If we were to deal with this question, having regard to the precise form of the pleadings, I feel bound to confess that one would have considerable difficulty in adopting a view different from that taken by Mr. Visvanadhier.

When we turn to the course which events took at the trial, we find that the 18th witness for the plaintiff on the 8th April 1904, gave evidence in support of the custom upon which the plaintiff now relies and no objection was taken to that evidence. On the 14th July, another witness gave evidence in support of the custom and no objection was taken to it. It was not until the 15th July, when the 26th witness for the plaintiff gave evidence that 'a *Kambala* can take as his wife a virgin without marriage rites', that objection was taken on behalf of the 1st defendant to the admissibility of this evidence on the ground that it was "beyond the scope of the case in the face of the wording of the second issue" and that objection was upheld. I do not suggest, of course, that because the defendant did not object to the evidence of the witness given in April, he was estopped from objecting to the evidence to a similar effect given by another witness in July. But it seems to me, in deciding whether in the exercise of the discretion we shall have this further evidence, it is

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material to observe that some two months before the evidence was given to which the defendant objected, evidence was given in the suit to the same effect without any exception being taken to it on behalf of the defendant. Now the actual form of the second issue as it now stands is:

"Whether the arrangement set up in paragraph 3 of the plaint is true, and whether such an arrangement in the absence of the factum of marriage, will give the 1st defendant, the status of a wife."

It is common ground that the expression 'factum of marriage' means ceremonies—marriage ceremonies in connection with the alleged marriage. As I observed, I have no doubt as a matter of scientific pleading, this issue and the allegation in the plaint on which the issue is based ought to have contained particulars of the custom upon which the plaintiff sought to rely at the trial. There can, I think, be no question that the words in themselves are wide enough to render evidence of the alleged custom admissible. Mr. Srinivasa Aiyangar, who contended that we ought not to interfere with the order made by the Subordinate Judge, referred us to a recent appeal to the Privy Council from Burma, *Ma Wan Di v. Ma Kin* (1), and he called our attention to an observation made by their Lordships on page 242 with reference to a similar question. The observations are in these terms:

"Whether the third issue in the suit was, in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct of the case, have construed it in the narrower sense of assuming the existence of a marriage."

As Mr. Rangachariar pointed out, this case cannot be regarded as on all fours with the case before us, because in the Burma case, it was at the latest stage of the proceedings that the question came before the Privy Council—the question as to whether the parties could treat an issue as having a certain meaning and whether it was capable of that meaning in view of the fact that the issue had been construed

in another and narrow sense at the earlier stage of the proceedings. But here the question has arisen at an earlier stage, namely, on appeal before us from the decision of the Subordinate Judge declining to admit certain evidence.

On the whole, we have come to the conclusion that it is desirable that the plaintiff should have an opportunity of adducing the evidence which the learned Subordinate Judge thought he ought to exclude. The case will, therefore, go back to the Subordinate Judge for a finding on the following issue:

"Is there a custom among the *Kambala* caste which would create the relationship of husband and wife without any marriage ceremony by the mere fact of a *Kambala* taking a virgin of another sect into his family as his wife and treating her as his wife, and which would give their offspring the same rights as those of the offspring of a couple who have gone through a marriage ceremony."

The plaintiff will be at liberty to adduce additional evidence and the defendants will also be at liberty to adduce evidence with regard to this issue.

Our order is, of course, without prejudice to the question as to the validity of the custom, if proved. The findings should be returned in six weeks and seven days will be allowed for objections.

AYLING, J.—I agree.

[In compliance with the above order the Subordinate Judge of Madura returned a finding that the custom set up, namely, of a *Kambala* bringing a virgin of another caste and living with her as wife and treating her as his wife, was neither a definite nor an ancient one, was not proved to be regarded as a proper one by the community, and was not plural or uniform and that he was unable to accept the nine instances referred to before him as sufficient to prove a custom, as instances of such unions having been challenged and recognized were almost wanting.]

[The appeal was then heard by Miller and Abdur Rahim, JJ.]

JUDGMENT.

MILLER, J.—The appellant is the son of the late *zemindar* of Bodinayakanur who

(1) 35 C. 232 (P. C.); 3 M. L. T. 93; 10 Bom. L. R. 41; 18 M. L. J. 3; 2 C. W. N. 220; 7 C. L. J. 112; 5 A. L. J. 63; 14 Bur. L. R. 3; 4 L. B. R. 175; 35 I. A. 41.

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died on the 15th of December 1883. The principal question which we have to decide is whether his mother Karuppayee, the 4th defendant in the suit, was married to the *zemindar* or not. The Subordinate Judge has found that she was not married, and I concur in that conclusion. It is conceded that there were no marriage ceremonies performed; it is conceded that there are ceremonies ordinarily in use in the *Kumbala* caste to which the *zemindar* belonged. The lady was a lady of a different caste—of the *Marava* caste—the daughter—so far as we know—of an agriculturist who lived in the town of Bodinayakanur. It is conceded that there is a secondary form of marriage which in *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik* (2), was found to be a legal marriage in this caste in the Saptur *zemindari*; and it is conceded that that form of marriage was not made use of on the occasion of the union of the *zemindar* and the 4th defendant. What is alleged is that there was a marriage by mutual consent of both parties. The lady said that she would not go and live with the *zemindar*, if he did not make her his wife, and the *zemindar* agreed to take her as a wife. Now it was suggested—and a finding was called for on the point—that by the custom of the caste to which the *zemindar* belonged, such an agreement amounts to a lawful marriage. The Subordinate Judge has found against the existence of the custom, and we are not asked to reverse that finding. So we have it that there is no custom of the caste by which marriage by mutual consent is marriage; and we are driven to look in the law laid down in *Shastras* for some form of marriage by mutual consent which might be applied to this case. But it is necessary first to find that the agreement alleged by the lady is proved, and I am unable to differ from the Subordinate Judge's finding that that agreement is not proved. Immediately after the *zemindar's* death, steps were taken by the Collector of the District, as is usually the case on such occasions, to ascertain facts in relation to succession

and so forth, of the *zemindari*. On that occasion, as Exhibit I shows, this lady, the 4th defendant, made no claim of any sort to be the wife of the *zemindar*. The Tahsildar in the Deputy Collector's presence took a statement from her, in which she did not say she was the *zemindar's* wife, and before the Collector, she made no claim of any sort to succession on behalf of her son. Now it seems to me that that could hardly have been her attitude at that time, if, as a matter of fact, some years before she had insisted on being made a wife before she would consent to enter the palace at all. Consequently, it seems to me that Exhibit I and also Exhibit II, in which she did not hesitate to describe herself not as a wife, but as *bhogastri*, are strongly against the alleged agreement. No doubt, it is suggested that the term "*bhogastri*" found in Exhibit II may be used to denote a married woman or wife and that was so in the Saptur *Zemindari* case: *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik* (2). But here it seems to me that the lady's own evidence shows that she did not regard this word *bhogastri* as meaning a wife. She would resent being called *bhogastri*. It is pretty clear that at the time of the *zemindar's* death, she made no claim of any sort to be his wife.

Now as to the evidence in support of the agreement, the agreement is supported by evidence which I cannot regard as of any very great value. The plaintiff's 1st witness who was employed in the *zemindari*; the plaintiff's 2nd witness who is the 4th defendant herself; the plaintiff's 4th witness who is the 4th defendant's cousin; the plaintiff's 5th witness who was a servant of the *zemindar*; the plaintiff's 6th witness who was also a servant of the *zemindar*—those are the persons who allege this agreement between the *zemindar* and the 4th defendant, and none of them, it seems to me, is a person who can be trusted in this matter. The plaintiff's 1st witness might have known the circumstance when he was a store-keeper under the *zemindar*, but he is not a person entitled to special credit, and there is no doubt that there

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are ways of obtaining evidence, in suit of this kind as in others, which have to be taken into consideration in judging the credibility of witnesses. The 2nd witness is the 4th defendant herself, and I am afraid that her statement on the subject cannot be relied on, having regard to Exhibit I and seeing how deeply interested she is in the result. The 4th witness is her cousin and the 5th witness is a petty servant of the *zemindar* whose evidence cannot be said to be of very great value. The 6th witness is a servant of the *zemindar* of, perhaps, some higher status; but he is also a defaulting tenant of the 1st defendant: and that might have induced him to give evidence for the plaintiff. So that there is no direct evidence of any very great value on this point—none, certainly, sufficient to counteract that afforded by the strong fact that the lady never alleged a marriage at the time at which she might have been expected to do so, when upon it depended the right of her son to succeed as the son of the *zemindar* immediately after his death. So that, I have no hesitation in finding that that agreement is not proved by this evidence. That being so, it is unnecessary to say whether I should have to hold that the *gandharva* marriage by mutual consent, would be a legal marriage between the *zemindar* and the 4th defendant. There was no such marriage. The lady was taken into the palace under circumstances which have not been proved by any direct evidence, unless I accept the defence evidence that she was abducted without the knowledge of her family, but it is unnecessary for me to say anything about that.

The lady not being married, the case of her son, the plaintiff, must be treated upon the footing that he was the illegitimate son of a continuous concubine of the *zemindar*.

Then we come to another question of fact which is to be decided, and that is whether the family of the *zemindar* was divided or not. It is perhaps really not necessary to decide it; because if the family were divided, then it seems to me, on the decision in *Parvathi v. Thirumalai* (3), the plaintiff

would be excluded by the widow; if the family were not divided, then it seems to me our decision must be that the plaintiff would be excluded by the 5th defendant. However, the Subordinate Judge has gone into the question, and it may be desirable to decide it on the evidence. I am of opinion, that it has been rightly decided by the Subordinate Judge that division is not made out. But before I go on to say anything about this evidence, I ought to refer to some evidence on the question of marriage which I forgot to deal with just now: some circumstantial evidence relied upon by the plaintiff. Once we find that the terms of an agreement are not proved by the direct evidence, and that there is no custom in the caste of marriage by mere consent, then circumstantial evidence cannot go far to prove such a marriage in this case. The evidence is evidence of treatment of the 4th defendant and her son, mostly during the life of the *zemindar*, and might no doubt, standing alone, be used as an indication of a legally valid marriage in due form. But we know that there was no marriage in due form, that is, in any of the customary forms in the caste, and the evidence of treatment could only go to show that the *zemindar* and his people believed that his union with the 4th defendant was a valid marriage. Considered in that light, the evidence of treatment is really of no great value in this case. But I may say generally that I agree in the finding of the Subordinate Judge that it does not show what it is intended to show. The plaintiff could show no more than that he was treated with affection and his mother was treated with affection and consideration by the *zemindar* during his life-time, and there is nothing incompatible in this evidence with the position of the lady as a favoured concubine and the mother of the *zemindar*'s only son. Two circumstances to which the Subordinate Judge refers—circumstances which occurred after the death of the *zemindar*, the alleged putting of new clothes upon the 4th defendant immediately after the *zemindar*'s death and the throwing of earth upon the grave by the plaintiff—might point to the recognition of the 4th defendant by the family as the widow of the *zemindar*, but upon these points, there is a conflict of evidence, and it is not

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satisfactorily proved that either of those things was done, and even the circumstantial evidence is not all in the plaintiff's favour. We find that in the *zemindari* accounts, the lady is referred to simply by her name 'Karuppayee' and not with any of the courtesy titles which, the Subordinate Judge points out, are usually accorded in the *zemindari* documents to the wives of the *zemindars*. So all the circumstances are not in her favour; and on the whole, as I have said, I can attach little value to this evidence as evidence of the agreement which forms the only marriage alleged.

Now to return to the question of division, it is not alleged that any partition of the property was made at any particular time. All that was alleged are certain circumstances such as separate residence and separate holding of property by different branches of the family. The branches lived in different houses but in the same compound. That, I think, is not evidence of division. Then it is said that they owned separate properties of the *zemindar*; but all that that means, so far as I understand the evidence, is that some members of the family held, under the Court of Wards or under the *zemindar*, portions of the *pannai* lands, not as having been divided into shares as their own property, but as lessees. That could hardly prove division. There are two judgments in suits to which the 1st defendant was a party and in which she alleged division, and the Judge then held that the *zemindar* was divided from his uncles. It was to the interest of the 1st defendant to allege it then, and I do not think those judgments are of any very great value in this case. On the other hand, there is Exhibit 42 which shows that there was no division at its date, *viz.*, the 1st November 1862. One member of the family, Vadamalai Muthu Naiker, was living separately, and the others were all living together as one family. That was in 1862, and there is no evidence of any partition thereafter. Surely, if there had been a partition among the various branches of the Bodinayakanur *Zemin* family after 1862, there must have been some record of it. Then it is said that allowances which had been given by the *zemindar* to members of the family, were withheld by him in some cases. There is evidence suggesting that the *zemindar*

was displeased with his relations, and he might have withheld the allowances on that account, and the fact that they did not go into Court and sue for them, seems hardly to justify the conclusion that there must have been a division long before, though it may be some evidence in favour of it, is not enough to turn the scale in the plaintiff's favour. And, further, supposing that the evidence of separate holding of lands were taken in favour of the plaintiff as showing division of those lands (though I think that is not so here), even then that would not be enough to show that as regards the *zemindari* itself, there was a division. There is certainly no evidence in this case that there was any division of the *zemindari*—that the *zemindari* was made to form a share of the family property before that time and was allotted to any one branch of the family—or that in any way, there was a separation in regard to the enjoyment of the *zemindari* among the co-parceners. The Subordinate Judge has examined the documentary evidence and he has come to the conclusion that there was no division. His judgment is full on the subject and it is not necessary that I should discuss those documents in detail. Once it is shown—and I think it is shown by Exhibit 42—that there was no division in 1862, it seems to me that much stronger evidence than we have in this case, is wanted to show that a division was made between the co-parceners after that time.

Holding, then, with the Subordinate Judge, that there was no division, it remains to be seen what is the position of the plaintiff as the illegitimate son of the *zemindar* in an undivided family. Now there is a decision in *Parvathi v. Thirumalai* (3), which is directly in point. There it was held that in the case of impartible property, the widow excludes the illegitimate son, and where the property is separate property, both the widow and the illegitimate son would be entitled to have a share in such property. Now the contention on behalf of the appellant was that that decision was shaken by the decision of the Privy Council in *Jogenra Bhupati Hurrochundra Mahapatra v. Nityanand Man Singh* (4).

In a later case in this Court, no doubt it was said that that decision was somewhat shaken, inasmuch as it expressed some doubt as to the correctness of the decision in *Jogendro Bhuputi v. Nittetunul Mun Singh* (5), which was upheld by the Privy Council. That it has ever actually been overruled, is certainly not the case, and in this Court in *Karuppa Goundan v. Kumarasami Goundan* (6), it was pointed out that the Privy Council case might properly be confined to its own facts, the case of the succession of an illegitimate son to the share of his legitimate half brother. There was a legitimate son and an illegitimate son of the same father and the Privy Council held that they were co-parceners. But in *Karuppa Goundan v. Kumarasami Goundan* (6), it was pointed out that the decision stopped there and need not be extended so as to involve a co-parcenary in the other collateral relations. Now *Karuppa Goundan v. Kumarasami Goundan* (6) is a case which is binding on us, and, if I may say so, it seems to me, that it is a proper interpretation of the Privy Council's decision, and that their Lordships did not intend to decide anything that was unnecessary for the purpose of deciding the question before them. Then we have some decisions of this Court as regards collaterals, that the illegitimate son is not entitled to succession in competition with them. There is the case to which I have referred and *Gopalasami Chetti v. Arunachellam Chetti* (7), which, no doubt, is a case of partible property. But I shall show at once that that can make no difference.

So far as joint family property goes in this Presidency, the decision in the Privy Council case does not prevent us from following the decisions of this Court that an illegitimate son is excluded by his father's co-parceners. Now Mr. Rangachariar contends that we ought not to treat the property as joint property, but that since the decision in *Sartaj Kuari v. De raj Kuari* (8), an impartible *zamin* has come to be held to be the

separate property of the *zamin*, and we must so treat it; the *zamin* in this case descends by lineal primogeniture, and the plaintiff, though illegitimate, is a son; and it is only in the absence of sons that we need look for any other heir; on these grounds, we ought to decide that the son is entitled to succeed to his father in preference to the widow or co-parceners. But the rule, as I understand it, when we have to look for the heir to an impartible *zamin*, is to see what the law of succession would be if the property were partible, with reference to the nature of the property, as ancestral or separate, and choose the successor accordingly, and if the successors would be the whole joint family, select one of the members by applying the rule of primogeniture, or whatever it be, applicable to the particular case. Now if that is so,—no decision has been cited to us which shows that it is not,—if we are to have regard to the nature of the property and see what would happen in the case of partible property, then there can be no doubt, according to the decisions of this Court, that the plaintiff is excluded by his father's co-parceners. All the cases which have been cited to us by Mr. Rangachariar as showing that there is no co-parcenary, properly speaking, in a case where the property is impartible as indicating that we ought to treat this as the separate property of the *zamin*, do not, in any way, deal with or depart from the rule which is to be adopted in looking for a successor to the *zamin*. There is, it may be, no real, at any rate, no effective co-parcenary in the case of an impartible estate, no effective interest in any collateral member of the family during the life-time of the *zamin*. That may be the effect of the cases, but they do not, in any way, interfere with the rule that when you have to look for a successor, you should find a person to succeed who would be one of the co-parceners if the property were partible. Now if this property were partible and the family joint, the 5th defendant would succeed. If it were separate property, the 1st defendant would succeed [*Parrathi v. Thirumalai* (3)]. Consequently without going into all the cases which were cited, there is really no doubt that the plaintiff must, as the illegitimate son of the

(5) 11 C. 702.

(6) 25 M. 429.

(7) 27 M. 32.

(8) 10 A. 272; 15 I. A. 51; 5 Sar. P. C. J. 139; 12 Ind. J. 219.

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emindar, be excluded from succession by the 5th defendant. The suit must fail so far as that goes.

There is another question. There was a question raised, whether the plaintiff is bound by a release executed by his mother (Exhibit II). That is a question raised on behalf of the respondent in bar of the plaintiff's claim. On the finding that his claim to the *zemindari* fails, it is only necessary to discuss the question of release in view of another question, whether he may be entitled to share in certain property which is alleged not to form part of the impartible *zemindari*. The release was made by the plaintiff's mother, the 4th defendant, on his behalf during his minority, and by it, she gave up all claims to anything in the *zemindari* and all the properties forming part thereof. She gave it up on his behalf in consideration of the allotment to him of certain land, a small amount of property compared with the *zemindari*. It is not shown that the lady had any independent advice in the matter. It was suggested that there was one person, the defence witness No. 20, who was her adviser; but he does not say so, and there is no suggestion that she had any other. On the other hand, we have it, the persons who drew up the document, are persons employed by the 1st defendant. So that it seems to me that it is very difficult to agree with the Subordinate Judge that this was a *bona fide* settlement by the family of family disputes or matters about which there were likely to be disputes. I think it will have to be held that the act of the 4th defendant was not binding upon her son and that the release is not a bar to the claim made by him to the *zemindari*.

The remaining question is whether there is any property left by the *zemindar* which is not part of the *zemindari*. If so, it seems to me on the decision of this Court that the plaintiff, the illegitimate son of the *zemindar*, is entitled to share it with the 1st defendant. We should have to find that it is separate property of the *zemindar* and not property of the joint family, and that it was not incorporated in the *zemindari* at the time of the *zemindar*'s death. Now in the plaint in the suit, the plaintiff did not claim a share; he claimed the whole and did not add an alternative prayer that, if he is not found

entitled to succeed to the *zemindari*, he might be given a decree for a share in the property which does not form part of the impartible *zemindari*; and on this ground the Subordinate Judge has held that he cannot be allowed a share by the decision in this suit. I think that that is not right. There is really no reason why the plaintiff should not be given his share if he is found entitled to it. A more difficult question, to my mind, is, whether he has any title. That was not made an issue until after the close of the evidence and during the argument. But the question was raised before that—at any rate, the question was raised whether there was any property which does not form part of the impartible *zemindari*. On this point, the parties put in statements, but no issue was framed at that time. It is not easy to say definitely that evidence was not let in on this question, or that any evidence which could have been let in, was excluded. But at the same time, inasmuch as there was no issue—before the evidence was closed—I think it difficult—it is unsatisfactory to make an attempt—to decide a question so large as this, upon evidence which it is not clear was all the evidence which would have been led to the issue. Consequently, I think that it will be necessary to admit further evidence upon this question.

A further question arises, whether, if the plaintiff can be given a share, he is not bound to bring in all the property which has been allotted for him under the release, and of which he is in possession. That question depends somewhat upon evidence as to whether that property was allotted to him by the release or had been given to his mother for him by the *zemindar*, and if the latter, on the circumstances under which it was given. In considering the issues which I propose to send down, the Subordinate Judge can deal with this matter.

Having given the matter the best consideration I can, I think that it is desirable to have the assistance of the Subordinate Judge upon it and he will be requested to record findings upon two issues, namely, (1) whether any of the property in suit, and if so, what property, is the separate property of the *zemindar* and not part of the impartible *zemindari* and if so, (2) to

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what share (if any) is the plaintiff entitled in it or any part of it.

I think that fresh evidence may be called as to the questions of fact which arise on those two issues. Two months' time will have to be allowed for findings and seven days for objections.

ABDUR RAHIM, J.—I have arrived at the same conclusion. This suit was instituted by the plaintiff, who is the appellant before us, in the Court of the Subordinate Judge of Madura West to recover the *zemindari* of Bodinayakanur. His claim is that he is the son of the late *zemindar* who died in 1888, and as such entitled to the property.

One of the principal questions that are raised by the appeal, is whether the plaintiff is the son of the *zemindar* as claimed by him. It is alleged that his mother, the 4th defendant in the suit, was married to the late *zemindar* in the *gandharva* form of marriage and it is urged that this form of marriage is valid, according to Hindu Law, in the *Kambala* caste to which the *zemindar* belonged. The Subordinate Judge, in a very full and exhaustive judgment, has found that the plaintiff is, in fact, the son of the late *zemindar*, but he says that he is his illegitimate son as there was no marriage between the 4th defendant and the *zemindar*. There can be no doubt on the facts that the plaintiff's mother was introduced into the palace of the *zemindar* while she was very young and that she lived with him till he died and the plaintiff was born to her. The form of marriage which is alleged to have been gone through according to the plaintiff, was this, both the parties, that is, the *zemindar* and the 4th defendant, who is of the *Maravar* caste and of humble extraction, agreed that they would live as husband and wife, that the latter should be regarded as the legal wife of the *zemindar*, and that she accordingly lived with the *zemindar* in the capacity of a wife. As regards the arrangement under which the 4th defendant came to live with the *zemindar*, I think the judgment of the learned Subordinate Judge is right, that, in fact, there was no agreement on the part of the *zemindar* to accept the 4th defendant as his wife and that she lived with him merely as a concubine. The

learned Vakil for the appellant has challenged this conclusion mainly upon certain circumstances which, he says, furnish strong evidence that the 4th defendant must have been living in the palace as a wife and not as the *zemindar's* concubine. All those circumstances are carefully considered by the learned Subordinate Judge and I think that neither any one of them in particular, nor all of them taken together, are such as can be said to be less consistent with the plaintiff's mother consenting to live with the *zemindar* as his concubine rather than as his wife. No doubt, the late *zemindar* treated the 4th defendant, so far as it appears from the evidence, with affection. He apparently took her about to temples and wherever he went on journeys. He gave her accommodation in a part of the palace where his own mother used to live and some other female relations of his, had their quarters. The plaintiff's mother was also allowed a separate cooking establishment and at the plaintiff's birth, certain ceremonies were performed. It also appears that in a certain photograph which was taken of some members of the *zemindar's* family the plaintiff, who at the time was quite a child, was included in the group. On the other hand, there is a very significant circumstance which goes against the case of the plaintiff. The plaintiff's mother is described in the accounts of the *zemindari* merely as "Karuppayee", that is, by her bare name without any such title as is customarily given to ladies of the *zemindar's* family. The plaintiff himself is described merely as "Thambi". The Subordinate Judge, in my opinion, rightly relies on this fact as showing that, although the plaintiff's mother enjoyed the protection and affection of the *zemindar*, she was not regarded by him or by his officials as his legitimate wife. Also as regards the oral evidence which is adduced in support of the arrangement put forward by the plaintiff, I think the Subordinate Judge has taken the right view. This evidence consists of the testimony of a number of persons who cannot be said to be disinterested and certainly are not people who can be implicitly relied upon to speak the truth. The Subordinate Judge rightly remarks that the fact that the 4th defendant's mother and other female relations of hers did not

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accompany her to the palace at the time she was first taken there, must be taken as considerably discounting the evidence of the witnesses who were cited to prove the alleged arrangement. On the other hand, there is evidence of certain witnesses for the defendant, including her Pleader, that at or about the time, the 4th defendant was taken to the palace, there was a criminal complaint lodged by certain relations of hers charging the *zemindar* with abduction. The case apparently came to nothing, as the enquiry showed that the 4th defendant went to the palace willingly and there was no abduction. But what is absolutely conclusive against the case of the plaintiff is the conduct of the 4th defendant herself after the *zemindar's* death. There was an inquiry held by the Collector as to who were the heirs of the *zemindar*, and the 4th defendant did not, at the time, put forward any claim on behalf of herself as his married wife, or on behalf of her son as the heir of the *zemindar*. It is inconceivable that if she was conscious that she occupied the status of a legal wife, she would not have asserted that position at once. On the other hand, in the statements that were taken at the time, the 4th defendant is described as "*Bhogastri*". Admittedly, this description is not ordinarily applied to the wives of *zemindars*. No doubt, Mr. Rangachariar contends that "*Bhogastri*" may simply mean an inferior sort of wife, but the evidence of the 4th defendant herself on the point rather tends to support the case of the defence that "*Bhogastri*" means only a concubine and not a wife. It was really not until the institution of this suit, which, it may be mentioned, is financed by a number of strangers, that a claim was put forward by the 4th defendant that she was married to the late *zemindar* and the plaintiff was his legitimate son. I, therefore, agree with the Subordinate Judge that the arrangement alleged by the plaintiff under which his mother lived in the palace has not been proved.

This is sufficient to conclude the case of the plaintiff so far as the question of legitimacy is concerned. But there is a further question which has been discussed by the Subordinate Judge and which has also been argued before us, namely, that even if

the alleged arrangement were proved, it would not, in law, amount to a valid marriage. It is not necessary to discuss this question at any length, but having heard the matter fully discussed at the Bar, I wish to express my clear opinion that the agreement set up by the plaintiff, even if proved, would not amount to a valid marriage in Hindu Law. I do not desire to consider the question whether the *gandharva* form of marriage requires any right or ceremony or not. My opinion is that if this amounts to *gandharva* form of marriage, it has not been shown that such marriages are valid in the caste to which the late *zemindar* belonged. It may be that the ancient Hindu Law texts allowed much greater latitude to *Sudras* in the matter of marriage than to the higher castes or rather to the *Brahmins*, and that perhaps among the *Kshatriyas*, the *gandharva* form of marriage has, even within recent times, been recognized as prevalent in some parts of India. But if this form of marriage were valid among the *Sudras* or rather in the caste to which the late *zemindar* belonged, I should have expected some evidence to be forthcoming as to its being in vogue among them. Mr. Rangachariar did not refer to any such evidence, and, as a matter of fact, the evidence, so far as it goes, shows that the *gandharva* form of marriage has long ceased to be practised, if it ever prevailed, in the *Kambala* caste. He admitted that there was a regular form of marriage, or rather two forms of marriage, one of a superior and the other of an inferior character, prevalent in the *Kambala* caste. Supposing, therefore, for argument's sake, that the *gandharva* form of marriage would, according to the ancient texts, be permissible among the *Sudras*, I am of opinion that, so far as this caste is concerned, it must, upon the evidence in the case, be held to be obsolete and no longer recognized as valid. Mr. Rangachariar has strongly contended that if ancient Hindu Law texts sanction this form of marriage, we must hold that it is valid. But I am not inclined to accept that position. If I find that a certain caste among the Hindus has long given up this form of marriage, and this is shown by their consistently adopting other more regular

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forms, I do not think that we are still obliged to recognize its validity in that caste.

The position, therefore, is this. The plaintiff is the illegitimate son of the last *zemindar*, and the question remains, whether, as such, he is not entitled to succeed to the *zemindar* in preference to the 1st defendant, the widow of the *zemindar*, or the 5th defendant, his cousin. With reference to this matter, we have to ascertain whether the family of the late *zemindar* was divided or not. Upon this point, the Subordinate Judge has discussed the evidence at great length, and I have no hesitation in saying that his conclusion that the family remained joint, must be adopted. Mr. Rangachariar does not allege that there was any formal division at any particular time, but he only points out certain circumstances from which he asks us to conclude that there must have been a division of the family. The circumstances he relies on, are, mainly, that since about 1884, some members of the *zemindar's* family, the uncles and cousins of the *zemindar*, held separate properties and had separate dealings in respect of those properties and with the exception of one uncle, the others have not been receiving any allowance or maintenance. He also relies upon certain observations in the judgment in a suit between one Kulasekara, an uncle of the *zemindar*, and the present 1st defendant to the effect that the plaintiff therein was divided from the *zemindar*. But none of those circumstances, to my mind, really compel us to come to the conclusion that the family was divided. It is perfectly clear from the documents exhibited in the case that up to at least 1862, all the members of the family lived together, though not in the same building, in the same compound. They received allowances and were treated in every other respect as members of the co-parcenary. Even the Court of Wards, when it had the management of this estate, treated the family as joint, and if there had been a separation after 1884 or 1862, surely there would have been evidence forthcoming as to that. In the absence of that evidence, from the mere fact that some of the members of the family had separate property or cultivated

some family lands, it does not follow that there was any alteration in the joint status of the family so far as the *zemindari* is concerned. The discontinuance of allowances to some of the co-parceners since 1884 was apparently due to the fact that they had quarrelled with the *zemindar*. As regards the observation in the judgment to which I have referred, not much importance can be attached to it as the question of division or non-division was not in issue in that suit. If, therefore, the *zemindar* and his uncles and cousins were members of one joint Hindu family, then, I think, it must be held that the plaintiff has no title to the *zemindari* as against 5th defendant. It is argued on behalf of the appellant that, according to established law, the holder of an impartible *zemindari* has absolute power of disposition over it and, therefore, we must treat the question of succession on the basis of the *zemindari* being the separate property of the *zemindar*. I do not think that that conclusion at all follows. All the decided cases lay down that, for the purpose of finding out the heir to an impartible *zemindari* where the *zemindar* was a member of an undivided family, we have to look to the co-parcenary. That is to say, we have to see who would be entitled to the property if it were the case of an ordinary partible joint family property. It may be that for purposes of enjoyment and disposition by the *zemindar* for the time being, the *zemindari* stands, to a great extent, on the same footing as the private property of the *zemindar*; but with that we have nothing to do. We have before us only the question of succession, and for that purpose we must treat the *zemindari* as ordinary joint family property if the *zemindar* remained undivided from his co-parceners. Then the question arises, can the plaintiff be said to be a co-parcener just as a legitimate son would be and as such entitled to succeed to the *zemindari* which is descendible by the rule of primogeniture? Upon that point, the weight of authority is against the plaintiff, at any rate so far as this Presidency is concerned. The illegitimate son of a *Sudra* is, no doubt, not one of the twelve kinds of sons mentioned in the Mitakshara, Chapter I, section II. He is not a

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sapinda of his natural father and cannot demand a share in the family property during his father's life-time. In the *Mitakshara*, Chapter I, section 12, his case is treated as a special case, and all that that section lays down is briefly this. The father may, if he chooses, give a share to his illegitimate son; on his death the illegitimate son is entitled to half the share of the legitimate son, he is also entitled to a share along with the daughter's son; and it has been ruled that upon a proper interpretation of the text, the illegitimate son does not exclude the widow or the daughter. I think the text clearly indicates that the illegitimate son is not a member of the co-parcenary to which his putative father belonged. Much reliance is, however, placed upon the ruling of the Privy Council in *Jogendra Bhupati Hurrochundra Mahapa'ra v. Nityanand Mar Singh* (4), but all that this decision lays down is that, where a man has left a legitimate son and an illegitimate son, on the death of the legitimate son, the illegitimate son succeeds him by survivorship, because, as I understand the decision, the text of the *Mitakshara* already alluded to gives him a share along with the legitimate son of his natural father and thus a co-parcenary is thereby created between these two. It has also been decided that if the legitimate son dies leaving a son of his own, that son will take his father's share. But I find no warrant for extending the scope of the Privy Council ruling so as to hold that an illegitimate son is a co-parcener along with his father's uncles and cousins. On the other hand, in a series of cases in this Court it has been held that the text of the *Mitakshara* relating to the illegitimate sons of *Sudras* only applies to separate property and not to property belonging to a co-parcenary. [See *Krishnayyena v. Muttusami* (9), *Ranoji v. Kandoji* (10), *Parvathi v. Thirumalai* (3), *Kuruppa Goundan v. Kumarasami Goundan* (6) and *Gopalasami Chetti v. Arunachellam Chetti* (7). Of these cases *Parvathi v. Thirumalai* (3), which relates to an impartible estate, is directly in point.]

I am, therefore, of opinion that the plaintiff is not entitled to succeed to the

zemindari as against the 5th defendant. Nor, in my opinion, can he oust the widow if the *zemindari* were, in fact, the separate property of the *zemindar*. He clearly occupies an inferior status, not only in comparison with the legitimate son, but also the widow, the daughter and the daughter's son, even if it can be said that he is entitled to an equal share with these persons.

On all these points, therefore, the plaintiff's case fails.

I may mention that the Subordinate Judge has also found that the plaintiff is debarred from claiming the *zemindari* by reason of a release executed by his mother, the 4th defendant, by which she relinquished, on behalf of her son and herself, all rights in the *zemindari* in consideration of having received certain properties from the first defendant. But I am unable to agree with the learned Judge on this point. When the 4th defendant purported, on behalf of her minor son, to relinquish his claim to the *zemindari*, which is of considerable value, on receipt of comparatively insignificant properties, it does not appear that she had obtained any legal advice as to the right of the plaintiff to the *zemindari*. There was no active dispute or question raised as to the plaintiff's title to the *zemindari* and, in my opinion, it would be going too far to say that the arrangement can be upheld as a proper family arrangement. I think, a release of this nature is beyond the power of a guardian and cannot be upheld, unless it is proved that it was executed after careful consideration of the minor's claims.

The only other point which we are asked to decide in the appeal is whether the plaintiff is entitled in this suit to obtain his share in the separate properties of the *zemindar*, supposing he left any. The suit as instituted was one for recovery of the *zemindari* and other properties forming part of the *zemindari* and no partition was asked for in the plaint of any properties which might be found to be the private property of the *zemindar*. It, however, appears that, during the progress of the suit, an issue was raised as to what were the private properties of the *zemindar*,

(9) 7 M. 407

(10) 8 M. 557.

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though even then the question was not distinctly raised as to the right of the plaintiff to a share in those properties. But, apparently, the question was argued and the Subordinate Judge refused to go into the matter only because this was a suit in ejectment, and he was of opinion that the plaintiff could not get any relief in respect of the private property of the *zemindar* in this suit. I do not appreciate the difficulty in giving relief to the plaintiff with respect to the separate property of the *zemindar*. It is not shown that all the parties who would be interested in the decision of such a question, are not before the Court. The state of the record, as it stands at present, is not, however, very satisfactory and I agree with my learned brother that we could not arrive at a satisfactory conclusion without having a proper finding of the Subordinate Judge on the point.

For these reasons, I agree in the order proposed.

[The memorandum of objections preferred by the 1st respondent was next argued.]

JUDGMENT.

MILLER, J.—We have decided that the plaintiff is excluded from the *zemindari* as the illegitimate son of the *zemindar*, and we have intimated our intention to send down to the lower Court questions for finding whether there is any part of the property left by the late *zemindar* in which the plaintiff is entitled to share. Before asking the Subordinate Judge to find upon these questions, it has become necessary for us to consider certain objections taken on behalf of the 1st defendant, the result of which, if accepted in their entirety, would be to exclude the plaintiff even from the separate property.

The objections are two. The first defendant relied upon a Will, which she alleges, was executed by her late husband the evening before his death, by which she took a life-estate in the whole of the *zemindari* and the separate properties: and there was also alleged during the course of the suit a custom by which in the caste to which the late *zemindar* belonged, illegitimate sons are refused a right to succeed to their father's property. The Subordinate Judge has found both points against the first

defendant and the objections relate to them. His decree dismissing the suit, is now sought to be supported on the ground that both those points also ought to have been found against the plaintiff.

I am doubtful whether on a true construction of the Will (Exhibit VI) which is propounded, it could be said that it deals with separate property of the *zemindar* at all. If it does not, of course it is unnecessary for us to consider whether it is genuine or not; but we have heard arguments fully upon the evidence and it may be desirable that we should pronounce our opinion upon the fact.

First then, the first defendant alleges that Exhibit VI is the last Will of her husband. The plaintiff alleges that Exhibit VI is a forgery. The Subordinate Judge has found that Exhibit VI is not proved to be the Will of the late *zemindar*, and he has given in his judgment very full reasons for his finding. He has considered the evidence very minutely and at considerable length; he has dealt with a number of circumstances which have led him to the conclusion that the Will should not be accepted, and I have come to the conclusion that his decision on the point is one with which I ought not to differ. I admit I have come to this conclusion with some hesitation because I have found great difficulty in deciding whether the evidence is sufficient or not to prove the Will; but on the whole, I am satisfied that I ought not to differ from the Subordinate Judge's finding, and I shall shortly state the principal reasons why I have come to that conclusion.

I agree with the Subordinate Judge that on the evidence, the state of the health of the *zemindar* was on the 14th December such that it is difficult to accept the signature in Exhibit VI as the signature which a man in his condition was likely to make, that the *zemindar* was able so late as 5 or 6 in the evening on the 14th December, to make a signature so steady and so strong as that in Exhibit VI—that is a point which we have to bear in mind. Seeing then that the appearance of the Will itself suggests suspicion, we have to look to the circumstances before and after the *zemindar's* death, to see whether it is more likely that he signed

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it or that he did not. The Subordinate Judge is of opinion that there is clear proof on the evidence that the *zemindar* was contemplating making a Will. I am not quite sure that is so. The letter which he received from his legal adviser in Madura, the late Mr. Pole, dated the 9th December, suggests to my mind that until then, at any rate, it was not the intention of the *zemindar* to make a Will. From the letter, I gather that he sent agents to Madura to see Mr. Pole and consult him whether an adoption could be made. He had been ill for some time, he had been in September to Madura for treatment, he returned in November to Bodinayakanur. Then early in December, he appears to have sent agents to Madura to see Mr. Pole, and Mr. Pole in reply to their representation gives his opinion as to adoption and as to the provision to be made for the illegitimate son, the plaintiff, in the event of adoption being made, but he says nothing about the Will. Exhibit XXVIII to my mind clearly shows that he had not considered that question. There is no doubt Exhibit XXIX, a letter written by Mr. Pole's clerk to the manager of the *zemindari* in which he makes some reference to the Will and to himself as executor, was written about the same time. But it may be that the manager consulted the clerk as to the desirability of the form in which the *zemindar* should make a Will in the event of his making one - it may possibly be, the manager recognised that the illness of the *zemindar* was assuming a serious aspect. However that may be, I do not think that Exhibits XXVIII and XXIX suggest that a week before death, the *zemindar* himself had any idea of making a Will. Then there is Exhibit XXXI, letter of the 13th December, which he is said to have sent to the Sub-Registrar of Periyakulam to bring him to Bodinayakanur in order "to register a bond and a Will which I intend doing." We have not the original of Exhibit XXXI. We have only what purports to be an office copy of it written by the *zemindar's* clerk, defence 36th witness, which is suspicious to this extent that it is the last entry in the book that was kept at the time and might have been inserted at any time. The Sub-Registrar's attendance was not procured, the original of the letter which is put in, was not produced and his clerk, the defence 37th witness, says that the original of the letter brought by the

zemindar's servant on the 14th December never came into his office records at all. So apart from the evidence of the defence 36th witness, we really do not know what was actually sent to the Sub-Registrar, or whether whatever was sent was sent by the authority of the *zemindar* or merely of the first defendant or the manager. Secondly, it is difficult to say that this evidence proves, even if we take it that a letter was sent and contained, as Exhibits XXXIV, XXXV and XXXVI would seem to indicate, some reference to the registration of a Will, it is difficult to say that it is proved that the making of the Will was in contemplation of the *zemindar* himself.

That being the state of things as to the *zemindar's* intention to make a Will, it seems to me, there are circumstances which make it improbable that any Will was made. As to what happened on the 14th, we find the accounts (Exhibits WWW) show certain payments to various persons of sums of money on that day and these persons are no doubt the attestors of the Will. I only allude to this because the Subordinate Judge relied on it, but those payments might have been explained if these witnesses had been asked to explain them, but they have not been so asked, and I, therefore, take it that the accounts ought not to be used as evidence against the Will. But there is no doubt that the conduct of the first defendant on the 15th December, immediately after the *zemindar's* death, does give rise to some suspicion. Before her husband's dead body was removed from the house, she made considerable gifts of land—100 *gulies* each, worth about Rs. 200 a *guli*—to a representative of each branch of her husband's family. That suggests undoubtedly that at that time she had some necessity, some need, of securing that they should not attack whatever she might do, and we find, when the Deputy Collector a few days later suggests to them and asks them questions as to the Will, all of them say they do not know whether there is a Will or not. That again suggests that in spite of the gifts to them, they were not prepared to give up entirely any claim there might arise in their favour by denouncing the genuineness of this Will and - I do not say it is strong evidence, but it does suggest that the facts surrounding the production of this Will, were not altogether satisfactory to the relations of the *zemindar*.

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There are only one or two other matters with which I shall have to deal. In Mr. Pole's letter, there is a suggestion for a provision for the plaintiff, the illegitimate son. The Will as propounded makes no provision for him. I think it is unlikely that unless the *zemindar's* agents had put the matter to Mr. Pole, he would have said anything about any provision for the plaintiff in the letter. So that suggests that the *zemindar* was intending a provision for the plaintiff on the 9th December. The fact that the Will contains no such provision, is commented upon by the Subordinate Judge, and in these circumstances, I think rightly, as pointing against the probability that it was a Will made by the *zemindar* himself. A stronger point perhaps is the fact that of all the nine attestors to the Will, there is not one of whom it can be said, he is a person in a position of such independence that it could be said of him that it is highly improbable he would have been a party to a forgery of the Will. On the 14th December—during part of the day at any rate—there were present two *zemindars* at Bodinayakanur, the *zemindars* of Peraiyur and Gantamannaickanur, and it seems to me extremely difficult to believe that at any time during the day when they had been there, one or the other was not asked to attest it. The Peraiyur *zemindar* was a friend of the late *zemindar*, and yet the evidence on behalf of the first defendant is that while he and Gantamannaickanur *zemindar* were away in the afternoon, the Will was made. If the *zemindar* was so strong as the first defendant would have us believe, there is no reason why he could not have waited till their return; if on the 13th, he contemplated the making of the Will, it is likely that he would ask at least one of these two gentlemen to be an attestor. It is suggested that the *zemindars* would not like to attest for fear of having to come to Court to support the Will; and it is suggested that the *zemindar* would like to keep the contents secret from them. But why he should have done so, it is not at all clear to me, and the fear of having to have to support the Will in a Court, does not seem to be a sufficient reason to deter his friends from attesting his Will.

Then there is another thing against the Will, that is, the form of it. If it was the

Will the *zemindar* had contemplated making, if it was, as the first defendant would wish us to believe, copied from the draft of a Pledar of Madura, it is not in a form that one would expect it to be. The Subordinate Judge points out and places a perfectly legitimate reliance on the fact that this Will does not appear to be a copy of a draft which would have been made by a gentleman of what I may call literary competence in the Tamil language. It is not likely to be the work of Mr. Seshier; it is more likely to have been drawn up by some of the servants in the palace; and an extraordinary thing about it is that while Seshier was a Pledar on behalf of the first defendant during the trial, and he was actually summoned to appear as witness, yet he was not put into the box to support the case that he drafted the Will. That is a fact which is very much against the case that he drafted the Will, and, therefore, against the case made by the defendant that the *zemindar* had sent agents to Madura to get a draft of a Will. The Subordinate Judge also points out that there were other persons, the Hospital Assistant who attended on the *zemindar*, one of his relations Choekalinga Asari, persons who might have attested the Will but whose attestation does not appear. Those, I think, are the strongest grounds (there are others relied on by the Subordinate Judge) in the case which make it improbable that the *zemindar* did execute the Will. As to the oral evidence, it is mainly the evidence of the attestors and, as I have said, the attestors are not persons on whose word any great reliance can be placed. The oral evidence on both sides is, it seems to me, unworthy of any great credence—on the one hand, there are the attestors and on the other hand, there are witnesses who say that the *zemindar* was in a state of collapse before the afternoon of the 14th, and that does not seem to be true; but the circumstances to which I have alluded and on which the Subordinate Judge relies are sufficient to throw so much doubt on the Will as to justify me in accepting the Subordinate Judge's conclusion that it is not the Will of the *zemindar*.

The other point raises the question of custom—the question whether by the custom of the *Kambala* caste an illegitimate son

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takes nothing of his father's estate or of the family property. The issue (21st issue) was framed at a late stage of the case after the defence evidence had been recorded: for our purpose, the evidence must be strong enough to show that the plaintiff is excluded by custom, not from the *zemindari* only but also from the partible property which belonged to the *zemindar*. The Subordinate Judge has dealt *seriatim* with all the instances on which reliance was placed to make out this custom. In most of them, he has disbelieved the evidence; he has disbelieved the evidence of some persons on the ground that they came to Court without summons, of others, that they are relations of the first defendant or persons favoured by the first defendant, of others, that they are men of straw. It has not been suggested to us that his appreciation of the evidence is not justified; thus a very large number of the instances to which he refers in paragraph 90 of his judgment, are instances which—though he does not clearly say so in paragraph 91—he holds are not proved, and I think we must agree with him. Then he points out that most of these cases are cases in which the illegitimate sons were provided during the life-time of their father with allotments for themselves: assuming these cases to be true, although it might be that this allotment might not in law prevent them from coming down upon their father's estate for a share after his death, still those are not cases in which the custom is distinctly proved. Because, it may be that the sons were satisfied with what was given them: that does not prove the custom set up. That leaves only a few cases which, as I have said, are for the most part discredited on the ground that the witnesses could not be believed. There is one instance the Subordinate Judge does not seem to disbelieve, that spoken to by the defence 8th witness—he speaks of an illegitimate son not getting any property, but that would be only one instance and would hardly be sufficient to prove a custom. There is another, the 46th witness, an illegitimate son: he says that his father's widow made provision for his maintenance only—but this I find is one of the cases the Subordinate Judge has disbelieved on the ground that the witness attended the

Court without summons. There are not, I think, any other cases of which it can be said that they are clearly cases in which illegitimate sons, by reason of a custom, have been excluded from inheritance of property which must have devolved on them under the ordinary law.

This as to the oral evidence. Then there are two judgments against the custom—judgments in which the custom was alleged but held to be not proved; and there is Exhibit XXIV of 1849 in which a *zemindar* alleged that by the custom of his caste illegitimate sons were not entitled to succeed to a *zemindari*. That is a document which might be valuable, if necessary, to exclude the plaintiff from the *zemindari*, but it is not of any value as we are dealing with the custom in reference to partible property. Considering the Subordinate Judge has disbelieved most of the evidence, he is right in holding that the evidence is not distinct, clear, and sufficient to make out the custom. And as a matter of fact, the custom set up in the written statement was not so general a custom as it was necessary to prove to enable the defendant to exclude the plaintiff from succeeding to the separate property. It is only a custom having reference to the *zemindari*—that was the custom which was set up in the written statement of the 1st defendant: but even that custom was not at first made the subject of a distinct issue. It may be that the 17th issue was intended to include it, as the evidence, the Subordinate Judge has considered was let in by the 1st defendant before the 21st issue was framed, but it is not quite clear to me that the question was properly raised in the suit. Assuming it was, I am prepared to hold that the Subordinate Judge was right in holding the custom was not made out. The effect then of my findings on these two questions raised by the 1st defendant, is that the finding which we agree to call for, will have to be furnished by the Subordinate Judge.

ABDUR RAHIM, J.—I entirely agree that the memorandum of objections fails on the two points raised by it and I have nothing to add to the judgment which has been delivered.

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[The appeal was finally heard after the receipt of the findings by Sir John Wallis, C. J., and Srinivasa Aiyangar, J.]

Messrs. T. Rangachariar, C. S. Govindaraja Mudaliar, C. S. Venkatachariar and N. R. K. Talachariar, for the Appellant.—The learned Subordinate Judge erred in holding that plaintiff was only entitled to a third share in the properties. He ought to have held that he was entitled to share equally with the widow and entitled to half a share. *Vide Ranoji v. Kandoji* (10), *Parvathi v. Thirumalai* (3), *Chinnammal v. Varadarajulu* (11), *Meenakshi Anni v. Appakutti* (12), *Rahi v. Govinda* (13), where the authorities are elaborately considered, and *Shesgiri v. Gireva* (14).

Messrs. S. Srinivasa Iyengar, K. V. Krishnaswami Iyer, T. V. Muthukrishna Iyer, P. Tirumalachariar and R. Padmanabha Chariar, for the Respondent.—The learned Subordinate Judge is right in holding that plaintiff is only entitled to a third share. The original text of Mitakshara is clearly in favour of that view. See Yajnavalkya, Chapter II, section 8, verses 133, 134. See also the commentaries of Vijnaneswara, Apararka and Medhathithi. All these lay down that the illegitimate son is only entitled to a third share. All the Sanskrit-knowing text-book writers on Hindu Law have also construed the text in the same way.

JUDGMENT.—The first question to be decided is whether the plaintiff, as the illegitimate son of his deceased father, is entitled to share equally with his widow, the 1st defendant, or whether he is only entitled to half of her share, i.e., to $\frac{1}{3}$ rd of the properties. In a series of cases in Madras beginning with *Ranoji v. Kandoji* (10), it has been held that an illegitimate son succeeding to his deceased father along with a widow, daughter or daughter's son is entitled to half of the properties and not merely to one-third [*Parvathi v. Thirumalai* (3), *Chinnammal v. Varadarajulu* (11), *Meenakshi Anni v. Appakutti* (12)]. In *Rahi v. Govinda* (13), Chief Justice Westropp elaborately re-

viewed all the texts of Hindu Law dealing with the rights of an illegitimate son and came to the conclusion (as we understand the judgment) that the illegitimate son was entitled to a half share of the properties; and in *Shesgiri v. Gireva* (14), Sargent, C. J., who delivered the judgment of the Court, took the same view and understood the decision in *Rahi v. Govinda* (13) as laying down the same rule. The learned Vakil for the respondent invited us to construe for ourselves the original text of the Mitakshara, which he says is clearly in his favour. He also cited the commentary of Apararka on the text of Yajnavalkya and the commentary of Medhathithi, the well-known commentator of Manu, on the same text. He further contended that all the text-book writers on Hindu Law who knew Sanskrit have construed the passage of the Mitakshara in the way he construes it. Much may no doubt be said in favour of this construction. But the decisions of this Court are not based merely on the interpretation of the text of the Mitakshara. In *Ranoji v. Kandoji* (10), in which the position of an illegitimate son was fully considered, reliance was placed on a passage from the Dattaka Chandrika which states in clear terms that the illegitimate son shares equally with the widow, daughter and daughter's son. It was this very passage of the Dattaka Chandrika which was relied on as authority for not excluding the widow from the succession when there is an illegitimate son, whereas the Mitakshara omits the widow from the category of persons who are not excluded by the illegitimate son. The Dayabhaga, which gives the illegitimate son an equal share with the daughter and daughter's son, was also referred to. In this state of things, we are not prepared to depart from the course of decisions in this Court which hold that the plaintiff is entitled to share equally with the widow.

The next question is whether the last zemindar's step-brother, Vadamalai, was disqualified by reason of insanity from sharing with his brother their father's separate property. Vadamalai, it should be mentioned, who was older than the zemindar but was the son of a junior

(11) 15 M. 307.

(12) 4 Ind. Cas. 299; 33 M. 226; 7 M. L. T. 26; 20 M. L. J. 359.

(13) 1 B. 97.

(14) 14 B. 282.

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wife, did not press his claim to succeed to the *zemindari* in preference to his brother, nor did he, after the brother's death, claim the *zemindari* against the widow. As regards the first point the respondents explain that according to the custom of *Kambala zemindars* the son by the senior wife succeeds to the *zemindari*. As regards the separate property left by their father it is urged that there was no need for a partition as Vadamalai lived with his brother, the late *zemindar*, in the palace, and after his death, went on living with his widow, the 1st defendant, whose sister's daughter he had married. These facts, it is suggested, explain his conduct in not having put forward a claim to the *zemindari* after his brother's death, and at the time of the compromise between the widow and the more distant co-parceners. The mere fact that Vadamalai did not press his claim to the *zemindari* is not, in our opinion, sufficient proof of insanity. On the other hand, we have the fact that he gave evidence in Court in Original Suit No. 15 of 1891 and though subjected to a lengthy examination gave rational answers, and that he married and had issue. On the whole we think the evidence does not establish that Vadamalai was disqualified from inheriting. It follows, therefore, that the late *zemindar's* share in his father's separate properties on his death passed by survivorship to Vadamalai and that the plaintiff has no claim to them. On this ground his claim to the properties mentioned in Exhibit ZZZZZ also fails.

Item 55 of Schedule A, the next item claimed by the plaintiff, is a bungalow in Madura built by the Court of Wards during the minority of the late *zemindar* at a cost of Rs. 60,000 on a site inherited by the *zemindar* and his brother from their father. The 1st respondent contends that either the bungalow became the joint property of the two brothers as the site was joint property, or that it was built as a town residence for the *zemindar* and was intended to pass with the *zemindari*, and that in either view the plaintiff's claim must fail. We agree with this contention.

The 1st respondent objects to items 61, 65 to 69, 73 to 76, 79 to 113, 116 to 118, 120 to 127, 129 to 138, 149, 151 to 177, 185, 221, 248, 249, 254, 285, 308 to 318, 322, 324, 330 to 345, 348, 350, 352, 354 to 357, 359

to 366, 375 to 379, 63, 64, 371 to 374, 380 to 410, 62, 70 to 72, 77, 78, 139, 140, 146, 323, 326, 328, 358, 367, 217, 218, 228 to 231, 247, 252, 259 to 264, in this Schedule A, which have been allowed to the plaintiff. They are lands within the ambit of the *zemindari* and the *zemindar* was entitled to the *melcaram* therein. He purchased the *kudivaram* right in items 61 to 410 and succeeded to the *kudivaram* right in the remaining items on the death of his mother. All these lands were cultivated as *pannai* along with the other *pannai* lands of the estate. They are clearly properties intended to be held with the *zemindari*; in fact they are accretions to the *zemindar's* interest in the *zemindari*. Following the decisions of this Court in *Lakshminipathi v. Kandasami* (15), *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik* (2), *The Ramnad* case (16) we disallow the plaintiff's claim to these items.

The plaintiff also claims items 57, 69, 135 and 136 of Schedule C. Item 57 is a jewel usually worn by women. The 1st defendant swears that the jewel was purchased for her. Considering that at that time the 1st defendant was the only lady in the *zemindar's* family who could have worn such a jewel we are inclined to believe her evidence and disallow the plaintiff's claim to this item. The respondent admits that the plaintiff is entitled to item 69. Items 135 and 136 are loose pearls and rubies and the 1st defendant claims them as her *stridhanam*. She did not set up this claim in Exhibit K and there is only her evidence in support of her claim. We are not prepared to act on it. We, therefore, allow the plaintiff's claim to these two items.

The 1st respondent claims the cattle used for cultivating the *pannai* lands, i. e., items 173 to 203 of Schedule C. The appellant admits that if the *pannai* lands are held to be part of the *zemindari* he would not be entitled to a share in them. As we hold that the *pannai* lands are appurtenant to the *zemindari* we disallow the plaintiff's claim to these items. The plaintiff admits that the 1st defendant is solely entitled to item 231 of this Schedule. The plaintiff

(15) 16 M. 54.

(16) 24 M. 613 at p. 636.

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accepts the valuation given by the 1st respondent for item 229, viz., Rs. 1,300, and will be entitled to his share of this sum and not to Rs. 2,607 as claimed by him. The 1st defendant argues that she ought not to have been made accountable for certain jewels said to have been given by her to her daughter and claims contribution from the partible properties for the expenses connected with her daughter's marriage. This claim was not made in the lower Court and we, therefore, disallow it.

The 1st defendant also contends that the lower Court was wrong in making her liable for items 9, 11, 15 and 17 of Schedule D. Plaintiff's witness No. 48, who was the 1st defendant's manager for a considerable time, says that these items were collected by the 1st defendant. She denies this, but does not produce the bonds which should be in her possession. In these circumstances we agree with the lower Court that she is liable to the plaintiff for his share of these items.

The finding of the lower Court will be modified accordingly.

As the release Exhibit II has been set aside, the plaintiff must deliver to the 1st defendant items Nos. 1 to 3 in Schedule I to that deed as they are *pannai* lands and are, therefore, impartible. In the fourth item and the moveables in the same Schedule he is entitled to a half share and he must account to the 1st defendant for the other half.

The plaintiff and the 1st defendant will pay and receive proportionate costs in the appeal.

The memorandum of objections is dismissed with costs; and the Pleader's fee payable will be on Rs. 1,588-15-0 plus Rs. 541-1-0.

Decree modified.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 28 OF 1914-15 OF
CAWNPORE DISTRICT.

August 18, 1915.

Present:—Mr. Holmes, S. M., and
Mr. Campbell, J. M.

BARMAL SINGH AND OTHERS—DEFENDANTS
—APPELLANTS
versus

SHEO NATH—PLAINTIFF—RESPONDENT.

*U.P. Land Revenue Act (III of 1901), s. 4 (12)—Sale of proprietary rights including *sir* by Hindu widow—Expropriatory rights not allowed—Sale declared null and void on suit by reversioners, effect of, on *sir* land.*

A Hindu widow alienated the property of her husband including *sir*. Three years after the sale she claimed expropriatory rights but her claim was disallowed. On the death of the widow, the reversioners got the sale cancelled:

Held, that the effect of the cancellation of sale was that *sir* rights revived in favour of the reversioners. [p. 852, col. 2.]

Third appeal from the order of the Commissioner of Allahabad Division dated the 16th January 1915, reversing the order of the Collector, Cawnpore District, in a case of correction of papers, under section 39 of Act III of 1901.

JUDGMENT.

HOLMES, S. M.—(August 11th, 1915.)—As it is admitted that the possession of the land was not transferred by the mortgage by Musammatt Rajrani in 1892 this mortgage does not affect the question. In 1899 she sold her proprietary rights to one Narpatt Singh and died in 1906. In 1910 Sheo Nath and other reversioners brought a suit to re-gain possession of the land and redeemed the mortgage. It was decided by the order of the High Court, dated 9th January 1912, that the sale was not binding on the reversioners. Musammatt Rajrani, it is admitted, never took up her expropriatory rights. It is clear then that the second proviso to section 4 (12) of the Land Revenue Act, definition of *sir*, does not apply as Sheo Nath or Musammatt Rajrani was never an expropriatory tenant. The only question is whether the land which was *sir* at the time of the sale ceased to be *sir* as becoming the subject of an expropriatory tenancy, under the first proviso to that sub-section.

The High Court decided there was no justification for the sale and that it cannot be held to be binding on the reversioners,

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The effect of this seems to be that the sale was practically declared null and void from the beginning and that the land in question remained as *sir*.

The only other question to be settled is in how much of the *sir* the respondent should be recorded. The appellants refused to agree to any compromise by which the respondent should be recorded as *sir*-holder in specific plots amounting to one-eighth of the *sir*. The other reversioners it is clear are no longer *sir*-holders and I think the Commissioner has come to a right conclusion that the present respondent must be entered as *sir*-holder in the entire *sir*. The appellants, of course, can sue them for profits.

Appeal dismissed with costs and Rs. 10 Pleader's fees.

(Later.)

The respondent says there is another reversioner who has not parted with his proprietary rights, Sukhbasi by name. The appellants admit this. Sukhbasi's name should be entered as joint *sir*-holder with Sheo Nath. To this extent the order of the Commissioner must be modified.

CAMPBELL, J. M.—I agree.

Order modified.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 442 OF 1914.

October 4, 1915.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Sri Sri Sri RAMACHANDRA MARDARAJA DEO, ZAMINDAR OF KALLIKOTA AND ALLAGADA ESTATE, MINOR, BY NEXT FRIEND, COLLECTOR OF GANJAM AND AGENT TO THE COURT OF WARDS— PLAINTIFF—PETITIONER

versus

DUKKEO PODHANO AND OTHERS—

DEPENDANTS—RESPONDENTS.

Madrass Estates Land Act (I of 1908), s. 3—"Rent," meaning of—Suit to recover rent for land let for building houses—Jurisdiction—"Jerayati" land, meaning of.

Money due for occupation of land let for the purpose of building houses is not "rent" within the meaning of section 3 of the Madras Estates Land Act, and a suit to recover it is cognizable by the Civil and not by the Revenue Court.

The term "*jerayati*" is applied indiscriminately both to "cultivable land" and "*inam* land," and does not necessarily mean land let for agricultural purposes.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Aska, in Small Cause Suit No. 1114 of 1912.

Dr. S. Swaminadhan, for the Petitioner.

Mr. B. Narasimha Rao, for the Respondents.

JUDGMENT.—We think that this is a suit which ought to be tried by a Civil Court and not by the Revenue Court. The suit is to recover a certain sum of money from the defendants who were in occupation of land belonging to the plaintiff, which was let to them for the purpose of building houses. That is the exact language which occurs in the *muchilika* and in the plaint. It is true that in both these documents the land is described as "*jerayati*" land, and it is upon the use of that word that the learned Pleader for the respondents has based his arguments and asked us to say that the defendants are *ryots* and that the land is their occupancy holding and so on. These inferences do not, it seems to us, necessarily arise from the use of the word "*jerayati*". "*Jerayati*" may mean cultivable land but it is also used in this Presidency as opposed to *inam* land.

Section 3 of the Estates Land Act defines rent as meaning "whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture." Here the land was not used or let for the purpose of agriculture. It does not appear that it was ever used for purposes of agriculture. But whatever that may be, it was certainly let for the purpose of building houses, not for agricultural purposes. That being so, the money payable on account of it is not rent within the meaning of section 3 of the Estates Land Act, and the suit is, therefore, cognizable by the Civil Court and not by the Revenue Court. We allow this revision petition and direct the Deputy Collector to forward the plaint to the District Munsif, who will receive it on his file and dispose of the case according to law. The costs will abide the result.

Petition allowed.

ADYA SARAN SINGH V. THAKUR.

VASUDEVAPATTA JOSHI V. NARAYANAPANI GRAHI.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 36 of 1914-15 of

FATEHPUR DISTRICT.

August 18, 1915.

Present:—Mr. Holms, S. M., and

Mr. Campbell, J. M.

ADYA SARAN SINGH—PLAINTIFF—

APPELLANT

versus

THAKUR AND ANOTHER—DEFENDANTS—

RESPONDENTS.

*Agra Tenancy Act (II of 1901), ss. 177 (c), 198—
Ejectment, suit for—Defendant pleading proprietorship
in third person, if question of proprietary title—Appeal
—Jurisdiction.*

In ejectment suits a question of proprietary title arises not only in cases in which the defendant pleads proprietorship in himself, but also in cases in which he alleges that a third person, and not the plaintiff, is the proprietor of the land in dispute and, therefore, an appeal from a decision of a Collector in such a case lies to the District Judge.

Second appeal from the order of the Commissioner of the Allahabad Division, dated the 9th February 1915, reversing that of the Assistant Collector, Fatehpur District, in a case of ejectment.

JUDGMENT.

Holms, S. M.—(August 17th, 1915.)—The appeal from the Assistant Collector's order was lodged before the District Judge. He held that section 177 (c) of the Tenancy Act only applied to suits in which there was a question of proprietary title as between the plaintiff and the defendant, who is alleged to be a tenant, and treated the present suit as turning on section 198 only. In the present suit the tenant did not exactly plead the benefit of section 198, but definitely pleaded that the plaintiff was not the proprietor of the land in suit but that a third person was, and in the tenant's grounds of appeal to the Commissioner he definitely re-stated his position. In this view then the appeal fell under section 177 (c) and should have been to the District Judge. I must hold, therefore, that the Additional Commissioner had no jurisdiction to hear this appeal.

I would, therefore, set aside the order of the Additional Commissioner and direct that the Commissioner return the memorandum of appeal with directions that it should be filed before the District Judge who may

be inclined to review his order. Parties to bear their own costs in this and the Commissioner's Court.

CAMPBELL, J. M.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 688 of 1914.

November 10, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

VASUDEVAPATTA JOSHI MAHA

PATRO AND OTHERS COUNTER-PETITIONERS

—PETITIONERS

versus

NARAYANAPANI GRAHI AND OTHERS

PETITIONERS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 182—
Application for execution by some of decree-holder's
legal representatives not purporting to be on behalf of
others, whether under limitation.*

An application for execution of a decree by some of the legal representatives of a decree-holder is covered by Explanation I of Article 182 of the Limitation Act and saves limitation in favour of all the legal representatives even though it does not purport to be on behalf of all.

Petition, under section 25 of Act IX of 1857, praying the High Court to revise the order of the Court of the Principal District Munsif of Berhampore, in Execution Petition No. 296 of 1914.

Mr. T. Rama Chandra Rao, for the Petitioners.

Mr. V. K. Srinivasa Aiyangar, for Mr. C. S. Venkataswami, for the Respondents.

JUDGMENT.—The only point for determination is whether, an application by some of the decree-holder's legal representatives not purporting to be on behalf of the other legal representatives also is sufficient to save limitation.

No authority has been cited to show that such an application is not covered by the Explanation I of Article 182 of the Limitation Act. The mere fact that the Court would have required the persons applying to give security for the shares of the other legal representatives, will not make an application one not falling under clauses 5 and 6. So far as defendants are concerned *Ramanuj Sewak Singh v. Hingu Lal* (1) decides that

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an application for execution against one of several legal representatives saves limitation and there is no reason why the same rule should not apply when one of the plaintiff's representatives applies for execution. *Ponnampilath Parapravan Kuthath Haji v. Ponnampilath Parapravan Barotti Haji* (2), *Subramanya Chettiar v. Alagappa Chetty* (3) and *Shib Chunder Dass v. Ram Chunder Poddar* (4) are in point.

The District Munsif is right in holding that the application is not barred.

I dismiss the petition with costs.

Petition dismissed.

(2) 3 M. 79.

(3) 30 M. 268; 2 M. L. T. 139.

(4) 16 W. R. 29.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2778 OF 1913.

September 22, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Seshagiri Aiyar.

DUJA BHANDARY AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

VENKU BHANDARI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Malabar Law—Gift of land to wife alone—No words of conveyance to children—Absolute interest—Makkalapaanpya.

Where a husband made a permanent lease of his properties to his wife, the deed containing no words conveying the estate to the children, and the wife executed a deed of gift in respect of the major portion of these properties in favour of her two daughters, one of whom sold some of the properties which fell to her share to a third party; and a suit was brought by the daughters' children for a declaration that the alienation was not binding on them:

Held, (1) that the donor intended to give an absolute estate to his wife; [p. 854, col. 2.]

(2) that the gift by the wife to her daughters conferred an absolute right on them and the plaintiffs had no right to contest the alienation. [p. 854, col. 2.]

Narasamma Hegadthi v. Billa Kesu Pujari, 31 Ind. Cas. 543; 25 M. L. J. 637, followed.

Kunhacha Umma v. Kutti Mammi Hajee, 16 M. 201; 2 M. L. J. 226; *Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veetil Chakkara Kannan v. Varayalankandi Kunhi Pokker*, 30 Ind. Cas. 755 18 M. L. T. 255; 29 M. L. J. 481, not followed.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suit No. 515 of 1912, preferred against that of the Court of the District Munsif of Karkal, in Original Suit No. 317 of 1911.

Mr. B. Sitarama Rao, for the Appellants.

Mr. K. Y. Adiga, for the Respondents.

JUDGMENT.—Defendants Nos. 1 and 2 are the daughters of one Kochu. Plaintiffs Nos. 1 to 4 are 1st defendant's children, 5th plaintiff and 3rd defendant are the children of the 2nd defendant. In March 1876, Kochu's husband gave a permanent lease of the properties in dispute to his wife. Kochu, in her turn, executed a deed of gift in respect of the major portion of these properties in favour of her two daughters, the 1st and 2nd defendants. In 1910, the 2nd defendant sold some of the properties which fell to her share to the 4th defendant. The present suit is for a declaration that the alienation is not binding on the plaintiffs.

We think the Subordinate Judge is right, but not for the reasons given by him. The argument of the learned Vakil for the appellants is that the gift to Kochu by her husband is as *puthrabakasam* property and that the 2nd defendant has no right to alienate it. Reliance was placed on *Kunhacha Umma v. Kutti Mammi Hajee* (1) and on the recent Full Bench decision in *Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veetil Chakkara Kannan v. Varayalankandi Kunhi Pokker* (2). It is conceded that when Exhibit I was executed, the defendants Nos. 1 and 2 were in existence, yet the gift is not made by the father to his wife and children although the words used are *makkalapaanpya*. There are no words conveying the estate to the children. In Exhibit II, Kochu deals with the properties as her self-acquisition. It is clear to our mind that the donor, under these circumstances, intended to give an absolute estate to his wife. In *Narasamma Hegadthi v. Billa Kesu Pujari* (3), a similar gift was construed as conferring an absolute right on the donee. The words (*santhanaparampariah*) in

(1) 16 M. 201; 2 M. L. J. 226.

(2) 30 Ind. Cas. 755; 18 M. L. T. 255; 29 M. L. J. 491.

(3) 31 Ind. Cas. 543; 25 M. L. J. 637.

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the document in that case were appropriate, as the donee was a male, and his heirs, in the absence of a testamentary disposition, would not be his children. In the present case, the donee being a female, *makkalin* is the proper word to denote the course of devolution. We see no reason to extend the principle of the Full Bench decision to this case.

The second appeal is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 6 OF 1914-15 OF
ALLAHABAD DISTRICT.

August 11, 1915.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

MURID—DEFENDANT—APPELLANT

versus

Musammât KASHIA—PLAINTIFF—

RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 4 (11), *cls* (a), (b), (c)—'Sir,' meaning *cf.*

A mere record of certain plots as *sir* in partition is not sufficient to bring them under the category of clause (b) of section 4 (11), which requires the establishment of village custom.

Second appeal from the order of the Commissioner of Allahabad Division, dated the 24th September 1914, reversing that of the Assistant Collector, Allahabad District, in a case of ejectment under section 58 of Act III of 1901.

JUDGMENT.

HOLMS, S. M.—(August 5th, 1915.)—The Pleader for the appellant was unable to show any evidence to support his contention of fact and in fact was inclined to agree that it was wrong. I find, however, that the *patwari* in the connected case, *Musammât Keshia v. Wazir*, stated that plots Nos. 1896 and 2117 were recorded in the *patti* of Ram Sewak as *khud-kasht* of two years in 1282 *Fasli*. The Commissioner, however, noted that no terms of years were given. The appellant says that this appeal does not turn on this point at all so it is unnecessary to clear up the discrepancy. Respondent bases her claim merely on clause (c) of the definition of *sir* and supports

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the Commissioner's finding for this reason. We have got then that Ram Sewak cultivated this land *khudkasht* in 1282 *Fasli* for two years and there is no evidence that he cultivated for longer. Plot No. 1896 was cultivated by *shikmis* in 1286 and 1287, and plot No. 217 by *shikmis* in 1285, 1286, 1292 and 1293, the year of partition. At partition these two plots were recorded as *sir*, although they certainly did not fall under the definition of *sir* in clauses (a) and (b) of section 4 (11) of the Land Revenue Act. I am unable to accept the view that the mere record as *sir* in partition is sufficient to bring land under the category of clause (b), which requires the establishment of village custom.

I would, therefore, set aside the order of the Commissioner and restore that of the Assistant Collector, respondent bearing costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed.

MADRAS HIGH COURT,

APPEAL NO. 252 OF 1914.

September 10, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Seshagiri Aiyar.

KUPPUSAMI REDDI—PLAINTIFF—

APPELLANT

versus

VENKATALAKSHMI AMMAL AND

ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption by Sudras in Dattaka form—Physical delivery and acceptance of child, necessity of.

Among *Sudras* the corporeal delivery and acceptance of the child is the essential part of adoption in the *dattaka* form. An actual adoption solely in pursuance of a previously manifested intention or a previous promise made, is not enough. (p. 856, col. 2.)

Venkata v. Subbala, 7 M. 548; *Subbarayan v. Subbammal*, 21 M. 497, referred to.

Shoshinath Ghose v. Krishnasunderi Das, 7 C. L. R. 313; 7 I. A. 250; 6 C. 381; 3 Shome L. R. 231; 4 Sar. P. C. J. 191; 3 Suth. P. C. J. 812; 4 Ind. Jur. 589; *Breswar Mukerji v. Ardhra Chander Roy*, 19 I. A. 101; 19 C. 452, followed.

Appeal against the decree of the District Court of Cheungleput, in Original Suit No. 56 of 1912.

FACTS.—In one suit the plaintiff claimed as legatee under a Will executed by one Sami Reddi and in the other suit he claimed as the reversioner of Sami Reddi on the ground that

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the adoption of the 2nd defendant, the son of Ramakrishnan an orphan, was invalid in law. The District Judge upheld the Will and decreed the first suit, but he dismissed the second suit on the ground that the adoption was valid. The present appeal is against the decree.

Mr. R. Shadagopachariar (with him Mr. A. Krishnaswami Aiyar), for the Appellant.—In this case it is clear that the adoption was in pursuance of a previous promise made to the adopted boy's father. In *Venkata v. Subhadra* (1) and *Subbarayar v. Subbammal* (2) an adoption in pursuance of a previous promise was held to be valid. When once the view that an inchoate adoption can be perfected years after by the performance of the religious ceremony is held to be valid, there cannot be any decree of incompleteness. In this case, the promise had been made to the father, and the *datta homam* was only performed subsequently.

Mr. T. Narasimha Aiyangar, for the Respondent.—The decisions in *Shoshinath Ghose v. Krishnasunderi Dasi* (3) and *Bireswar Mukerji v. Ardha Chander Roy* (4) clearly show that there must be an actual giving and taking of the boy to be adopted. It is not enough that there should be a manifestation of a mere intention or promise. If this view were upheld, it would lead to dangerous consequences. There must be an actual giving and taking.

JUDGMENT.

SESHAGIRI Aiyar, J.—In the connected Appeal No. 111 of 1914 we came to the conclusion that the Wills set up by the plaintiff and the defendants were not proved. The further question arises for decision in this appeal whether the adoption of the 2nd defendant is valid and whether the gift evidenced by Exhibit VI in his favour is binding on the reversioners beyond the life-time.

The parties are *Sudras* and the adopted boy was an orphan at the time of the adoption. There is no dispute as to the factum of the adoption. The District Judge was of opinion that the father of the adopted boy, Ramakrishna Reddi, himself gave the boy to the deceased Sami Reddi during his life-time and

(1) 7 M. 548.

(2) 21 M. 497.

(3) 6 C. 381; 7 C. L. R. 313; 7 I. A. 250; 3 Shome L. R. 281; 4 Sar. P. C. J. 191; 3 Suth. P. C. J. 812; 4 Ind. Jur. 589.

(4) 19 C. 452; 19 I. A. 101.

that the actual adoption made by the widow of Sami Reddi 10 years later was valid. He relied on *Venkata v. Subhadra* (1) and *Subbarayar v. Subbammal* (2). In the first place, the evidence regarding the physical handing over by Ramakrishna Reddi and the acceptance by Sami Reddi is not satisfactory. Mr. Srirangachariar gives no independent evidence, but speaks to what he heard Sami Reddi say as to what Ramakrishna Reddi told him. This proves very little. Moreover, Exhibit I makes it clear beyond all doubt that no giving took place when Sami Reddi was alive. Even accepting all that has been deposed to, and regarding Exhibit XI (a) as expressing a preference by the deceased in favour of the adoption of one of the sons of Ramakrishna Reddi, the actual adoption solely in pursuance of a manifested intention will not be valid. The Judicial Committee held in *Soshinath Ghose v. Krishnasunderi Dasi* (3) that among *Sudras* "the corporeal delivery and acceptance of the child.....is the essential part of adoption in the *dattaka* form". In the case before the Privy Council, the correspondence that passed between the parties showed that one party offered and the other party accepted the boy. There was no physical delivery or acceptance. Their Lordships held that this proper contract was of no avail. This view has been affirmed in *Bireswar Mukerji v. Ardha Chander Roy* (4). In the present case, Sami Reddi at least made a promise by word of mouth that he would adopt one of the sons of his dying brother. Mr. Krishnaswami Aiyar wants us to extend the analogy of *Venkata v. Subhadra* (1) to this case. His argument is that there cannot be different degrees of incompleteness and if one form of inchoate adoption can be perfected years after by the performance of the religious ceremonies, the manifestation of an intention to adopt a particular boy can be regarded as a step in furtherance of the actual adoption. *Venkata v. Subhadra* (1) decided that if the giving and taking had taken place, the *datta homam* can be performed subsequently. This view may lead to complications. It is not clear whether during this period of suspense, the boy is to be regarded as belonging to the

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natural or adoptive family. Estates might fall in. Is he to have a share in either, in both or none of the estates belonging to the two parties? If the physical act of delivery is part of the same transaction of the *datta homam*, although some little time may intervene between the two ceremonies, the one act can be regarded as supplementing the other. Assuming, however, *Venkata v. Subhadra* (1) to be correctly decided, as to which it is not necessary to express a definite opinion now, we are not prepared to extend it to the case of *Sudra* adoptions. The adoption must be declared invalid. From what has been stated in the connected appeal, it follows that the gift deed (Exhibit VI) is not binding on the plaintiff beyond the life-time of the 1st defendant. The appeal must be allowed and the suit decreed with costs throughout.

WALLIS, C. J.—I quite agree and will only add that I attach very little importance indeed to the oral evidence as to a conversation which took place some seventeen or eighteen years before between Sami Reddi and his brother Ramakrishna. Sami Reddi at that time was married, but his marriage had not been consummated and though his horoscope may have possibly stated that he was not going to have children, I do not think that his faith in horoscopes would have been such as to induce him to make a definite promise to take one of these boys in adoption. I think that at most what passed amounted to no more than this, that he promised that if he had occasion to make an adoption, he would give preference to one of the sons of Ramakrishna Reddi. Therefore, for this reason also I think that the appeal must be allowed and the suit decreed with costs throughout.

Appeal allowed; Suit decreed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCESREVENUE PETITION No. 1 of 1914-15 of
ALLAHABAD DISTRICT.

August 26, 1915.

Present:—Mr. Holms, S. M. and
Mr. Campbell, J. M.

Raja PARTAB BAHADUR SINGH—

DEFENDANT—APPELLANT

versus

ABDUS SALAM AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Agri. Tenancy Act, II of 1901, s. 177—Question of proprietary title—Acquiescence—Appeal.

In a suit for ejectment, the defendant pleaded that he was the proprietor of the fields in dispute or in the alternative that he had at least acquired occupancy rights. The Court of first instance held against the proprietary right but held that the defendant had got occupancy rights. The plaintiff appealed. The defendant raised an objection that no appeal lay to the Commissioner, who held that no question of proprietary title was in issue in appeal as the defendant appeared to have acquiesced in the Assistant Collector's finding, that the proprietary title could not be urged and that the appeal had been filed solely on the point of occupancy tenure.

Held, that as the defendant could not appeal he could not be said to have acquiesced in the finding of the Assistant Collector, and, therefore, a question of proprietary title was in issue and the appeal lay to the District Judge. [p. 858, col. 1.]

Second appeal from the order of the Commissioner of the Allahabad Division, dated the 29th June 1914, reversing that of the Assistant Collector, Allahabad District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(August 25, 1915.)—Section 177 lays down that "in all suits in which a question of proprietary title has been in issue in the Court of first instance and is a matter in issue in the appeal", the appeal shall lie to the District Judge from the decree. The question for decision is, what interpretation should be placed on the words "and is a matter in issue in the appeal". In this particular case the Assistant Collector found against the defendant's claim to be proprietor of the land in suit for reasons which on the face of them seem to be good ones, but he found that the defendant was an occupancy tenant and dismissed the suit for ejectment. Against this the plaintiff appealed to the Commissioner and the defendant had no opportunity of raising his claim to proprietary title before the Commissioner, for the Commissioner held for reasons which are

ICCHAMONI DASÍ v. PROSUNNO KUMAR MONDAL.

not very clear, that he could not raise it, not observing apparently that an appeal could only be against a decree and not against a finding on an isolated issue. The appellant's contention is that when the question of proprietary title is a matter which was in issue before the Commissioner when he heard the appeal, section 177 (e) applies, and that immediately the question was raised before the Commissioner he should stop further proceedings and return the appeal to be filed before the District Judge. This is rather a curious contention and would lead to a good many inconvenient results, one of which might be that when the respondent found all the other points in the case had been decided against him he would then raise the question of proprietary title and get the case sent to the District Judge, who would then have to go afresh into all the points which the Commissioner had practically decided. The other side urge that the words mean that the question of proprietary title must be a matter in issue in the grounds of appeal, and bases this interpretation on the argument that obviously the forum should be without doubt before the memorandum of appeal is filed.

The latter interpretation has the undoubted anomaly of allowing the District Judge to decide a considerable number of appeals in which the question of proprietary title is in issue and leaving a considerable number of appeals in which the question is really in issue to be decided by the Commissioner. No decision of the High Court or of the Board can be found on the question for decision before me. Looking at the undoubted intention of the Act that questions of proprietary title should be decided on appeal by the District Judge and not by the Commissioner, I accept the appellant's contention, and would set aside the order of the Commissioner and direct that he return the memorandum of appeal to the appellant before him to be presented to the District Judge. Costs to follow the event.

CAMPBELL, J. M.—I have discussed this case with my colleague and agree with his finding.

Appeal allowed.

CALCUTTA HIGH COURT.

RULE NISI No. 1121 of 1914.

April 16, 1915.

Present:—Mr. Justice Chapman and
Mr. Justice Newbould.

Srimati ICCHAMONI DASÍ—

PETITIONER

versus

PROSUNNO KUMAR MONDAL AND OTHERS

—OPPOSITE PARTY.

Estoppel—Suit compromised—Sale—Application to set aside—Party compromising suit, if can urge setting aside of sale entirely.

A party who enters into a compromise is not estopped from contending that a sale in the suit, if set aside at the instance of another party, should be set aside in its entirety.

Rule against the order of the District Judge of 24 Pargannahs.

Babu Harendra Krishna Sarbadhicary, for the Petitioner.

Babus Sarat Chandra Roy Chowdhury and Dhienendra Krishna Roy, for the Opposite Party.

JUDGMENT.—We are not satisfied that any question of the exercise of jurisdiction illegally or with material irregularity arises in this case. But it is said that Prosunno having entered into a compromise it was not open to him to file a cross-appeal. It was not contended apparently before the District Judge that Prosunno was estopped. We do not think that he was estopped from taking the argument which was accepted by the District Judge, namely, that if the sale is set aside at all it must be set aside in its entirety.

The Rule is discharged with costs, hearing fee one gold mohur.

Rule discharged.

AMIR-UN-NISSA V. RAM CHARAN DAS.

SAILABALA DEBI V. NRITYA GOPAL SEN PODDAR.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION No. 33 OF 1912-13 OF
ALLAHABAD DISTRICT.

December 3, 1913.

Present:—Mr. Baillie, S. M.

Musammal AMIR-UN-NISSA—DEFENDANT
—APPELLANT

versus

Rai Fahadur Lala RAM CHARAN DAS

AND OTHERS—PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 14,
O. III, r. 1—*Plaint—Signature of authorised agent*
—*Plaint, if valid—Agra Tenancy Act (II of 1901),*
s. 193 (e).A plaintiff signed by the authorised agent of the
plaintiff is valid in law unless it is shown that the
suit has not been instituted with the approval of
the plaintiff.Mahabir Prasad v. Shah Wahid Alam, A. W. N.
(1891) 152, distinguished.Second appeal from the orders of the
Commissioner, Allahabad Division, dated the
10th June 1913, reversing that of the
Assistant Collector, Allahabad District, in
a case of ejectment.FACTS.—The suit was for the ejectment
of the appellant. One of her objections
was that the plaint was defective as it
was not signed by the plaintiff as required
by the Code of Civil Procedure. She
referred to section 51 of the old Civil
Procedure Code, present Order VI, rule 11.
For plaintiff reliance was placed on Order
III, rule 1, and clause (c) of section 193 of
the Tenancy Act for the proposition that the
plaint signed by a recognised agent was
valid. The Assistant Collector held that
an agent is allowed to sign the plaint
only when the plaintiff is unable to do so
for sufficient cause, [*Mahabir Prasad v. Shah*
Wahid Alam (1).]The Commissioner held that the Assistant
Collector was under no obligation to satisfy
himself as to the reason why it was not
signed by plaintiff himself; that the fact
that it was not so signed predicated the
existence of adequate reason *viz.*, absence
or other good cause and the Assistant
Collector was not required to call for proof
of such things; and that the Board's rule
5 in Circular No. 24-II, Part II, authorised
the agent, holding a power-of-attorney, to
sign.

(1) A. W. N. (1891) 152.

JUDGMENT.—I entirely agree with the
Commissioner in this case. The provisions
of rule 14, Order VI, that a plaint should be
signed by the party are subject to the pro-
visions of Order III, rule 1, which allow
any act required by law to be done by a
party to be done by the authorised agent
of that party. There was in my opinion
no reason whatsoever why the Court should
in this case have required the personal
signature of the plaintiff himself. The
ruling by Mr. Justice Knox, *Mahabir*
Prasad v. Shah Wahid Alam (1), refers to
a case in which the plaintiff himself had
no knowledge of the institution of the suit,
and does not appear to me to be relevant
to the present case in which there is no
reason whatsoever to doubt that the suit has
been instituted with the approval of the
actual plaintiff.I decline to interfere with the Com-
missioner's order. The appeal is dismissed
with costs on appellant.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULE NISI No. 839 OF 1914.

December 3, 1915.

Present:—Mr. Justice Richardson and
Mr. Justice Roe.SAILABALA DEBI AND OTHERS
—DECREE-HOLDERS—PETITIONERS

versus

NRITYA GOPAL SEN PODDAR AND OTHERS

—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r.
90—*Sale under rent-decree—Non-transferable occupancy*
holding, mortgagee of, right of, to set aside sale—"Whose
*interests are affected by the sale," meaning of.*A mortgagee of an entire non-transferable occu-
pancy holding, who has purchased the holding in
execution of his mortgage-decree, is a person "whose
interests are affected by the sale" of the holding in
execution of a rent-decree, within the meaning of
Order XXI, rule 90 of the Civil Procedure Code, 1908,
and as such has a *locus standi* to apply under that
rule to set aside the sale. [p. 861, col. 2.]The words of rule 90 "whose interests are affected
by the sale" are very wide. [p. 861, col. 2.]*Abdul Rahman Sarkar v. Promode Behary Dutta*, 28
Ind. Cas. 182; 20 C. W. N. 40; 22 C. L. J. 108, distin-
guished.Rule against the order of the District
Judge of Dacca, dated the 18th May 1914,

SAILABALA DEBI U. NRITYA GOPAL SEN PODDAR.

in Miscellaneous Appeal Suit No. 24 of 1914.

FACTS.—The landlords in execution of a rent decree put up to auction-sale, an occupancy holding which was non-transferable, and purchased it themselves for Rs. 38 only. Previous to the sale, the holding was purchased by the mortgagee of the holding in execution of the mortgage-decree. The mortgagee-auction-purchaser applied under Order XXI, rule 90, Civil Procedure Code of 1908, to set aside the sale on the ground of fraud and irregularity and substantial injury. The Munsif held that he had no *locus standi* to make the application. On appeal the District Judge held that he had a *locus standi* and on consideration of the evidence came to the conclusion that the rent sale was at a grossly inadequate price due to fraud and suppression of sale proclamation by the landlords decree-holders and set aside the sale. He, however, did not come to any finding as to the allegation of the mortgagee-auction purchaser that after his purchase the landlords, by accepting rent and *salami* from him, recognised him as a tenant and also on the question whether the application under Order XXI, rule 90, was barred by limitation. The landlords moved the High Court under section 115, Civil Procedure Code, 1908, and got a Rule. On the Rule coming on for hearing before N. R. Chatterjee and Roe, JJ., their Lordships remanded the case to the District Judge for findings on the question of limitation and the alleged recognition. The District Judge found that limitation was saved by the operation of section 18 of the Limitation Act as the decree-holders by their fraud concealed the sale from the mortgagee and that the mortgagee-auction-purchaser had never been recognised by the landlords. After the return of these findings, the Rule again came on hearing before Mr. Justice Richardson and Mr. Justice Roe.

Babu Romesh Chandra Sen, for the Petitioners.—The mortgagee-auction-purchaser has no *locus standi* as his purchase is not valid against the landlords. The landlords could eject him at any moment. If this rent sale is set aside, the landlords might bring a suit for ejectment of the mortgagee-auction-purchaser and he will have no

answer to the suit. He acquired no interest in the holding as against the landlords and, therefore, he has no *locus standi* to make an application to set aside the sale. The cases reported as *Abdul Rahman Sarkar v. Promode Behary Dutta* (1), *Deno Nath Dey Sarkar v. Kali Kumar Roy* (2) and *Prosunno Kumar Midlar v. Bama Churn Mondal* (3) support my contention.

[**RICHARDSON, J.**—The case reported as *Abdul Rahman Sarkar v. Promode Behary Dutta* (1) is clearly distinguishable—there the question was as to the *locus standi* of a transferee of a non-transferable occupancy holding to make an application under Order XXI, rule 89. The words of rule 90 are very wide. How could it be said that the mortgagee's interests were not affected by the rent sale when he was entitled to the balance of the sale-proceeds after satisfaction of the rent decree?]

Babu Ramesh Chandra Sen.—The word "interests" in rule 90 means interest in the property sold. The mortgagee has no valid interest in the occupancy holding as against the landlord. The word "interests" in rule 90 has been construed by Mr. Justice Mookherjee in *Jogendra Nath Chatterjee v. Manmatha Nath Ghose* (4) and also in a Madras case, *Kathiresan Chettiar v. Ramaswamy Chettiar* (5).

Babu Brojendra Nath Chatterjee (with **Babu Biraj Mohan Mozumdar**), for the Opposite Party, contended that apart from the question of land or jurisdiction, the application of the petitioner ought not to succeed in a case like this. It had been found by the lower Appellate Court that the landlords by means of fraud and suppression of sale proclamation purchased the holding at one-twentieth of its price. In a case like this the decree-holder could not invoke the extraordinary jurisdiction of the High Court under section 115, Civil Procedure Code. The powers of the High Court under that section are to be exercised to prevent injustice and not to perpetuate

(1) 28 Ind. Cas. 182; 22 C. L. J. 108; 20 C. W. N. 42.

(2) 29 Ind. Cas. 916.

(3) 3 Ind. Cas. 461; 13 C. W. N. 652.

(4) 15 Ind. Cas. 668; 17 C. W. N. 80 at p. 81; 16 C. L. J. 565.

(5) 26 Ind. Cas. 93; 27 M. L. J. 302; (1914) M. W. N. 871.

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injustice. Again the District Judge did not fail to exercise a jurisdiction which was vested in him, nor did he exercise his jurisdiction illegally or with material irregularity in holding that the opposite party had a *locus standi*. At best he committed an error of law. The word "interests" in rule 90 has not the restricted meaning contended for by the other side, as the preceding sentence shows—a "person entitled to share in rateable distribution of assets" may not have any interest in the property sold. Referred to *Abdul Rahman Sarkar v. Promode Behary Dutta* (1).

JUDGMENT.—This is a Rule calling upon the opposite party to show cause why the order of the District Judge of Dacca, dated the 18th May 1914, should not be set aside. The matter arises out of the sale of a holding at the instance of the landlords in execution of a decree for arrears of rent. The holding had previously been sold by a mortgagee of the original tenant in execution of a decree on the mortgage and purchased by the mortgagee for the sum of Rs. 400. At the sale at the landlord's instance, the holding was purchased by the landlords for the sum of Rs. 38 only. The mortgagee then applied under Order XXI, rule 90, Civil Procedure Code, to have the sale set aside on the ground of material irregularity and fraud in conducting the sale. The Court of first instance held that the mortgagee had no *locus standi* to make such an application and, for that and other reasons, dismissed the application. On appeal, the learned District Judge held, on the contrary, that the mortgagee was entitled to make the application and, on the merits, he set aside the sale. We are asked to set aside the order of the District Judge on the ground that he had no jurisdiction to make it, the mortgagee not being a person entitled to apply under the rule referred to. It should be mentioned that the sale in both instances was the sale of an entire holding. The question at issue depends on the meaning to be attached to the words "whose interests are affected by the sale" in Order XXI, rule 90. Our attention was invited by the learned Pleader for the petitioners (the landlords) to the ruling of this Court in the case of *Abdul Rahman Sarkar v. Promode Behary Dutta* (1). In

that case, it was held (the case arose in Eastern Bengal) that the purchaser in execution of a mortgage-decree of an entire non-transferable occupancy holding was not competent to apply under Order XXI, rule 90, Civil Procedure Code, to set aside under that rule a subsequent execution sale held in execution of a rent-decree in which the landlord himself had purchased the property. The language of rule 90 is, however, not the same as the language of rule 90. The words of rule 90 "whose interests are affected by the sale" are very wide and, in our opinion, it is impossible to say that the mortgagee in the present case does not come within the rule. For one thing, he is interested in the sale-proceeds and is clearly entitled to any balance of the sale-proceeds remaining over after the landlord's dues have been satisfied. It seems to us that his interests were clearly affected by the sale which he seeks to have set aside and that the view adopted by the learned District Judge is correct. That being so, the Rule must be discharged with costs. We assess the hearing fee at two gold mohurs.

Rule discharged.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 10 OF 1912-13 OF

CAWNPORE DISTRICT.

December 4, 1913.

Present:—Mr. Baillie, S. M.

GANGA CHARAN—DEFENDANT—

APPELLANT

versus

MANGHI PRASAD AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Ejectment, suit for—Pro forma defendant, relief not claimed against—Decree against him, validity of.

An order of ejectment against a *pro forma* defendant against whom no relief was asked as he was alleged to have no connection with the land in dispute, is not bad when that person's rights have been threshed out and he has been found to be a non-occupancy tenant. [p. 862, col. 1.]

Second appeal from the order of the Commissioner, Allahabad, dated the 21st May 1913, reversing that of the Assistant Collector of Cawnpore District, in a case of ejectment.

NIHAL SINGH v. MAL SINGH.

FACTS.—The entry in the papers of 1319 *Fasli* in regard to the land in dispute was Ganga Charan, non-occupancy tenant, twelve years, absconded (*farar*), new, one year, Ram Charan *Brhaman*. The *zaminidar* brought a suit against Ram Charan and Chainwa on the ground that they were his tenants-in-chief and that Ganga Charan had no connection with the land. He made Ganga Charan a *pro forma* defendant but sought no relief against him. Ganga Charan claimed occupancy rights. The Court of first instance dismissed the suit on the ground that Ram Charan and Chainwa were the sub-tenants of Ganga Charan.

Upon appeal the Commissioner ejected Ganga Charan holding that he had not acquired occupancy rights.

On appeal the Board passed the following

JUDGMENT.—The only objection pressed in this case is of a technical character. It urges that the ejectment of Ganga Charan should not have been decreed in a suit in which the plaintiff denied that he had any connection with the land in question and alleged that Ram Charan and Chainwa, entered as sub-tenants of Ganga Charan, were really the tenants-in-chief. I cannot see that the fact that the plaintiff has been drawn up in this way has in any way injuriously affected Ganga Charan, who has been able to have his claim to occupancy rights considered on the merits. It is clear that he cannot have occupancy rights and that the decree for his ejectment is in accordance with the law.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1721 OF 1913.

October 29, 1914.

Present:—Mr. Justice Chevis.

NIHAL SINGH—PLAINTIFF—

APPELLANT

versus

MAL SINGH—DEFENDANT—RESPONDENT.

Shamilat land—Possession of portion by one co.

owner—Dispossession—Suit for possession—Possession, nature of, allowed—Joint possession.

In the absence of a special custom whereby a proprietor can hold exclusive possession of a portion of the *shamilat* until its partition, he is entitled to joint but not exclusive possession if he is ousted by other proprietors in the village.

Second appeal from the decree of the District Judge, Amritsar, dated the 9th July 1913, varying that of the Munsif, first Class, Tarn Taran, dated the 28th March 1913, decreeing the claim.

Mr. *Devi Dyal*, for the Appellant.

Mr. *Nihal Chand Mehra*, for the Respondent.

JUDGMENT.—Plaintiff sued for possession of the site in dispute, alleging that he was the owner and had been forcibly dispossessed by defendant about 1½ years prior to suit. Defendant denied and alleged that he and not plaintiff was the owner.

The first Court gave plaintiff a decree for possession, but the learned District Judge on appeal held that the site was *shamilat deh*, and reduced the decree to one of joint possession along with the defendant.

Before me it has been admitted by Counsel on both sides that the site is *shamilat deh*, and that the parties are both proprietors.

Plaintiff's Counsel asks for a remand to prove a special custom whereby a proprietor can hold exclusive possession of *shamilat* land. Plaintiff sued on the allegation of being the sole owner and I do not consider he is entitled to the remand now asked for. Besides, plaintiff is not seeking to hold possession, he is seeking to re-gain possession, and as this is not a suit under the Specific Relief Act, he must show a superior title in order to dispossess the defendant. He has an equal title no doubt and he holds a decree for joint possession. With that he must rest content.

I dismiss the appeal, but I pass no order as to costs of this appeal, as both parties falsely alleged exclusive possession to begin with.

Appeal dismissed.

DWARKA V. NAZIR HUSAIN KHAN.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION No. 32 of 1914-15 OF
ALLAHABAD DISTRICT.

August 20, 1915.

Present:— Mr. Holms, S. M., and
Mr. Campbell, J. M.DWARKA AND OTHERS—DEFENDANTS—
APPELLANTS

versus

Syed NAZIR HUSAIN KHAN AND OTHERS—
PLAINTIFFS—RESPONDENTS.*Agra Tenancy Act (II of 1901), ss. 13 (a), (b) and
(c), 14(1) (a), 168—Wrongful dispossession—Re-gaining
of possession—Limitation.*In order to apply the provisions of section 13
(a) of the Tenancy Act to a tenant wrongfully
dispossessed, it is not necessary that the possession
should have been re-gained within six months.Second appeal from the order of the
Commissioner, Allahabad Division, dated the
16th January 1915, reversing that of
the Assistant Collector, Allahabad District,
in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(August 3rd, 1915.)—In this case the Additional Commissioner has come to a definite finding that the appellants' predecessor was out of possession for a year, that is to say, for over six months. Apart from this the remarks in Appeal No. 31 of 1914-1915* apply to this case also, but it is necessary to come to a decision on the point of law. On the whole I think the words "subject to the provisions of this Act" in section 168 are against the respondents' contention that the re-gaining of possession mentioned in section 13 (a) must be within six months. I doubt if it was ever intended that the privileges extended under section 13 (a) should be less than those extended under sections 13 (b) and 13 (c), and the reason why no period was laid down in section 13 (a) appears to be that two different classes of cases have been treated therein although it would have been better had they been kept separate. In the case of ejectment under a decree of a Court it is impossible to say how long the appeal will take and, therefore, no limit was laid down. This is probably the reason why no limit was laid down in the case of a

* [See *Ram Bhayee v. Nazir Husain*, 81 Ind. Cas. 815—Ed.]

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tenant who has been wrongfully dispossessed and who afterwards re-gained possession of the land, and the different period laid down in section 14 (1) (a) supports this contention.

I would set aside the order of the Additional Commissioner and restore that of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 26 of 1915.

April 26, 1915.

Present:—Mr. Justice Leslie Jones.

Musammul SAHIB ZADI—DEFENDANT—
APPELLANT

versus

ALLAH BAKHSH & Co.—PLAINTIFFS—
RESPONDENTS.*Custom—Succession—Daughter of Rau of Jamal Patti of Mauza Lala Darya in Multan District marrying her first cousin—Other first cousins, if excluded.*

There is no custom whereby the daughter of a Rau of Jamal Patti of Mauza Lala Darya, by reason of her marriage with her first cousin, excludes her other first cousins from succession to her father's estate. [p. 864, col. 2.]

Second appeal from the decree of the District Judge, Multan, dated the 10th August 1914, reversing that of the Honorary Munsif, 3rd Class, Basan, Tehsil Multan, dated the 18th of January 1913, dismissing the claim.

Mr. Badr-ud-din, for the Appellant.

Pandit Bal Mukand Trikha, for the Respondents.

JUDGMENT.—The question in this case is whether the daughter of a Rau of the Jamal Patti of Mauza Lala Darya in the Multan District who has married her first cousin, excludes her other first cousins from the succession to her father's estate. The instance on page XVI of Sir Charles Roe's Customary Law, in which the answer to question 12 to the effect that daughters exclude collaterals among Raus was taken from the Mamdasi Patti and other Raus, supported the contrary view. In an exactly paralled case, Further Appeal No. 89 of 1905, it was held by Lal Chand,

HARI HAR PRASAD V. MATA PRASAD.

J., that the special custom set up on behalf of the daughters was not established and although the fact of marriage with a collateral does not appear to have been specially considered, there is nothing in evidence now before me which would induce me to take a contrary view. There is but one instance from Patti Jamal Din, which can be said to support the case of the appellant, and it is not possible to hold that the *onus* of proving a special custom has been discharged.

The appeal is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 5 OF 1914-15 OF

FATEHPUR DISTRICT.

March 22, 1915.

Present:—Mr. Holmes, S. M.

HARI HAR PRASAD—PLAINTIFF—

APPELLANT

versus

MATA PRASAD AND OTHERS—DEFENDANTS—

RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 22—Succession—Ex-proprietary rights acquired by two persons in full right—Death of one without heirs—Right of heirs of other to get entire holding—Survivorship.

Where two persons acquire jointly ex-proprietary rights and one of them dies without leaving heirs entitled to inherit under the Tenancy Act, the other gets the entire holding.

Appeal from the order of the Commissioner, Allahabad Division, dated the 1st October 1914, confirming that of the Settlement Officer, Fatehpur District, in a case of correction of records.

FACTS.—The material facts of the case are that the two sisters Musammât Minti and Musammât Pragiya inherited *in* proprietary rights from their father and sold the same and became full ex-proprietary tenants. Musammât Pragaiya left a son Sardha Prasad, who in his life-time made a gift of tenancy to his son Mata Prasad whose name was accordingly entered. On the death of Musammât Minti, her husband's name was entered as she left no heirs entitled to inherit. On the death of her husband Kali Charan, his brother Hari Har Prasad claimed to be entered as co-

tenant with Mata Prasad. The Court of first instance ordered Mata Prasad's name to be entered in half of the holding as ex-proprietary tenant and in half, the name of Hari Har Prasad as non-occupancy tenant. On appeal the Collector reversed the decision holding that on the death of Musammât Minti, the entire holding reverted to Mata Prasad alone, as there had been no division between the two sisters.

The Commissioner confirmed this order. On 3rd appeal being preferred, the Board passed the following

JUDGMENT.—Appellant relies on a note of a case reported in the Allahabad Law Journal decided by the High Court on February 4th, 1910, in which it was held that when a Hindu died before the passing of the present Tenancy Act and left two daughters, on one daughter dying, the occupancy tenancy devolved on her surviving sister in preference to her sons. Admitting this head-note is accurate, the circumstances of the present case are different, for the *zemindari* appears to have been sold during the life-time of the two sisters and they became ex-proprietary tenants in full right. Mata Prasad then apparently has a valid claim to be ex-proprietary tenant in this holding. What remains to be determined is, what Kali Charan's rights, if any, are. The Assistant Collector was clearly wrong in holding him to be a non-occupancy tenant in an ex-proprietary holding. He clearly has no claim whatever to be entered as a co-ex-proprietary tenant. He argues that he is not a sub-tenant for there is no contract of tenancy between him and Mata Prasad. It is true that he has paid at times half the rent to the *zemindar* apparently because the *zemindar* admitted him at one time without any justification to part of a holding which was not vacant and he is in possession of certain fields. Had I been trying the case originally, I might have considered whether his name should be entered in the column of tenant-in-chief as *kabiz* in respect of these plots or whether his name should not appear at all. On the whole, on third appeal, I see no sufficient reason to interfere with the order passed and dismiss the appeal with costs and Pleader's fee, Rs. 10.

Appeal dismissed.

HAKIM RAI V. PESHAWAR BANK, LTD.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 1937
OF 1914.

March 13, 1915.

Present:—Mr. Justice Shadi Lal.

HAKIM RAI—OBJECTOR—APPELLANT

versus

THE OFFICIAL LIQUIDATOR OF
PESHAWAR BANK, LTD., MULTAN, AND
OTHERS—RESPONDENTS.*Companies Act (VII of 1913), s. 2—Companies Act (VI of 1882), s. 3—Transfer of shares after insolvency of Company—Informal transfer by Director of his shares, effect of.—Liability as contributory.*

Where a Company has become insolvent although no winding up has commenced, the Directors may and ought to refuse registration of any transfer of shares. [p. 865, col. 2; p. 866, col. 1.]

Non-observance of the requisite formalities for transfer of shares is a fatal defect: such a transfer does not absolve the transferor from his liability as a contributory, particularly when he is himself one of the Directors of the Company. [p. 866, col. 1.]

Where a Bank stopped payment on 22nd September 1912 and on 2nd October of the same year one of the Directors transferred his shares to a man of straw without observing the rules on the subject:

Held, that the transfer was both invalid and mala fide. [p. 865, col. 2; p. 866, col. 1.]

Miscellaneous first appeal from the order of the Additional Judge, Multan, dated the 7th August 1914, rejecting appellant's objection.

Mehta Bahadur Chand, for the Appellant.

Mr. Santanam, and Pandit Balnukand Tirkha, Official Liquidator, for the Respondents.

JUDGMENT.—The appellant, L. Hakim Rai, has been found by the Additional Judge, Multan, to be a contributory of the Peshawar Bank, Ltd. in respect of 500 shares, and the question for determination in this appeal is whether the order of the lower Court placing him on the list of the contributories is or is not correct.

There is no doubt that the appellant was duly allotted 500 shares in April 1912 and the plea that the contract to take shares was induced by fraud or misrepresentation was overruled by the lower Court and has been expressly abandoned by the learned Pleader for the appellant in this Court. The point for decision is whether the alleged transfer of the shares to one Uttam Singh is a valid transaction which is binding upon the Company and its creditors.

Now it is quite clear that the Company suspended payment on the 22nd September

1913 and though it is alleged that it again did some business for a few days, I do not believe that there was any real resumption of its normal work.

It appears that L. Hakim Rai was a member of a sub-committee of three persons appointed to manage the affairs of the Bank by the so-called Directors of the National Banking and Commercial Corporation, Ltd., which was never registered as a Company under the Indian Companies Act and did not, therefore, come into existence. It is apparent that the above such committee had no legal status and its action cannot be binding upon the Bank.

The circumstances of the case make it abundantly clear that L. Hakim Rai in order to escape his liability on the shares decided to transfer them to Uttam Singh, whom the learned Judge of the lower Court describes as a man of straw. The instrument of transfer was executed on the 3rd of October 1913 and placed on the 9th October 1913 before the above-mentioned sub-committee consisting of Sedhu Ram and Tota Ram besides L. Hakim Rai. It appears that Sedhu Ram refused to sign the proceedings which, *inter alia*, dealt with the proposed transfer and at the next meeting held on the 20th October he was not present and one Bawa Jaswant Singh was added by Hakim Rai and Tota Ram to co-opt with them, and the deed of transfer was sanctioned by the three persons.

The question of the transfer of shares never came up before a meeting of the Bank or of its Directors. In fact the alleged transfer was not sanctioned by any person or body of persons having authority to act on behalf of the Bank. I have already stated that the sub-committee which dealt with the matter was not a properly constituted body and had absolutely no power to enter into any transaction for the Bank.

The transfer not having been effected with the approval of the Directors cannot be enforced against the Liquidators, who represent the creditors and the contributories and the appellant consequently is still liable on the shares.

In view of the above finding, it is unnecessary to refer to the rulings which have been cited before me. The rule of the law is quite clear that where a Company is insolvent, although no winding-up has commenced the

BADRI PRASAD v. RAM CHARAN.

Directors may and ought to refuse registration of any transfer (*vide* Halsbury's Laws of England, Volume 5, page 189). In this case, the Directors never got an opportunity of expressing their opinion on the proposed transfer. Lala Hakim Rai being himself a Director was bound to observe all requisite formalities, and if he transferred his shares informally, it is his own fault. In fact the non-observance of the requisite formalities by a Director is a very strong piece of evidence tending to show that the transfer was not made *bona fide*. I, therefore, decline to recognise the transfer and hold that the appellant was properly placed on the list of the contributories and that his name must remain there. The appeal is dismissed with costs.

Appeal dismissed.

similar suit had been dismissed in 1910. The judgment in that case was admittedly erroneous, but erroneous or correct, I can find nothing in the law which provides that the dismissal of a suit for enhancement bars the filing of a fresh suit in a subsequent year. Section 41 provides that when an enhancement has taken place, no suit shall lie for a period of 1½ years, but it does not provide that when an enhancement has been refused, no suit should lie for that period. It would be reasonable that it should so provide, but it does not do so and we are not entitled to read such a provision in the law as it now stands. I think that the Commissioner's order must, therefore, be cancelled.

The applicant urges that the rent arrived at by the Court of first instance, but not given effect to, should be decreed. I have examined proceedings in that case. The enhancement is very large and the rates are considerably in excess of the Settlement Officer's rates of 1902. The enquiry was confined to the *patwari's* selection of one-soil holdings of similar character to each of the fields in question. They are not based on any extended examination of the general incidence of occupancy rates. It appears to me that such an enhancement cannot safely be sustained. I would, therefore, in restoring this case to the file of the Court of first instance, direct that it be disposed of afresh on the merits after an exemplar area has been obtained by the enquiries of the presiding officer himself of extent sufficient to make certain that the rates arrived at are really prevailing rates, and not rates which may accidentally be payable by one or two holdings.

Costs will follow the final issue.

TWEEDY, J. M.—I concur.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 36 OF 1912-13 OF
FARRUKHABAD DISTRICT.

March 25, 1914.

Present:—Mr. Baillie, S. M., and
Mr. Tweedy, J. M.

BADRI PRASAD—PLAINTIFF—
APPELLANT

versus

RAM CHARAN—DEPENDANT—
RESPONDENT.

Enhancement, suit for, dismissal of—Fresh suit, if maintainable—Exemplar area, extent of.

A dismissal of a suit for enhancement of rent is no bar to the filing of a fresh suit in a subsequent year.

An exemplar area should not be confined to a single-holding area but should extend to an extent sufficient to make certain that the rates arrived at are really prevailing rates.

Application for revision of the order of the Commissioner, Allahabad Division, dated the 26th August 1913, confirming that of the Assistant Collector, Farrukhabad District, in the case of enhancement of rent under section 43 (a) of Act II of 1901.

JUDGMENT.

BAILLIE, S. M.—(March 21st, 1914.)—Both the lower Courts in this case dismissed a suit for enhancement on the ground that a

MOTILAL v. GANGA BAI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 321-B OF 1914.

April 26, 1915.

Present:—Mr. Stanyon, A. J. C.

MOTILAL—PLAINTIFF—APPELLANT

versus

GANGA BAI—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), ss. 32, 34, 35, 77—*Suit to compel registration*—“Person executing the document”, meaning of—Agent—Court, duty of, while proceeding under s. 77—Object of registration—Actual executant—Constructive executant—Suit, maintainability of.

The phrase “person executing the document” and its derivatives as used in sections 32, 34, 35, 58 and 73, Indian Registration Act, refer to the person who actually signs or marks the document in token of execution, whether for himself or on behalf of some other person; and he is the proper defendant in a suit brought to compel registration under section 77, Registration Act. [p. 867, col. 2.]

A Registering Officer has to satisfy himself that the document was executed by the person by whom it purports to have been signed, not constructively but actually. Neither the Registrar nor a Court proceeding under section 77 has any concern with the legal effect of the document, e. g., when the executant is an agent professing to execute for a principal, whether he has authority to execute. [p. 868, col. 1.]

Registration is designed to guard against fraud by obtaining a contemporaneous publication and an unimpeachable record of each document, and for that purpose, the Registering Officer has only to be satisfied that a certain person, not being a minor or lunatic, admits having signed or marked the deed which purports to have been executed by him. [p. 868, col. 1.]

Where a deed is executed by an agent for a principal and the same agent appears and presents the deed or admits execution before the Registering Officer, that is not a case of presentation under section 32 (c) of the Act or appearance and admission by agent under section 34 (1) and 35 (b). It is a presentation, appearance or admission by the actual executant himself. [p. 868, col. 1.]

A person who executes in favour of another any document which is compulsorily registrable, is bound *ipso facto* to assist in having that document registered, wholly irrespective of its legal effect upon himself or any other person. [p. 868, col. 2.]

Second appeal against the decree of the District Judge, West Berar, Akola, dated the 22nd January 1914, reversing that of the Additional Subordinate Judge, Akola, dated the 31st January 1913.

Mr. J. Mitra, for the Appellant.

Mr. D. G. Deshmukh, for the Respondent.

JUDGMENT.—One Ranglal Dhannal was a business agent of Musammal Ganga Bai, the defendant in this suit. On the 8th April

1909 Ranglal, purporting to act on behalf of his principal, executed a document, Exhibit P-1, which is a sale of a 1-anna 4-pies share in a certain Ginning Factory for Rs. 4,000 to the plaintiff. The deed recites that it is executed to carry out a contract for the above sale made by the defendant's husband before he died, and that he had already received the price in full. This deed was not presented for registration till the 21st July 1909, when only 17 days remained of the original period of 4 months allowed for that purpose. The document was presented by the plaintiff, and he foresaw that the attendance of the executant was not likely to be secured before the period expired. He, therefore, applied to the District Registrar, before whom presentation was made, for an extension of time under section 34 of the Indian Registration Act, as applied to Berar, but that application was refused, and, on the 9th August 1909, no executant having appeared in the meantime, the Registrar made an order refusing to register the deed. Thereupon on the 21st August 1909, the present suit was filed under section 77 of the said enactment, to compel registration. As the plaint was originally drawn, the defendants impleaded were Musammal Ganga Bai, the constructive executant, and Ranglal, the actual executant of the deed, but the name of Ranglal was subsequently struck out under circumstances which have not been disclosed. The first Court went into the question of Ranglal's authority to bind the defendant by execution of the deed, and gave the plaintiff a decree against the defendant Ganga Bai to compel registration. On appeal by Ganga Bai the learned District Judge held that in the present suit the plaintiff had no cause of action against Ganga Bai as she had not executed the deed, and reversing the decree of the first Court the Judge dismissed the suit. The plaintiff has, therefore, made this second appeal.

I am of opinion that the appeal must fail. I think that the phrase “person executing the document” and its derivatives as used in sections 32, 34, 35, 58 and 73, Indian Registration Act, refer to the person who actually signs or marks the document in token of execution, whether for himself or on

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behalf of some other person: and that he is the proper defendant in a suit brought to compel registration under section 77, Registration Act. A Registering Officer has to satisfy himself that the document was executed by the person by whom it purports to have been signed, not constructively but actually. Neither the Registrar, nor a Court proceeding under section 77 aforesaid, has any concern with the legal effect of the document, *e. g.*, when the executant is an agent professing to execute for a principal, whether he has authority to execute. Registration is designed to guard against fraud by obtaining a contemporaneous publication and an unimpeachable record of each document, and for that purpose the Registering Officer has only to be satisfied that a certain person, not being a minor or lunatic, admits having signed or marked the deed which purports to have been executed by him. Section 35 of the above enactment is very clear on that point.

It is hardly necessary to say that, where a deed is executed by an agent for a principal, and the same agent appears and presents the deed or admits execution before the Registering Officer, that is not a case of presentation under section 32 (c) of the Act, or appearance and admission by agent under sections 34 (1) and 35 (b). It is a presentation, appearance or admission by the actual executant himself. In the present case, for the purposes of all procedure under the Registration Act, and, therefore, for the purposes of this suit, Ranglal was the executant of Exhibit P-1. The Registering Officer had to satisfy himself that Ranglal, being *sui juris* and *compos mentis*, had executed the deed: and though Ranglal could make such admission personally or by representative, assign, or duly authorized agent, it was his admission alone that could give jurisdiction to the Registering Officer to register the deed: and, therefore, he is the only person against whom a suit would lie under section 77, Registration Act. It would make no difference to his legal power to voluntarily admit execution, or to his legal liability to be compelled to do so by suit, that his execution was unauthorized, or that, before registration, he had ceased to be an agent of the principal on whose behalf he had professed to act in executing the document. A person

who executes in favour of another any document which is compulsorily registrable, is bound *ipso facto* to assist in having that document registered, wholly irrespective of its legal effect upon himself or any other person. For the purposes of this suit, and of the registration which it is brought to compel, Ranglal was, and Ganga Bai was not, the executant of the document.

Therefore, the suit has rightly been dismissed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.
ORIGINAL CIVIL SUIT No. 253 OF 1915.

August 14, 1915.

Present:—Mr. Justice Macleod.

BAPUJI SORABJI PATEL—

APPLICANT

versus

BHIKUBHAI VIRCHAND—RESPONDENT.

Bombay High Court Rules, r. 519—Taxation of costs—Interpretation of rule.

Under the present wording of rule 515 of the rules of the Bombay High Court the words "as the Taxing Master shall in his discretion think proper to be settled by Counsel" only refer to special affidavits, and not to pleadings.

Application for an order to review the taxation of bill of costs of the plaintiff.

JUDGMENT.—Under the present wording of rule 519 the words "as the Taxing Master shall in his discretion think proper to be settled by Counsel" only refer to special affidavits, and not to pleadings. There can be no doubt there was an intention to follow the English rule, but this intention was frustrated by the word "such" being placed before 'special affidavits' instead of before 'pleadings.' Therefore, the Taxing Master must be asked to review his taxation and allow such fees to Counsel as he thinks proper.

SUBRAMANIA OTHUVAR v. MUNUSAMIYA PILLAI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 68 OF 1915.

November 12, 1915.

Present:—Mr. Justice Phillips.

SUBRAMANIA OTHUVAR—PLAINTIFF—
PETITIONER

versus

MUNUSAMIYA PILLAI—DEFENDANT—
RESPONDENT.*Civil Procedure Code (Act V of 1908), O. XVII, r. 2—Failure of one party to appear at an adjourned hearing—Judicial discretion Dismissal for default.*

Order XVII, rule 2 of the Civil Procedure Code, throws upon the Court the responsibility of exercising a judicial discretion before disposing of a case under Order IX, when at an adjourned hearing the parties or any of them fail to appear.

Where, therefore, a plaintiff has closed his case, and there is evidence which if un rebutted would prove his case, it is not a judicial exercise of discretion to dismiss the suit for default, and the Court should record the defence evidence even though the plaintiff is absent and dispose of the case on its merits.

Ningappa v. Gowdappa, 7 Bom. L. R. 261, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tuticorin, in Small Cause Suit No. 1202 of 1913.

Messrs. T. V. Gopaiswami Mudliar and A. Ganesa Aiyar, for the Petitioner.

Mr. M. D. Devadoss, for the Respondent.

JUDGMENT.—This suit has been dismissed under Order IX, rule 8 of the Civil Procedure Code, but Order XVII, rule 2 of the Civil Procedure Code, only says that when at an adjourned hearing the parties or any of them fail to appear, the Court "may" dispose of the case under Order IX of the Civil Procedure Code. The word being "may" and not "shall" entails on the Court the exercise of some discretion, and this discretion must be judicial discretion. When a plaintiff has closed his case, and there is evidence which if un rebutted would prove his case, it can hardly be deemed a judicial exercise of discretion to dismiss the suit for default, because the defendant and his witness could not be examined. There was no reason why the defence evidence should not have been recorded in plaintiff's absence, and the case disposed of on its merits—and this is the course that the Subordinate Judge should have followed. The plaintiff's Vakil's conduct in throwing up the case can hardly be justified and

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consequently the plaintiff when left without a legal adviser deserved consideration at the hands of the Court. The view taken is in accordance with that of the Bombay High Court in *Ningappa v. Gowdappa* (1) and following that case, I set aside the decree and order the Subordinate Judge to restore the suit to file and dispose of it on its merits. The costs of this petition will abide the result.

Petition allowed.

(1) 7 Bom. L. R. 261.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 660 OF 1914.

September 3, 1915.

Present:—Mr. Batten, A. J. C.

DAOLAT RAI—PLAINTIFF—APPELLANT
versusSHEIKH CHAND—DEFENDANT—
RESPONDENT.*Mortgage—Construction of document—Permanent lease—Equity of redemption, clog on.*A document styled a *patta* contained *inter alia* the following:—

"Thirty years ago I had taken from you Rs. 150 and in lieu thereof executed two bonds mortgaging with possession my agricultural land (*jirayat*)..... From that year the *jirayat* has remained in your possession and was cultivated by you. Now I execute a new bond for those rupees and agree that in lieu of those rupees, you may take the produce of the *jirayat*. . . . The field has been given in your possession from to-day, there will be no interest and I will claim no produce. When I or my heirs pay the whole amount mentioned, you may receive it and continue to cultivate the field for ever from this day. After payment to you of the whole amount of this bond, you shall pay Rs. 8 per annum on account of rent of the field in perpetuity from generation to generation."

Held, the document was an usufructuary mortgage-deed and that the stipulation in the deed that after the mortgage-money was paid off, the mortgagee would remain in possession as perpetual lessee on payment of a yearly rent, was a clog on the equity of redemption. [p. 870, col. 2.]

Second appeal against the decree of the District Judge, Nimar, dated the 11th August 1914, reversing that of the Junior Munsif, Khandwa, dated the 27th February 1914.

Dr. H. S. Gaur, for the Appellant.

Rai Bahadur V. R. Pandit, for the Respondent.

PAOLAT RAI P. SHEIKH CHAND.

JUDGMENT.—These are both appeals of the plaintiff against the judgments and decrees of the District Judge. Second Appeal No. 660 is the appeal against the decision of the District Judge on the appeal of the defendants against the decree of the Munsif in favour of the plaintiff giving him a decree for redemption. Second Appeal No. 661 is the appeal against the judgment and decree of the District Judge dismissing the plaintiff's appeal in respect of the price of redemption, which judgment and decree were a necessary consequence of the decision on the defendants' appeal.

The questions for decision are whether the deed, Exhibit P-1, which is described as a *patta* also amounts to a mortgage, and whether the lease contained in the same document is a clog on the equity of redemption. If both these questions are answered in the affirmative, the plaintiff is entitled to redeem, and the District Judge was wrong in dismissing his suit. The District Judge has correctly set out the terms of the deed. The document is styled a *patta*, and the following are the relevant portions of its contents:—

"30 years ago I had taken from you Rs. 150 and in lieu thereof executed two bonds mortgaging with possession my agricultural land (*jirayat*). . . . From that year the *jirayat* has remained in your possession and was cultivated by you. Now I execute a new bond for those rupees and agree that in lieu of those rupees you may take the produce of the *jirayat*, three mango trees and two *moha* trees. When myself or my heirs would pay the rupees you may receive them, but we will not take the *jirayat* and trees; you may possess and cultivate them for ever The field and trees have been given in your possession from to-day, there will be no interest and I will claim no produce of field or trees. When I or my heirs pay the whole amount mentioned above you may receive it and continue to cultivate the field for ever from this day. . . . After payment to you of the whole amount of this bond, you shall pay Rs. 8 per annum on account of mango produce and rent of the field in perpetuity from generation to generation."

The District Judge, while admitting that the test as to whether a *zur-i-peshgi* lease is a mere lease or an usufructuary mortgage is whether the transfer was made for the purpose of securing the amount of money

advanced, or merely in consideration of lease money received, and while recognising that such leases partake of the nature of usufructuary mortgages when there is a power of redemption reserved, goes on to say:—

"The document in suit is undoubtedly not the mortgage-deed nor a renewal of it and it has been rightly urged that the suit for redemption cannot be based upon it. It is a lease intended to take effect after redemption, and is a document upon which the mortgagee may rely as a defence against the mortgagor's claim for possession, but it cannot form the basis for a suit for redemption. From the recital in it the two mortgages were of 30 years' prior date, and these are the mortgages which the plaintiff must redeem. . . . The document in suit merely contains an admission of the previous mortgages, but it is not a renewal of them or a fresh mortgage, for it was not executed for the purpose of securing the payment of the balance due on the old mortgage. There is in it no obligation to pay the old balance, nor any power of redemption, express or implied."

I can only say that in face of the express terms of the document these remarks are somewhat surprising. The document is clearly an usufructuary mortgage-deed, in renewal of two old usufructuary mortgage-deeds; it secures the debt due on the old deeds. It provides that usufruct be taken in lieu of interest, and that the mortgagee's rights as such shall come to an end on the payment of the principal. It goes on to provide that on the principal being paid, the mortgagee shall remain in possession as perpetual lessee on a rent of rupees 8 a year. A clearer case of an usufructuary mortgage combined with a perpetual lease forming a clog on the equity of redemption it would be difficult to find. The District Judge refers to *Mahomed Muse v. Jijibhai Bhagvan* (1) and *Subrao Mangeshaya v. Manjappa Shetti* (2), but distinguishes those cases on the ground that the present deed is not a mortgage-deed at all. The facts here are not to be distinguished from those in *Mahomed Muse v. Jijibhai Bhagvan* (1), where Sargent, C. J., observed—

"Such a condition, although it does not exclude the right of redemption, fetters it

(1) 9 B. 524.

(2) 16 B. 705.

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with the onerous obligation of accepting the mortgagee as a perpetual tenant, and ought not, therefore, in our opinion, to be enforced in a Court of Equity."

The same learned Chief Justice in *Subrao Mangeshaya v. Manjapa Shetti* (2) remarked:—

"The general rule as to agreements of this nature between mortgagor and mortgagee is stated very broadly by Lord Redesdale in *Hickes v. Cooke* (3) in the following terms:—'No agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease) where the mortgage continues, ought to stand, if impeached within reasonable time, from the great advantage which the mortgagee has over the other party in such a transaction.'"

And the learned Chief Justice goes on to observe that a *mulgeni* or permanent lease would certainly have the effect of diminishing the value of equity of redemption. In *Pamurlapati Ankiredu v. Samurlapati Subbiah* (4) it was held that where a lease and mortgage form one transaction and contemplate the continuance of the lease after the discharge of the mortgage, the transaction is a fetter on the equity of redemption which the Court ought not to enforce.

For these reasons I am of opinion that the learned Munsif was right in holding that the lease formed no obstacle to the plaintiff's suit for redemption, though his *ratio decidendi*, that the lease was not for consideration, was not correct. I set aside the decrees of the District Judge, and direct that the decree of the Munsif allowing redemption be restored, subject to the plaintiff's appeal as to the price of redemption, which the District Judge must now dispose of on the merits. The respondents-defendants will pay their own and plaintiff's costs in both Appellate Courts, on the defendants' appeal to the District Court and on the plaintiff's consequent appeal to this Court. The costs of the plaintiff's two appeals regarding the price of redemption will be costs in the suit.

Appeal allowed.

(3) (1816) 4 Dow. 17 at p. 28; 16 R. R. 6; 3 E. R. 1074.

(4) 12 Ind. Cas. 382; 21 M. L. J. 1010; 10 M. L. T. 256; (1911) 2 M. W. N. 231; 35 M. 744.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 444 AND 446
OF 1914.

July 29, 1915.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Napier.

CHILUKURI SITARAMAYYA AND OTHERS
—DEFENDANTS—APPELLANTS IN S. A. NO. 444
OF 1914

CHELLA SESHACHALAM AND ANOTHER—
DEFENDANTS—APPELLANTS IN S. A. NO. 446
OF 1914

versus

SRI RAJAH VENKATA RANGAYYA
APPA RAO BAHADUR ZEMINDAR
GARU—PLAINTIFF—RESPONDENT

IN BOTH.

*Provincial Small Cause Courts Act (IX of 1887),
Sch. II, cl. 7—Suit for enhanced kattubadi, whether
cognizable by Court of Small Causes—Second appeal.*

A suit claiming enhanced kattubadi on the ground of default in payment of the money rate, is not a suit for "enhancement of rent" within the meaning of clause 7, Schedule II, of the Provincial Small Cause Courts Act and is cognizable by a Small Cause Court and, therefore, no second appeal lies in such a suit. [p. 872, col. 1.]

Mullapudi Balakrishnayya v. Venkataratnasinha Appa Rao, 19 M. 329; *Gajapati Rajah v. Suryanarayana*, 22 M. 11; *Harischandra Deo v. Narayana*, 24 M. 508 at p. 511, followed.

Second appeals against the decrees of the District Court of Kistna, in Appeal Suits Nos. 41 and 43 of 1913, preferred against the decrees of the Court of the Additional District Munsif of Masulipatam, in Original Suits Nos. 357 and 359 of 1909.

Mr. B. Narasinha Row, for the Appellants.

Mr. V. Ramesam, for the Respondent.

JUDGMENT.—In these second appeals, the plaintiff claims enhanced kattubadi on the ground that the defendant has committed default in the payment of the money rate. This is not a suit to enhance the rent under clause 7 of the second Schedule of the Provincial Small Cause Courts Act. In such suits there will be a claim for a declaration that in all years to come the rate payable should be enhanced. Following *Mullapudi Balakrishnayya v. Venkataratnasinha Appa Rao* (1), *Gajapati Rajah v. Suryanarayana* (2) and *Harischandra Deo*

(1) 19 M. 329.

(2) 22 M. 11.

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v. *Narayana* (3) we hold that no second appeal lies in these cases, as the amount of the claim in each case is below 500 rupees. These second appeals are dismissed with costs.

Appeals dismissed.

(3) 24 M. 508 at p. 511.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 6-B OF 1915.

September 3, 1915.

Present:—Mr. Stanyon, A. J. C.

GOVERDHAN—PLAINTIFF—APPELLANT
versus

MARUTI—DEFENDANT—RESPONDENT.

Tort—Joint tort-feasors—Trespasser, lessee from—Joint liability.

Where more persons than one are concerned in the commission of a wrong, the wronged person has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage and it does not matter whether they acted as between themselves as equals, or one of them as agent or lessee of another. [p. 873, col. 1.]

Therefore, where a trespasser let the land trespass upon to another person who cultivated it and took the produce, both are liable for damages caused by the trespass. [p. 873, col. 2.]

Mulun Mohun Singh v. Ram Das Chuckerbutty, 6 C. L. R. 357; *Bireskhar Dutt v. Baroda Prasad Ray*, 11 Ind. Cas. 504; 15 C. W. N. 825 followed.

Second appeal against the decree of the Additional District Judge, West Berar, Akola, dated the 8th October 1914, reversing that of the Junior Munsif, Akola, dated the 3rd May 1913.

The Hon'ble Mr. M. B. Dadabhoy and Mr. Vivian Bose, for the Appellant.

Mr. A. V. Zinjarde, for the Respondent.

JUDGMENT.—The plaintiff alleges that he was wrongfully dispossessed of his field by defendant Pundalik, so that he was compelled to sue him for recovery of possession. Pending that suit Pundalik let the field to defendant Maruti, who actually cultivated it and enjoyed the produce of it. Subsequently, the plaintiff got a decree for possession, and then brought the present suit against both the defendants for damages. The first defendant Pundalik pleaded that he alone had cultivated the land and taken its produce. The second defendant Maruti admitted that

he had taken a registered lease of the land from Pundalik, but asserted that he had not gone on the field in pursuance thereof or cultivated the land. The plaintiff replicated that having taken the lease, Maruti was responsible in damages whether or not he cultivated the area. The first Court found that the defendant Maruti had cultivated the land, and gave a decree for damages against both the defendants as joint tort-feasors. Maruti appealed, and the lower Appellate Court, without any analysis of the evidence or legal finding on questions of fact, supposed the case to be governed by the decision in *Dukaloo v. Dhularsing* (1), and reversed the decree and dismissed the suit against Maruti. The judgment of Neill, J. C., in the case cited, is extremely brief; it enunciates a proposition without any discussion of the law applicable, is unsupported by any authority, and may have to be re-considered in a proper case. But it has no application whatever to the present case. There can be no source of error more fruitful than the practice of drawing analogies from rulings on the land laws of the Central Provinces for the decision of cases governed by the totally different land laws of Berar. A *malguzar* in the Central Provinces holds the proprietary interest in the tenancy lands of his village, and it may be, as held by Neill, J. C., in the above case, that if he wrongfully ejects a tenant from his holding and lets the same to another person, the tenant's remedy for damages lies only against his landlord and not also against the person who actually cultivates the holding. The only reason given by the learned Judicial Commissioner for the view he took was that the landlord, though a wrong-doer, was still the owner of the land, and the subsequent holder under him could not be regarded as a co-trespasser. That reason has no existence in the case before me. Here Pundalik [who is apparently a co-occupant with the plaintiff and Soneji (P. W. No. 1) of the same survey-number, divided into three parts by metes and bounds] was a trespasser pure and simple upon the land of the plaintiff; and, if the defendant Maruti cultivated the land pending that trespass, he became a joint tort-feasor. The law has

(1) 4 C. P. L. R. 187.

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been very clearly laid down both in England and in India. In *Henderson v. Squire* (2) and *Doe v. Harlow* (3), though the facts were converse to those of the present case, the question being whether the tenant was liable as well as his sub-tenant who actually held over beyond the term of the tenancy against the will of the lessor and despite notice to quit, the *ratio decidendi* seems to have been this that both the actual trespasser and he who assisted him to trespass were liable in damages. Applying these principles to this case, supposing Maruti the "sub-trespasser" to have actually cultivated the land, his liability for damages would be considered beyond question, and Pundalik would also be liable for having trespassed constructively through his sub-trespasser. The Indian cases are still clearer. In *Mudun Mohun Singh v. Ram Dass Chuckerbutty* (4) it was decided that where lands are wrongfully withheld from the rightful owner, not only the actual occupiers but also the person who had leased the lands to the actual occupiers, may be held to have committed a joint trespass and to be jointly liable for damages caused by such trespass. The case of *Doe v. Harlow* (3) was followed. Here again the liability of the actual occupier was accepted as beyond question. In *Bireskur Dutt v. Baroda Prasad Ray* (5) the rule expounded will be sufficiently evident from the following part of the *placitum*:—

"Where more persons than one are concerned in the commission of a wrong, the wronged person has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage and it does not matter whether they acted as between themselves as equals or one of them as agent or lessee of another:

"Held, therefore, that a trespasser is liable jointly with his lessees for the entire amount of mesne profits and not merely to the extent of rents realized by him from his lessees."

(2) (1889) 4 Q. B. 170; 10 R. & S. 183; 38 L. J. Q. B. 73; 19 L. T. 60; 17 W. R. 519.

(3) (1840) 54 R. R. 523; 12 Ad. & Ell. 40; 113 E. R. 724.

(4) 6 C. L. R. 357.

(5) 11 Ind. Cas. 504; 15 C. W. N. 825.

The law is thus clear that if Pundali trespassed, as has now been found, and then let the land trespassed upon to Maruti who cultivated it and took the produce, both are liable for damages caused by the trespass. Maruti has denied the fact of the trespass. The first Court found against him. The lower Appellate Court assumed that finding to be correct in making an order for costs, but that cannot be a legal disposal of the issue.

The appeal is allowed, the decree of the lower Appellate Court is reversed and the case is remanded to that Court for a fresh decision with advertence to the law as now laid down. There will be a refund of Court-fees, since the decision of the lower Appellate Court proceeded on a preliminary point. Other costs here and hitherto will follow the event.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 1539 OF 1914.

November 15, 1915.

Present:—Mr. Justice Piggott.

GAURI RAI AND OTHERS—DEFENDANTS—

APPELLANTS

versus

Musammal BHAGGINA—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Admission of evidence in appeal—Discretion of Court.

In admitting evidence in appeal the Court should strictly follow the procedure laid down by Order XLI, rule 27, Civil Procedure Code, and specially by the second clause of the rule. [p. 875, col. 1.]

Second appeal from the decision of the District Judge of Ghazipur, dated the 30th June 1914.

Mr. M. L. Agarwalu, for the Appellants.

Mr. Haribans Sahai, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit for arrears of rent. The only question is as to the rate of rent payable by the said defendants to the plaintiff-respondent. The first Court gave the plaintiff a decree based upon a rate of Rs. 4 9-6 per *bigha* per annum. On appeal by the plaintiff the District Judge found

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the rate of rent payable to be Rs. 8 per *bigha* per annum and amended the decree of the first Court accordingly. In second appeal it is contended that the decision of the District Judge was arrived at after an improper use of the powers of the Court under Order XLII, rule 27 of the Code of Civil Procedure, that is to say, after improperly permitting the plaintiff to produce additional evidence. *Secondly*, it is contended that the decision is liable to interference in second appeal because it was based on a misinterpretation of the documentary evidence before the Court. These are the only pleas with which I am concerned. I may note that there was a good deal of evidence produced on the question of the rate of rent payable including entries in the *patnael's* papers and records of past litigation not between the same parties, which were alleged to be relevant to the issue before the Court for various reasons with which I am not concerned. Both parties, however, were agreed that there had been a previous litigation between the predecessors-in-title of the parties to the present suit, in which this very point had been raised and decided. This was a litigation which terminated in a decree of this Court dated January 5th, 1894. A copy of the judgment on which that decree was based was on the record. The important words in the judgment are the following:—"The decree of the Revenue Court in favour of the plaintiff, who as assignee of one Manbahal, the lessee from the admitted landlord, is entitled to recover the rent found due to the landlord from the land admittedly held by the respondent, should be restored". From the context it is clear that by the decree of the Revenue Court was meant the decree of the Assistant Collector in that very case, which had been reversed by the District Judge in first appeal. I do not think it can be said that the lower Appellate Court has misinterpreted these words. The learned District Judge remarks that the judgment of the High Court is silent about the rate of rent. On behalf of the defendants-appellants it is contended that the said judgment is not silent inasmuch as it lays down that the rent recoverable is that due to the landlord from the defendants. The suggestion I take it is that the District

Judge should have gone on to ascertain from the materials on the record what was the rent due to the landlord, that is to say, to the superior proprietor of this land. I think, however, that the learned District Judge has correctly appreciated the situation. The judgment of the High Court did not merely lay down that the plaintiff was entitled to recover the rent due to the landlord, the expression used was "rent found due to the landlord." Read in connection with the context, these words obviously mean the rent which the Assistant Collector found to be due; otherwise this Court in second appeal would not have restored the decree of the Assistant Collector but would have called for a finding as to the rate of rent due. Therefore, the learned District Judge set himself to enquire what was the rent which the Assistant Collector found to be due in the litigation which terminated in this Court's decree of January 5th, 1894. Curiously enough there was no copy of the judgment of the Assistant Collector to be found on the record. The parties had caused to be summoned in the first Court the record of certain previous litigations, and it is possible that a copy of this particular judgment was to be found on one or the other of those files and was made the basis of argument by the parties in the Court of first instance. On the face of the record, however, there appears to be a serious *lacuna* in the evidence and it was for the District Judge to determine what he ought to do under the circumstances. The case for the present appellants I understand to be that it was the duty of the District Judge to hold the plaintiff responsible for the absence from the record of sufficient evidence as to the amount of the rent found due in the previous litigation. The appeal then before the Court, being an appeal by the plaintiff, would in that case have failed and the decree of the first Court would have been affirmed. The District Judge appears to have permitted, if he did not actually direct, the plaintiff (appellant before his Court) to file a copy of the judgment of the Assistant Collector. This he has endorsed with a simple order admitting it on to the record without giving any reason. That order bears the same date as the judgment which followed

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upon it and the learned District Judge seems to have thought that the statement of the facts set forth in his judgment was on the face of it sufficient justification for the course adopted by him. It would be better if Courts of first appeal would be content to follow strictly the procedure laid down by Order XLI, rule 27 of the Code of Civil Procedure, and specially by the second clause of the said rule. At the same time, I am not prepared to hold under the circumstances of the present case that the learned District Judge did not exercise a judicial discretion in the admission of this evidence or that he exercised that discretion improperly or irregularly so as to warrant the interference of this Court in second appeal. After all he was dealing with the record of a litigation which had taken place in his own Court. If he had simply sent for the file from his record room for inspection, it is quite probable that no objection would have been taken and yet it is in many ways more convenient that the facts connected with a previous litigation should be proved by the production of certified copies than by the inspection of record which might not come before a higher Court in the case of a subsequent appeal. For these reasons I find no adequate ground for interference in this case and I dismiss this appeal with costs.

Appeal dismissed.

— — —
 LOWER BURMA CHIEF COURT.
 SPECIAL SECOND CIVIL APPEAL NO. 296
 OF 1914.

December 10, 1915.

Present:—Mr. Justice Parlett.

MA MIN KYIN—PLAINTIFF—APPELLANT
versus

MAUNG WA AND OTHERS—DEFENDANTS—
 RESPONDENTS.

Buddhist Law—Partition during step-father's lifetime—Practice—Appeal—New defence inconsistent with original, if allowed—Limitation.

A Court should not allow a new plea to be raised in appeal which is inconsistent with the original one in the lower Court. [p. 875 col. 2.]

It is for the Judge to decide questions of law arising in the course of trial and he should not

accept a view suggested by Counsel unless satisfied as to its soundness, it being quite different from an admission of fact by Counsel or from his waiving or withdrawing any part of his client's claim under instructions. [p. 876, col. 1.]

Under Burmese Buddhist Law, partition can be claimed by a step-child during the step-father's lifetime. [p. 876, col. 1.]

Mi So v. Ma Hnat Tha, S. J. 177, referred to.

When the parties are working lands in turns by mutual arrangement, there is no adverse possession. [p. 876, col. 2.]

Ma Le v. Ma Hmyin 4 Ind. Cas. 298; 5 L. B. R. 112, referred to.

Mr. May Oung, for the Appellant.

Mr. C. R. Connell, for the Respondents.

JUDGMENT.—Plaintiff-appellant was the daughter of Maung Shwe Dok and Ma Ke; the former died in the infancy of the plaintiff-appellant, and Ma Ke then married Maung Wa, the 1st defendant-respondent, by whom she had seven children, the other defendants-respondents. The suit was brought after Ma Ke's death to recover a three-quarters share of certain land alleged to be the joint property of Maung Shwe Dok and Ma Ke and a one-eighth share of other lands acquired during the marriage between Maung Wa and Ma Ke.

The defence set up was that all the property was acquired during Ma Ke's second marriage, and that the suit was barred by limitation, time running from the date of Ma Ke's death which occurred over 15 years before the suit was filed.

The plaintiff alleged that Ma Ke's death occurred only some 10 years before the suit and the lower Court found that it occurred less than 12 years before and that the suit was in time. It held that a portion only of the property alleged by plaintiff to have belonged to Maung Shwe Dok and Ma Ke did so belong, and that all the rest was acquired during the second marriage and granted a decree for a three-fourths share of the former and one-eighth of the latter.

Maung Wa and one only of his children appealed and they raised an entirely new defence, which they ought not to have been allowed to do and one which was totally inconsistent with their main defence of limitation, namely, that the suit for a share of property acquired during the marriage of Maung Wa and Ma Ke was premature, and could not be brought before Maung Wa's death. The plaintiff's legal adviser acceded to this

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proposition of law and the Divisional Judge accepted it without discussion as to its soundness, and in the result, having held that all the property was acquired during the second marriage, he dismissed the suit entirely. I must point that it is for the Judge to decide questions of law which arise in the course of the trial, and that he should not accept a view of it suggested by Counsel unless satisfied of its soundness. It is quite a different matter from an admission of fact by Counsel, or from his waiving or withdrawing any part of his client's claim under instructions. In this case, as remarked above, the defence ought not to have been allowed to be raised at all at this late stage of the proceedings, and from the fact that it had never been suggested before, it behoved the Judge to consider it with particular care before deciding it. An attempt has been made in this appeal to bolster up this defence by arguing that as children cannot claim partition of their parent's estate during the life-time of either parent a step-child should not be in a better position; and that though the *Dhammathats* declare the shares to be allotted on such a partition being made, they do not expressly say a partition can be claimed. So far as I am aware that is the usual form in which the case is stated in the *Dhammathats*, and the declaration that a person is entitled to a certain share connotes that he may sue for it. Section 230 of Volume I of the Digest of Buddhist Law is quite clear on the point, and leaves no doubt whatever that the partition can be claimed during the step-father's life-time, as he is allotted the largest share. *Mi So v. Ma Hmat Tha* (1) is in point, and there are doubtless numerous other cases. The decision of the District Court that the suit is premature is reversed.

At the hearing of this appeal appellant's Counsel accepted the Divisional Court's finding of facts that all the property in suit was acquired during the 2nd marriage. Appellant's share of all of it is, therefore, one-eighth. The Divisional Court expressly held the suit not barred by limitation. At the hearing of this appeal the respondent's Counsel desired to support the dismissal of the suit as barred by limitation. Under rule 22 of

Order XLI he was not really entitled to do this as he had filed no cross-objection in the time allowed. But Appellant's Counsel raised no objection to the point being raised, and he was afforded an opportunity of quoting further ruling, and of being heard again on the point. I have, therefore, considered it, and have not the slightest doubt that the suit was in time.

Upon the evidence I consider the Sub-Divisional Court's finding as to the date of Ma Ke's death was palpably wrong. There can be no doubt whatever that she died more than 12 years before the suit was brought, but since her death the plaintiff and her step-brothers and sisters have admittedly been working all the lands in suit in turns by mutual agreement, and, therefore, it is perfectly obvious that there has been no possession adverse to the plaintiff. [See *Ma Le v. Ma Hmyin* (2).]

The appeal is allowed and there will be a decree for a one-eighth share of all the plaint lands in favour of the plaintiff, with costs in all Courts calculated on that basis.

Appeal allowed.

(2) 4 Ind. Cas. 293; 5 L. B. R. 112.

ALLAHABAD HIGH COURT. SECOND CIVIL APPEAL NO. 1599 OF 1914.

July 28, 1915.

Present:—Justice Sir George Knox, Kt.,
GURPRASAD SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

RAM SAMAJH SINGH AND OTHERS—
DEPENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—'Sufficient cause', meaning of—Appeal filed with wrong decree—Procedure, slack, effect of.

The words "sufficient cause" in section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice where no negligence, inaction or want of bona fides is imputable to the appellant. [p. 877, col. 2.]

Where a memorandum of appeal was accompanied not by a copy of the decree appealed against but by a copy of a decree in a connected case and where the whole procedure in the case, so far as the appellant was concerned, was slack to the utmost extent:

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Held, that there was not sufficient cause for not presenting the appeal within the period of limitation and that, therefore, section 5 of the Limitation Act did not apply. [p. 877, col. 2.]

Second appeal from a decree of the Additional Subordinate Judge of Gorakhpur.

Mr. Narmadeshwar Prasad Upadhia (for Dr. Surendra Nath Sen), for the Appellants.

Mr. Jang Bahadur Lal, for the Respondents.

JUDGMENT.—A copy of the decree appealed against has now been put upon the record. It was filed before this Court on the 30th of July 1915, and I understand that when it was filed there was no explanation supported by an affidavit or otherwise as to the reason why it was filed so long after the time granted in the Indian Limitation Act. The ordinary time for the filing of this appeal expired a few days after the 1st of November 1914. As I have shown in my order of the 28th July 1915, the memorandum of appeal was not accompanied by a copy of the decree appealed against. It was accompanied by the copy of a decree passed in a case with which apparently it was intimately connected, and the fact that the decree, with one exception to which I shall presently refer, was the same as the decree which was passed in this case allows the inference that though there must have been negligence on the part of those who filed the memorandum of appeal, yet that negligence was one which might easily have occurred. But when one turns to the final words of the decree it will be found that the decree in the present case, namely No. 65/78, differs *toto cælo* from the decree which was passed in case No. 78/65. Whoever is responsible for the preparation of the papers constituting the memorandum of appeal must have done so in such a perfunctory manner that the Court is unable to hold that the appellants had sufficient cause for not presenting the appeal within the period of limitation prescribed therefor. This view of the case is strengthened when it appears that on the 3rd of November 1914, the appellants applied to the Court below for a copy of the decree and the copy of the decree was given on the same day. Even if the mistake had not been noticed before, it is difficult to understand how it was

that when this copy was procured the mistake was not discovered. The learned Vakil for the respondents in support of his preliminary objection refers me to the case of *Gulab Devi v. Shanker Lal* (1), in which an appeal was admitted by a District Judge acting on a mistaken report of his office. The learned Judges in connection with this observe that the Judge did not admit the appeal under section 5 of the Indian Limitation Act of 1877 and could not have done, so as there were no materials before him by which the appellant could have satisfied him that the appellant had sufficient cause for not presenting the appeal within the period of limitation. While it is true that the words *sufficient cause* in section 5 of the Indian Limitation Act should receive liberal construction so as to advance substantial justice when no negligence or inaction or want of *bona fides* is imputable to the appellant, see *Rakhal Chandra Ghosh v. Ashutosh Ghosh* (2). I find it quite impossible in the present case to hold that there has been no negligence, nor inaction, nor want of *bona fides* on the part of the appellants. The whole procedure in the case so far as the appellants are concerned was slack to the utmost extent. They now propose to file an affidavit. If I give them permission to do that I should be encouraging slackness. The preliminary objection must be allowed and is allowed. This appeal is dismissed with costs.

Appeal dismissed.

(1) A. W. N. (1892) 47.

(2) 19 Ind. Cas. 931; 17 C. W. N. 807 at p. 809.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 105 OF 1914.

September 29, 1915.

Present:—Mr. Batten, A. J. C.

PIRBHU AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

Musammal WAZIRBI—DEFENDANT

RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 116—Cove.

PIRBHU V. WAZIRBI.

nant of title, damages for breach of—Damages, suit for—Limitation, when begins to run.

A breach of a covenant for title caused by the absence of right contracted for is entire and complete at the time of the execution of the conveyance, and, therefore, the Statute of Limitations in such a case in the absence of fraud begins to run in the covenantor's favour as from the date of the execution of the sale-deed. [p. 878, col. 2; p. 879, col. 1.]

First appeal against the decree of the District Judge, Seoni, dated the 31st July 1914.

Dr. H. S. Gour, for the Appellants.

Mr. J. Mittra, for the Respondent.

JUDGMENT.—One Yusuf Mohammed Khan, the son of Sirajobi, married Wazirbi, by whom he had three daughters Nasib Begum, Jamal Begum and Kamal Begum. On the 24th May 1897 Yusuf Mohammed Khan sold the whole sixteen annas of *Mauza Sagar* by a registered sale-deed to Pirbhu and Rupchand, now represented by the plaintiffs-appellants Pirbhu and the sons of Rupchand.

It is admitted by both sides in this Court that the sale-deed contains an express covenant of title Yusuf Mohammed Khan died in 1901, and Sirajobi in 1903. Suit No. 20 of 1907 was brought by the three daughters of Yusuf Mohammed Khan to recover an eight-anna share of the village, on the ground that they were the heirs of their grandmother Sirajobi who owned an eight-anna share. The claim was decreed and this Court dismissed the second appeal of the then defendants, the present defendants, on the 12th November 1912. This suit decided that Yusuf Mohammed Khan had no title in eight annas of the sixteen annas sold. The present suit has been brought against Wazirbi and other legal representatives of Yusuf Mohammed Khan, as a result of the former suit. Several reliefs are claimed by the plaintiffs; the only relief with which we are now concerned is the claim for damages for breach of the covenant of title. Other reliefs are undoubtedly time-barred. The learned District Judge, in a well-reasoned judgment, has held that the suit, in so far as it is a suit for damages for breach of covenant of title, is governed by Article 116 of the Limitation Schedule, and that limitation began to run from the day on which the sale-deed was executed. On this finding

the suit has been dismissed as time-barred.

The learned Counsel for the appellants, while admitting that Article 116 governs the case, contends that the period of limitation began to run from the date when the decree of this Court finally decided that Yusuf Mohammed Khan had no title as regards eight annas of the sixteen annas conveyed. In support of his proposition the learned Counsel relies on *Bahadur Lal v. Jadha* (1), where limitation began to run from the date of the decree settling the question that the vendor had no title. But in that case the parties agreed as to the date from which time began to run, and *Imay, J. C.*, held that the view appeared to be correct, in view of the special terms of the deed which contained an express covenant, not in the terms of a covenant of title, but to reimburse the vendee all costs incurred in discharging the encumbrance and in obtaining possession of the property sold. There was certainly no judicial pronouncement that in a case like the present time would begin to run, not from the date of the sale-deed, but from the date when the vendee was dispossessed by the true owner. The learned Counsel has also cited *Krishnan Nambiar v. Kannan* (2) and *Zemindar of Vizianar, Ram v. Behara Suryanarayana Patrule* (3). But in both these cases, in which Article 116 was held applicable to a suit of the present kind, no question arose as to when time began to run, as the suits were brought within six years of the execution of the deed.

A reference to Williams on the Law of Vendors and Purchasers and Dart on the Law and Practice relating to Vendors and Purchasers shows that there is a very strong balance of authority, that a breach of a covenant for title caused by the absence of the right contracted for is entire and complete at the time of the execution of the conveyance, so that the Statute of Limitations will begin to run in the covenantor's favour as from that date. I would

(1) 2 N. L. R. 174.

(2) 21 M. 8.

(3) 25 M. 587; 12 M. L. J. 249.

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refer specially to the cases of *Spoor v. Green* (4) and *Turner v. Moon* (5). In the latter case Joyce, J., adopts the view taken by Baron Bramwell in the former case of the meaning of the judgment of Lord Ellenborough in *Kingdon v. Nottle* (6). Baron Bramwell makes it clear that Lord Ellenborough was not considering the question of limitation at all. This is important in view of the fact that the learned Counsel for the appellants, Dr. Goar, relies on the arguments contained in the latter part of paragraph 106E of the 4th edition of his valuable work on the Law of Transfer, where he relies on the words of Lord Ellenborough.

With reference to the hypothetical extreme case put by him at the end of the above cited paragraph, it seems that the case would be one of fraud, when limitation would be saved by the principles embodied in section 18 of the Limitation Act. The same principles are expressed in *Gibbs v. Guild* (7); if the breach of covenant were fraudulently concealed by the covenantor, according to the law the Statute will not begin to run until the time when the fraud was, or might with reasonable diligence have been, discovered. In the present case no pleading of fraud has been made by the appellants, and the circumstances contra-indicate fraud, for the plaintiff Pirbhu admits as a witness that he knew that half of the property stood in the revenue registers in the name of Sirajobi.

The learned District Judge has taken a correct view of the law, and the appeal is dismissed with costs.

Appeal dismissed.

(4) (1874) 9 Ex. 92 at p. 99; 43 L. J. Ch. 57; 30 L. T. 393; 22 W. R. 547.

(5) (1901) 2 Ch. 825; 70 L. J. Ch. 822; 85 L. T. 90; 60 W. R. 237.

(6) (1815) 16 R. R. 379; 4 M. & S. 53; 105 E. R. 755.

(7) (1882) 9 Q. B. D. 59; 51 L. J. Q. B. 313; 30 W. R. 541; 46 L. T. 248.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 353 OF 1913.

November 22, 1913.

Present:—Justice Sir P. C. Bauerjee, Kt.,
and Mr Justice Tudball.

KHETRA PAL—DEFENDANT—APPELLANT
versus

Musammam MUMTAZ BEGAM—PLAINTIFF
AND ANOTHER—DEFENDANT

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63
—Decree below Rs. 5,000—Suit valued above Rs. 25,000
—Jurisdiction.

The plaintiff brought a suit for a declaration that the property in suit, which she claimed under a sale-deed, was not liable to attachment and sale in satisfaction of the decree held by defendant No. 1 against defendant No. 2. The decree was for Rs. 2,000. The suit was valued at Rs. 25,000. The suit was decreed. The defendant preferred an appeal to the High Court.

Held, that the proper valuation of the suit was Rs. 2,000 and, therefore, the appeal lay to the District Judge, and not to the High Court. (p. 880, col. 2.)

First appeal from a decree of the Subordinate Judge of Agra, dated the 1st August 1913.

Messrs. Shyam Krishna Das and Narain Prasad Ashthana, for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapra and Messrs. Ibn Ahmad and Girdhari Lal Agarwala, for the Respondents.

JUDGMENT.—The first question which arises in this appeal is whether the appeal lies to this Court. For the decision of that question we have to determine what was the value of the subject-matter of the suit in the Court below. If the amount of that value was below Rs. 5,000, the appeal would not lie to this Court but lay to the Court of the District Judge. The suit was brought under the following circumstances. The first defendant, who is the appellant here, holds a decree against the second defendant, the husband of the plaintiff-respondent. In execution of that decree he caused the property in suit to be attached as the property of his judgment-debtor. An objection was preferred by the plaintiff claiming the property under a sale-deed alleged to have been executed in her favour on the 22nd of May 1912. Her objection having been overruled, she brought the present suit on the 4th of January 1913 and asked for a declaration that the property in suit "was not liable to attachment and sale in satisfaction of the amount due to defendant

MEGHRAJ F. JOHNSON.

No. 1," and she also prayed that her right to the property be declared. She alleged the date of the cause of action to be the 4th of January 1912. No doubt she made her husband a party to the suit, but she asked for no relief against him and did not allege any cause of action which would entitle her to sue him. Apparently her husband was only made a formal defendant to the suit. The lower Court decreed her claim and the decree-holder, the defendant No. 1, has preferred this appeal. No doubt in the plaint the value of the subject-matter for purposes of jurisdiction is stated to be Rs. 25,000 but this, in our opinion, was clearly erroneous. As we have already said the plaintiff claims no relief against her husband and she does not allege any cause of action as against him. All that she asks for is that it be declared that the amount of the decree held by the first defendant ought not to be realized from her property, that is, from so much of it the value of which would be equivalent to the amount of the decree. It is admitted in this case that the amount of the decree is about Rs. 2,000. It is, therefore, clear that the object of the suit is to relieve the property from a burden to the amount of Rs. 2,000 which the decree-holder, defendant No. 1, is seeking to impose on it by attaching the property. The whole of the property is not in dispute and under the attachment and the sale which might take place in pursuance of it, the whole property cannot be sold but only so much of it as will be sufficient for the realization of the amount of the decree. Therefore, the value of the subject-matter of the suit is the amount of the decree, and not the amount of the actual value of the property or the value for which the plaintiff alleges that she purchased it. The matter was decided by this Court in the case of *Dwarka Das v.ameshar Prasad* (1), and the same view was adopted in *Dhan Devi v. Zamurad Begum* (2). The matter was considered by their Lordships of the Privy Council in the recent case of *Phul Kumari v. Ghanshyam Misra* (3). The exact point which is now before us was not in issue before their Lordships, but there are observa-

tions in the judgment which clearly support the view taken by this Court. Their Lordships say, "the value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit." In the case before us the amount of the decree is below Rs. 5,000 and much below the actual value of the property. Therefore, according to the view expressed by their Lordships, the value of the suit should be regarded as the amount of the decree. That amount being less than Rs. 5,000 an appeal from the decree of the Courts below lay to the District Judge and not to this Court. We accordingly direct that the memorandum of appeal be returned to the appellant for presentation to the proper Court. Under the circumstances we make no order as to the costs of this appeal.

Memorandum of appeal returned.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 92 OF 1914.

January 23, 1915.

Present:—Sir Henry Drake-Brockman,
Kt., J. C.

MEGHRAJ—APPLICANT
versus

JOHNSON RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 35—Costs, general rule as to—Small Cause Court, not following facts on record—High Court, whether can interfere—Jurisdiction—Revision—Provincial Small Cause Courts Act (IX of 1887), s. 25—Promissory note—'On demand,' meaning of—Creditor, liability of, for bringing action without demand—Debtor, liability of—Contract Act (IX of 1872), s. 49.

A High Court has power to interfere under section 25 of the Provincial Small Cause Courts Act, 1887, where a Small Cause Court departs from the general rule as to costs that they shall follow the event for reasons which find no adequate support in the facts on record. [p. 881, col. 2.]

Musammal Uma v. Musammal Kallu, 3 C. P. L. R. 185; *Bhaiyalal v. Jamnadas*, 11 C. P. L. R. 91, referred to.

The words 'on demand' used in a promissory note payable on demand do not constitute a condition precedent, but merely import that the debt is due and payable immediately [p. 882, col. 1.]

A creditor, however, who commences an action without having first demanded payment, may pro-

(1) 17 A. 69 A. W. N. (1895) 3.

(2) 27 A. 440; 2 A. L. J. 115; A. W. N. (1905) 37 (F. B.).

(3) 35 C. 202; 12 C. W. N. 169; 35 I. A. 22 (P. C.); 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 503; 10 Bom. L. R. 1.

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perly be saddled with the costs of the trial, if the debtor was all along willing to pay. [p. 882, col. 1.]

Jeunissa Laddi Begum v. Manikji Kharsetji, 7 B. H. C. R. 36 at p. 38; *Perumal Ayyan v. Alagirisami Bhagavathar*, 20 M. 245 at 248; 7 M. L. J. 222; *Macintosh v. Haydon*, (1826) 27 R. R. 757; *Ryan and Moody* 362, followed.

Under section 49 of the Contract Act, it is generally for the debtor to seek out the creditor for the discharge of his debts. [p. 882, c. l. 1.]

Ganesh v. Sathakaran, 13 C. P. L. R. 74 at p. 77, followed.

Civil revision against the decree of the Small Cause Court, Nagpur, dated the 23rd September 1913.

Mr. M. R. Boble, for the Applicant.

Mr. A. J. Balm, for the Respondent.

JUDGMENT.—This is an application for revision of so much of a decree passed by the Small Cause Court, Nagpur, as refuses the plaintiff any part of his costs, although as to the greater part of his claim he was successful.

The suit was brought on a promissory note payable on demand and not at any specified place. It was executed by the defendant on the 20th November 1911. Several oral demands for payment were made by the plaintiff's servant Govind Rao (P. W. No. 2), and finally on the 22nd April 1913 a notice was sent to the defendant which he received two days later. On the 30th April the defendant sent the plaintiff by registered post a letter in the following terms:—

"Your registered notice to hand. I was surprised to receive it, as I never refused to settle your account. Your servant came to me on 2 or 3 occasions and he was told to ask you to call and make up accounts. Will you, therefore, come over and make up accounts and meanwhile send me a memo. showing (1) the amount originally borrowed and the date on which it was handed over to me, (2) the amounts received by you in payment of the loan and (3) balance due up to the end of April?"

The plaintiff received this letter on the 2nd May, but neither sent a reply nor complied with the defendant's request. The suit was filed on the 19th August 1913.

Interest was claimed at the rate of 3 per cent. per mensem, but the defendant pleaded that 1 per cent. per mensem was the rate agreed upon and the lower Court found in his favour on this point. A further plea was taken to the effect that

the defendant should not be held liable for interest after the 30th April 1913 or for the plaintiff's costs of suit. In this connection the defendant's written statement contains the following:—

"As the transaction was entered into by the plaintiff in person with the defendant at the latter's bungalow and as it was the practice in previous dealings between the parties to make up the accounts at the defendant's house, the defendant naturally expected the plaintiff to comply with his request in the letter and was ready with the amount wherewith to pay the plaintiff."

According to the lower Court's judgment the points for determination thus raised are:—

"Is the plaintiff entitled to interest up to the 19th August 1913 or up to the 30th April 1913?"

"Can the plaintiff demand costs of this suit under the circumstances of the case?"

The former was found against the defendant on the ground that he neither made a legal tender before suit of the sum he considered due nor deposited that sum in Court during the trial. But the plaintiff's costs were disallowed *in toto* for the following reasons:—

"The letter and the acknowledgment filed by the defendant clearly show that the plaintiff is to blame for this litigation. If he had gone to the defendant as he was accustomed to do, this suit would not have been filed, as the defendant was ready to settle the matter before coming to Court."

The general rule as to costs is that they should follow the event. This is plain from section 35 of the Civil Procedure Code, and was also held in *Musammatt Ima v. Musammatt Kallu* (1). The lower Court has stated in writing its reasons for not following this general rule and so far has complied with section 35 of the Code. The plaintiff-applicant's contention, however, is that the reasons given find no adequate support in the facts on record, and if this is correct, this Court should, I think, interfere on the principle laid down in *Bhaiyalal v. Jumnadas* (2).

Now it is not contended that as a matter of law the plaintiff was bound to attend at the defendant's bungalow to

(1) 3 C. P. L. R. 185.

(2) 11 C. P. L. R. 91.

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demand payment. Under the exception to section 64, Negotiable Instruments Act, 1881, no presentment of the note was necessary in order to make the defendant chargeable thereon. The words "on demand" do not constitute a condition precedent, but merely import that the debt is due and payable immediately, and it is for this reason that the period of limitation applicable runs from the date of the instrument, not from the time of the demand: see Article 73 of the first Schedule to the Indian Limitation Act, 1908, *Jeannissa Lodli Begam v. Manikji Khursetji* (3) and *Perumal Ayyan v. Alagirisami Bhagavathar* (4). The law of England is the same and will be found stated in *Byles on Bills* (page 321, 17th edition) and in *Norton v. Ellam* (5). In both countries, however, the creditor who commences an action without having first demanded payment may properly be saddled with the costs of the trial, if the debtor was all along willing to pay: see *Macintosh v. Haydon* (6). In so far as the plaintiff had as a matter of courtesy been accustomed to visit the defendant personally to state his claims, the defendant had ample notice before suit that this should no longer be expected. There is really no room for any suggestion that the defendant did not know what he had to pay. The plaintiff's servant was ready to show the accounts, and no accounting was in fact necessary, seeing that even up to the date of the lower Court's judgment no payment was ever made. It is not suggested that the defendant did not know the date or amount of the note or the rate of interest he had agreed to pay, and under the general rule embodied in section 49 of the Indian Contract Act, it is for the debtor to seek out the creditor for purposes of performance: see *Ganesh v. Sidhakaran* (7). Had the plaintiff complied with the defendant's request, it is certain that the parties would not have agreed as to the

amount payable by way of interest, and no less certain that the defendant, however, ostensibly willing to discharge his debt, would not in fact have done so. As to the latter point, I need only refer to the facts that nothing was paid into Court at the trial under Order XXIV of the first Schedule to the Civil Procedure Code, and that at the defendant's request the decree was for payment by two instalments, the first not falling due till nearly a month after conclusion of the trial. Having regard to the illustrations in rule 4 (2) of the said Order, I am clearly of opinion that in a case like the present it was improper to deprive the plaintiff of all his costs. The defendant should have tendered what he considered due, and just as he has been made to pay interest up to the date of the suit, so he should be ordered to pay so much of the plaintiff's costs as corresponds necessarily to the latter's success, namely, Court-fee (Rs. 48) on the sum decreed, Pleader's fee (Rs. 31-8-0) on the said sum, Court-fee (8 annas) on the *wakalatnama*, and process-fee (8 annas) for summons to the defendant, total Rs. 80-8-0. No more than this is asked for by the plaintiff in this Court.

The decree of the Small Cause Court is modified by substituting for the direction that each party do bear his own costs a direction that the defendant do pay Rs. 80-8-0 out of the plaintiff's costs and that otherwise costs be borne as incurred. The defendant will pay the costs of the application to this Court. I allow Rs. 15 as Pleader's fee.

Decree modified.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 112 OF 1915.

November 15, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

HAR PRASAD—DEFENDANT—

APPELLANT

versus

MUKAND LAL—RESPONDENT.

U.P. Land Revenue Act (III of 1901), ss. 111, 112—

(3) 7 B. H. C. R. 36 at p. 38.

(4) 20 M. 245 at p. 248; 7 M. L. J. 222.

(5) (1837) 6 L. J. Ex. 121; 2 M. & W. 461; 1 M. & H. 69; 1 Jur. 423; 46 B. R. 646; 150 E. R. 539

(6) (1826) 27 R. R. 757; Ryan & Moody 362.

(7) 13 C. P. L. R. 74 at p. 77.

HAR PRASAD V. MUKAND LAL.

Partition—Party required to file civil suit—Failure to file civil suit—Order—Appeal—Jurisdiction.

The applicant applied in the Revenue Court against the defendant claiming partition. The defendant objected that the applicant's share was less than what he claimed. The Collector made an order under section 111 of the Land Revenue Act, requiring the defendant to bring a suit in the Civil Court within three months to determine the question. This was not done. After the expiry of three months, the case again came up before the Collector. The defendant alleged that the decision of the Civil Court for partition in respect of the non-revenue paying property of the parties had settled the question. The Collector overruled this objection. The defendant appealed to the District Judge.

Held, that no appeal lay to the District Judge.

First appeal from an order of the District Judge of Saharanpur.

Mr. Nihal Chand, for the Appellant.

Dr. Surendro Nath Sen, for the Respondent.

JUDGMENT—This appeal arises under the following circumstances. Mukand Lal presented an application in the Revenue Court against Har Prasad, alleging that he was entitled to $\frac{2}{3}$ ths of the recorded property and claiming partition. Har Prasad filed an objection that Mukand Lal's share was only one-half and the other half belonged to him. This matter having come before the Collector he made an order under section 111 of the Land Revenue Act requiring Har Prasad to bring a suit in the Civil Court within three months to determine the question. Har Prasad never brought any such suit. He alleges, however, that there was pending in the Civil Court a suit for partition brought by Mukand Lal in respect of non-revenue paying property, and that it was decided in that suit that they constituted a joint Hindu family and were, therefore, on partition entitled to all the joint property half and half. After the expiry of three months when the case again came before the Collector, it was found that Har Prasad had not complied with the order. He tried to make out that the finding of the Civil Court had settled the question. The Collector made an order in which he stated that the Civil Court's decision had nothing to do with the revenue-paying property. The Collector accordingly overruled the objection which had been filed by Har Prasad. Against this order Har Prasad filed an appeal in the

District Judge's Court. The District Judge held that no appeal lay to him and returned the memorandum of appeal for presentation to the proper Court. Section 111 of the Revenue Act provides that when an objection is made by a recorded co-sharer involving a question of proprietary title, one of three courses is open to the Collector: he may either decline to grant the application until the question be settled by a competent Court, or he may require any party to the case to institute a suit in the Civil Court within three months to settle the question or he may proceed to enquire into the merits of the objection himself. Clause (3) provides that if this last-mentioned course is adopted the Collector is to follow the procedure laid down in the Code of Civil Procedure for the trial of original suits, and in that case an appeal lies to the District Judge (Section 112). It is clear that no appeal lies to the District Judge when the Collector makes an order under clauses (a) and (b) of section 111 (1). Clause (2) provides that if the Collector requires a party to bring a suit within three months and he fails to comply with the requisition, the Collector must decide the question against him. It is contended on behalf of the appellant that he substantially complied with the order of the Collector directing him to institute a suit. We find that all he did was to put in a defence to the effect that the family was a joint family and that the suit should be dismissed on the ground that all the family property had not been included in the suit. It is stated (probably correctly) that the result of this defence was that Mukand Lal's suit for partition in the Civil Court was dismissed. In our opinion what Har Prasad did was in no way a compliance with the order of the Collector directing Har Prasad to institute a suit in the Civil Court within three months. Even if we assume that Har Prasad substantially complied with the order of the Collector and that the latter should have decided in favour of Har Prasad, the section does not provide for an appeal in such case to the District Judge. We think the Court below was right. We accordingly dismiss the appeal with costs.

Appeal dismissed.

RAMAN CHETTY F. A. V. P. FIRM. UDAI BHAWAN SINGH v. MANAGER, KAYASTHA PATHSHALA.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 89 OF 1915.

September 7, 1915.

Present:—Mr. Justice Ormond and
Mr. Justice Twomey.

A. K. R. M. S. RAMAN CHETTY—
APPELLANT

versus

A. V. P. FIRM—INSOLVENT—RESPONDENT.

*Provincial Insolvency Act (III of 1907), s. 22—
Receiver—Court's functions—Remedy of purchaser in
auction.*

Section 22 of the Provincial Insolvency Act does not contemplate that a lengthy inquiry should be held in a complaint against the irregularities of a sale held by a Receiver in an insolvency case as if the matter was a regular claim for specific performance. Under that section the Court simply ratifies, reverses or modifies the executive acts of its officer and any order under that section does not preclude a party from pursuing his ordinary remedy by a suit for specific performance against the Receiver.

Mr. S. N. Sen, for the Appellant.

Mr. C. R. Connell, for V. T. Sithambaran Chetty, Creditor.

Mr. Chari, for S. H. Chetty firm, Creditor.

JUDGMENT.—The firm of A. V. P. at Moulmein was declared insolvent. A Receiver was appointed to sell the assets. There was some immoveable property in the Ramnad District. The Receiver at Moulmein appointed the Official Receiver of Ramnad and Madura to sell the property as his agent. The property was put up for auction at Madura and the appellant was the highest bidder. Complaints were made to the Receiver at Moulmein and also to his agent, the Official Receiver of Madura, that the property had been sold for less than its value, owing to the sale not having been properly published. The Receiver at Moulmein accordingly refused to complete the sale and convey the property. The appellant applied to the District Judge of Amherst under section 22 of the Provincial Insolvency Act to order the Receiver to complete the sale. The learned Judge after reading the report of the Receiver and the correspondence between the Receiver and his agent, the Official Receiver of Madura, refused to interfere with the action of the Receiver; and the appellant now appeals from the District Judge's order of refusal.

He complains that a proper enquiry was not held under section 22 and that he was

not given the opportunity of adducing evidence that the sale was unconditional and that the proclamation of sale was duly published. Section 22 does not require the Court to hold any enquiry. The section does not contemplate that a lengthy enquiry should be held as if the matter was a regular claim for specific performance. Under that section, the Court simply ratifies; reverses or modifies the executive acts of its officer; and any order under that section does not preclude a party from pursuing his ordinary civil remedy. The District Court was of opinion *prima facie* that the sale had not been properly advertised; that the purchaser, the appellant, was very probably acting on behalf of the insolvent, and that it was through the action of the insolvent that the inadequate price was obtained. The Court apparently overlooked the statement of the Official Receiver of Madura in his letter to the Receiver at Moulmein, stating that the sale was made subject to confirmation of the Receiver at Moulmein. In that case, the appellant has no cause to complain; the Receiver at Moulmein has thought fit not to confirm the sale. Under section 22, the Court would be entitled to accept that statement by the Official Receiver of Madura as a fact, without postponing the enquiry to enable the complainant to adduce evidence to the contrary. The appellant has the remedy by a suit against the Receiver for specific performance, if he is so advised.

This appeal is dismissed with costs, three gold mohurs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 8 OF 1912-13 OF
ALLAHABAD DISTRICT.

August 22, 1913.

Present:—Mr. Baillie, S. M., and
Mr. Tweedy, J. M.

UDAI BHAWAN SINGH—DEFENDANT—
APPELLANT

versus

MANAGER, KAYASTHA PATHSHALA
—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 13, 58—Ejectment

LA AUNG v. MAUNG SO.

of father - Land re-let to minor son - Joint family - Continuous possession - Occupancy right.

When a father was ejected under section 58 of the Tenancy Act and immediately after the land was leased to his son aged sixteen who was joint with his father:

Held, that the re-letting was in fact a re-admission of the father to the holding within the meaning of section 13 of the Tenancy Act.

Second appeal from the order of the Commissioner, Allahabad Division, dated the 3rd October 1912, reversing that of the Assistant Collector of Allahabad District, in the case of ejectment.

JUDGMENT.

BAILLIE, S. M.—(August 18th 1913.)—The father of appellant was ejected by a suit in 1904 from the land now in question. A lease was then given in the name of the appellant, who appears to have been from the evidence at the time 16 years of age and who was certainly joint with his father. It appears to me to be beyond doubt that the re-letting was in fact a re-admission of the father to the holding within the meaning of section 13 of the Tenancy Act and as it took place within a year from the date of the ejectment, there was no break in the continuity of the occupation of this land. To hold otherwise is to provide an obvious and easy method of making the provisions of section 13 useless. The father has since died and the son succeeded him in the holding.

I would allow this appeal, cancel the order of the Commissioner and restore that of the Court of first instance. Costs on respondent.

TWEEDY, J. M.—The son to whom the lease was given was a minor and incapable of making contract and this important point was not noticed by the Commissioner. He had also no separate holding and was joint with his father. In view of this fact and considering that the lease was a wholly invalid document, I am prepared to agree in holding that the father was re-admitted to the tenancy and I would decree the appeal.

Appeal allowed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 19 OF 1915.

December 7, 1915.

Present:—Mr. Justice Maung Kin.

LA AUNG—APPELLANT

versus

MAUNG SO—RESPONDENT.

Mortgage—Redemption, suit for—Burden of proof—Court's duty in such cases.

In a suit for redemption, the plaintiff when he is put to strict proof and is out of possession, must stand or fall by the strength of his evidence and cannot depend upon the weakness of his adversary's case. In such cases it is absolutely wrong to deal with the case of the defendant first and prove it to be worthless and then turn to that of the plaintiff. The Court should see whether the plaintiff has discharged the burden lying upon him; his case cannot be held to be true because the defendant has failed to prove his defence. [p. 885, col. 2.]

Ma Ya v. Maung Kyauk, B. S. J. 482; *Pa Shwe Aung v. Pa To Bya*, B. S. J. 494, referred to.

Mr. J. E. Lambert, for the Appellant.

JUDGMENT.—The respondent Maung So sued the appellant La Aung for redemption of two pieces of land. Maung So's case was that his mother, Mi Than Da Bon, mortgaged the lands to her brother, Maung Hnaung, some 25 years ago for the sum of Rs. 200 on condition that Maung Hnaung should take possession of the lands and enjoy the profits thereof in lieu of interest on the loan. Both Mi Than Da Bon and Maung Hnaung are dead. La Aung is Maung Hnaung's son. In his defence he says that he does not know whether there was a mortgage or not and puts the plaintiff to strict proof thereof.

Now, the onus of proof is very heavily on the plaintiff, so much so that he must stand or fall upon the evidence he produces and cannot depend upon the weakness of his adversary's case. See *Ma Ya v. Maung Kyauk* (1) and *Pa Shwe Aung v. Pa To Bya* (2). In a case like this, it is absolutely a wrong method to deal, as the lower Appellate Court appears to have done, with the case of the defendant first and prove it to be worthless and then turn to that of the plaintiff, as if the Court had to say whether the one or the other of the two cases is true. All that the Court has to do is to say whether the plaintiff has discharged the onus which is upon him, his case cannot be held to be true

(1) B. S. J. 482.

(2) B. S. J. 494.

ISHAR DUTT v. MUSAI DUBE.

because the defendant has failed to prove his defence, nor can one relax the strictness with which one has to approach the plaintiff's case because of the weakness of the defence.

Let us now consider the evidence adduced by the plaintiff.

He himself says that he was present at the mortgage but does not say who else was present. At any rate, he has not produced any witness who was present on the occasion.

Obviously, his evidence alone is not sufficient. His witness Thauk Ka Pyu says that, though he was not present when the loan was given, he one day heard Mi Than Da Bon say to Maung Hnaung, "You can enjoy the lands, but you must give me back the lands when I want to redeem them." He also says that, when he heard this, the money had been paid 2 or 3 days before. What led to this statement by Mi Than Da Bon and how the witness knew that the money had been paid, the record does not show. When he gave the evidence he was 49. So he must have been 24 or so when the transfer of the land took place. Even if he was present when there was a conversation between Mi Than Da Bon and Maung Hnaung about the lands, it is difficult to see how he could remember the terms of it 25 years afterwards, when we know that he could not have been—he does not say he was—called in to witness a transaction which was going to take place. On reading his evidence carefully, one gets the idea that he must have been, if at all, present quite casually, so that there would be no reason why he should afterwards remember anything at all about it. I consider his evidence worthless.

Some reliance has been placed upon the admitted fact that Maung Hnaung shortly before his death said that the plaintiff might be allowed to redeem the property. In my judgment this does not prove the transfer to be a mortgage. Maung Hnaung and Mi Than Da Bon were brother and sister and it might be that Maung Hnaung wanted his nephew, the plaintiff, to have his mother's lands, if he could pay the money for which the transfer was made. The issue involved cannot be held to be proved by such evidence of admission alone.

I hold that the plaintiff has failed to prove his case.

The decree of the lower Appellate Court is reversed. The respondent will pay costs throughout.

Decree reversed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 561 OF 1914.

November 15, 1915.

Present:—Mr. Justice Piggott.

ISHAR DUTT AND ANOTHER—PLAINTIFFS—
APPELLANTS
versus

MUSAI DUBE AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. X.I, c. 1—Appeals, separate, by two sets of defendants—Appeal by one set, dismissal of—Appeal, hearing of, by other set—Discretion of Court to dismiss suit as against all defendants.

The plaintiff filed a suit for possession against two sets of defendants and obtained a decree in the first Court. Both the sets of defendants filed separate appeals on different dates. The appeal filed by one set of defendants was heard and dismissed. Subsequently the appeal filed by the other set of defendants was taken up. The Additional District Judge who heard the latter appeal being of opinion that the plaintiff had no title to the property, dismissed the suit as against all the defendants.

Held, that the Judge had the discretion under Order XLI, rule 4, of the Civil Procedure Code to dismiss the suit as against both sets of defendants. [p. 888, col. 1.]

Second appeal from the decision of the Additional District Judge of Gorakhpur, dated the 26th May 1914.

Mr. Parmeshwar Dayal, for the Appellants.

Mr. Girdhari Lal Agarwala, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of possession over immoveable property. In the array of parties originally impleaded there were five defendants of the first party, seven defendants of the second party and one defendant of the third party. Of this last it is sufficient to say that she was alleged to have a joint right with the plaintiffs to the property in suit, and was impleaded because she declined to join in the suit. The plaint does not disclose any difference in the position of the defend-

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ants first party and the defendants second party except in so far as it alleges that the defendants first party have filed a collusive suit against the defendants second party. On the question of the existing possession over the property in suit the plaint merely says that the possession of the defendants first party and second party is wrongful. The Court of first instance decreed the suit on the 20th of September 1912. Separate appeals were filed by the defendants first party and by the defendants second party. The appeal of the former was filed on the 18th of November 1912 and that of the latter was filed on the 26th of November 1912. This appeal was transferred to the Court of the Additional District Judge of Gorakhpur sitting at Basti and was dismissed by him on the 4th of February 1913. In the meantime the appeal of the defendants first party remained pending, its connection with the other appeal having apparently been overlooked. It was, however, transferred to the Court of the Additional District Judge and was disposed of on the 26th of May 1914 by the successor of the learned Additional District Judge who had dealt with the appeal of the defendants second party. On the most important issue of fact in the case, an issue which involved the entire title of the plaintiffs to the property in dispute, the learned Additional Judge who held charge of that office in the month of May 1914, came to a conclusion diametrically opposite to that arrived at by his predecessor in the month of February 1913. Finding that the plaintiffs had failed to prove their title to the land in dispute he accepted the appeal of the defendants first party and dismissed the suit altogether. The plaintiffs have come to this Court in second appeal. The plea taken to the effect that the District Judge of Gorakhpur had no jurisdiction to decide the appeal seems to be based on some misapprehension. The plea to the effect that the decision of February 4th, 1913, operates as *res judicata* against the defendants first party seems to me quite unsustainable. It was a decision to which they were no parties, and it was actually arrived at while the question in issue was under adjudication on the appeal filed by them

on November 18th, 1912. It was further contended that, in any case, the Additional District Judge who decided the appeal of the defendants first party ought not to have dismissed the plaintiffs' suit altogether, but should have so framed his decree as to maintain for the plaintiffs the benefit of the dismissal of the appeal brought by the defendants second party. The course taken by this litigation in the lower Appellate Court was certainly unfortunate and the result arrived at appears anomalous. Nevertheless I am not clear that the plaintiffs are entitled to any relief from this Court. They are themselves mainly responsible for the curious result of the litigation in the lower Appellate Court. The defendants first party and the defendants second party had each availed themselves independently of a right undoubtedly secured to them by Order XLI, rule 4 of the Code of Civil Procedure, that is to say, each set of defendants had appealed from the whole decree, on the ground that the said decree proceeded upon a ground which was common as against all the defendants. There is no necessary presumption that either set of defendants was cognizant of the filing of the appeal by the other set. The plaintiffs on the other hand must have received notice of both the appeals, and it was apparently remiss on their part, as it was certainly unfortunate for them, that they did not invite the attention of the Court below to the advisability of hearing both the appeals together. As matters turned out the Additional District Judge who took cognizance in the month of May 1914 of the appeal filed by the defendants first party was possessed of the discretion reserved to a Court of Appeal by Order XLI, rule 4, above referred to. Having decided against the plaintiffs a point which went to the root of their title, it would certainly have been anomalous for him to so frame his decree as to allow the plaintiffs to claim possession against one set of defendants. If the defendants second party had never filed an appeal at all the decision of the Court of first instance would have become final against them. Yet the Appellate Court would have been clearly entitled to exercise, on the appeal of the defendants first party, the discretion

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conferred upon it by Order XLI, rule 4, Civil Procedure Code. There is no provision of law which lays down that this discretion is taken away in the event of an unsuccessful appeal by one defendant or set of defendants, and I do not find myself able to formulate any principle of law which would take away that discretion. The dismissal of the appeal filed by the defendants second party in no way affects the principle that the decree of the Court of first instance had not become final against the defendants first party so long as their appeal against the same remained undisposed of on the file of the Additional District Judge of Gorakhpur, and if that decree had not become final it remained subject to the discretion conferred upon an Appellate Court by Order XLI, rule 4, Civil Procedure Code. This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REFERENCE NO. 10 OF 1915.

November 22, 1915.

Present:—Mr. Justice Ormond and Mr. Justice Twomey.

M. MEYER—APPLICANT

versus

MRS. C. LEA—RESPONDENT.

Alien enemy—License to trade—Suits, right to bring.

An alien enemy who has been licensed to trade in British India, has access to the Courts and may bring suits.

Schaffinius v. Soldberg, (1915) T. L. R. 31, referred to.

FACTS of the case appear from the following Order of Reference made by the Judge, Small Cause Court, Toungoo:—

"The facts of the case are, that one M. Meyer, who is a Turkish Jew, born in Bagdad, in Asia Minor, files a suit for the recovery of a sum of Rs. 13-8-0 due by the defendant Mrs. Lea, for balance of price of the goods sold and delivered to her by the plaintiff.

The defendant admits purchasing goods as alleged by the plaintiff, but she denies owing any sum to the plaintiff, as she has

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fully discharged her debt. She also contends that the plaintiff being an alien enemy, has no right to sue.

The plaintiff obtained on the 21st April 1915 a license to continue his business of a shop-keeper. The license does not indicate that the plaintiff can institute a suit in a Court for the recovery of any sum. From reading the license of the plaintiff, I am of opinion that the plaintiff has no right to sue, but I am doubtful whether I am correct in my view.

I, therefore, most respectfully beg to refer this point for the decision of the Hon'ble Judges of the Chief Court, under Order XLVI, rule 1 of the Code of Civil Procedure."

JUDGMENT.

ORMOND, J.—In view of the decision in *Schaffinius v. Soldberg* (1) I would answer the question referred to this Court in the affirmative.

TWOMEY, J.—It is quite clear from the case cited by Mr. Justice Ormond that an "alien enemy" who has been licensed to carry on his trade or business in British India has access to the Courts and may bring a suit. Meyer may, therefore, sue.

Reference answered in affirmative.

(1) (1915) T. L. R. 31.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 357

OF 914.

November 25, 1915.

Present:—Mr. Justice Ormond.

AHAMUT—PLAINTIFF—APPELLANT

versus

KALU—DEFENDANT—RESPONDENT.

Lessor and lessee—Land let out by person having no title—Suit for rent, maintainability of—Jurisdiction.

A person who lets out land to another, can recover rent from him, though he has no title in law to the land, and Civil Courts have jurisdiction to entertain suits for such rent even though the land be Government waste land. [p. 889, col. 1.]

Maung Naw v. Ma Shwe Hmat, 30 Ind. Cas. 772; 8 Bur. L. T. 191 (F. B.), referred to.

Mr. Campagnac, for the Appellant.

Mr. Sin Hla Aung, for the Respondent.

JUDGMENT.—The plaintiff sued the defendant to recover Rs. 25 rent in respect

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of 5 *karies* of grazing land let out by him to the defendant. The defendant denied that he had agreed to pay any rent to the plaintiff and alleged that the land was Government waste land. The Township Court gave a decree to the plaintiff. On appeal, the District Court remanded the case to the Township Judge to enquire in his capacity as Revenue Officer whether the plaintiff had acquired the status of a landholder. The Township Officer found that it was Government waste land in occupation of the plaintiff who had not acquired the status of a landholder and reported to the District Court, who then dismissed the suit on the ground that Civil Courts have no jurisdiction. Plaintiff now appeals.

The question whether the plaintiff had acquired the status of a landholder does not arise in this case, and from the recent Full Bench decision in *Maung Naic v. Ma Shwe Hmat* (1) it is clear that if A lets out land to B, though he has no title in law to the land, he can recover rent from B (*i. e.*, defendant). The Civil Courts have jurisdiction in the present case, even though the land was Government waste land. It is contended by the respondent's Advocate that there is no sufficient evidence to establish the tenancy between the defendant and the plaintiff. Plaintiff's case, I think, is that he bought this land from Abdul Ywathugyi who, perhaps, was Abdul Gafar referred to in the cross-examination of the 2nd witness for the defendant. The only evidence that the plaintiff produced to show that there was an agreement by the defendant to pay him rent for this land, is the evidence of two witnesses who say they went with the defendant to the plaintiff and agreed to take a certain number of *karies* at Rs. 5 a *kani* for grazing. If the land was Government waste land in the ordinary sense, *i. e.*, not occupied by any one, there is a strong presumption that one individual would not agree to pay rent to another individual for such land. Plaintiff should have called the previous owner or occupier of this land from whom, he says, he bought it; and he could probably have called previous tenants of his. The evidence is

very meagre, as it stands, as to any agreement by the defendant to pay rent; and it would appear that the land in fact is Government waste land. In my opinion, the plaintiff has not made out his case. I, therefore, dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION No. 10 OF 1913-14 OF
FARRUKHABAD DISTRICT.

March 26, 1914.

Present:—Mr. Baillie, S. M., and
Mr. Tweedy, J. M.

HARI AND OTHERS—PLAINTIFFS—APPELLANTS
versus

SRI THAKURJI MAHARAJ—DEFENDANT
—RESPONDENT.

Agua Tenancy Act (II of 1901), s. 43—Enhancement of rent, suit for—Exemplar area—Prevailing rates—Procedure.

Where in a suit for enhancement there was nothing on the record to give information as to how the rates applied were obtained or what was the exemplar area accepted or how the rates were worked out:

Held, that there was no proper trial by the Court below, inasmuch as the tenants were entitled to demand that the enquiry should conclusively show that the rates applied were actually the rates prevalent. [p. 890, col. 1.]

Second appeal from the order of the Commissioner, Allahabad Division, dated the 13th August 1913, modifying that of the Assistant Collector, Farrukhabad District, in the case of enhancement of rent under section 43 of Act II of 1901.

JUDGMENT.

BAILLIE, S. M. (March 20th, 1914).—In this case both parties appeal against certain rents fixed in the Commissioner's decision. The appeal by the *zemindar* is in regard to petty reductions made by the Commissioner in connection with which it cannot possibly be suggested that any question of law is involved. That appeal is dismissed.

As regards the tenant's appeal, the Commissioner records that the officer who made the original enquiry and the officer to whom the work of enhancement was transferred both visited the village. The first officer made a careful record regarding each of the

(1) 30 Ind. Cas. 772; 8 Bur. L. T. 191 (F. B.).

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fields in question, noting those in which there was reason for not applying general rates. Apart from this, the information as to how the rates applied were obtained is practically nil. There is a pencil slip in file showing the rates, but I can find nothing which makes it clear what the exemplar area accepted was or how the rates were worked out. The rent of the appellants was enhanced in Court some 10 years ago and the rates now applied give an enhancement of something close on 50 per cent. in several holdings. That occupancy rents could rise 50 per cent. in 10 years is a proposition which cannot be accepted. It is possible that the former rent was unduly low, but in the circumstances the most definite and clear evidence of the propriety of the rates assumed is necessary. It is not sufficient to hold, as the Commissioner has done, that because the officer trying the case was careful the result must be correct. The tenants are entitled to demand that the enquiry should conclusively show that the rates applied are actually the rates prevailing amongst the occupancy tenants of the neighbourhood. It seems to me impossible to uphold the decision in the present case.

I would cancel the orders of both the lower Courts and direct that the case be restored for hearing and decided by the analysis of the occupancy rental of a sufficient number of neighbouring and similar villages.

Costs will follow the final issue.

TWEEDY, J. M.—I entirely agree with the proposed order. The defects pointed by the Senior Member in his judgments of the Courts are found frequently in enhancement cases and vitiate the whole proceedings. The judgment of the Court of first instance must show clearly the area of the exemplar numbers and how far they correspond with the fields in dispute and must show that the rates devolved really are "prevailing" rates. I consider that the decision of the Assistant Collector is based on no evidence and that there has been no proper trial.

Appeal allowed; Case remanded.

LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL No. 16 OF 1915.
November 5, 1915.

Present:—Mr. Justice Parlett.

MA THIN—PLAINTIFF—APPELLANT
versus

H. M. YASSIM AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Registration Act (XCI of 1908), s. 17 (1) (b)—Agreement to re-sell—Consideration—Offer kept open till certain time, effect of.

Where A sells a house and site for Rs. 1,500 to B by a registered-deed and B on the same or the following day agrees to sell the property to A for the same amount in writing, B's agreement is compulsorily registrable as it is not merely an agreement to sell which does not require registration, but is one which creates a right of redemption for that amount. [p. 891, col. 1.]

Muthu Venkatchalapathi v. Pyanda Venkatchalapathi, 27 M. 348; *Suranj Pershad v. Phul Singh*, A. W. N. (1906) 180, referred to.

An offer to sell and to keep the offer open to a certain day is *nudum pactum* and can at any time before acceptance be recalled [p. 891, col. 1.]

Mr. Villa, for the Appellant.

Mr. Ginnwalla, for the Respondents.

JUDGMENT.—On 24th September 1912, appellant sold a house and site to one Babu for Rs. 1,500 by registered-deed. On the same or the following day Babu gave appellant a promise in writing to the effect that he agreed to sell to her the same house and ground provided she at any time paid him Rs. 1,500. Babu died on 27th July 1911; his widow Ma Cho sold the property to the respondents. Appellant then sued the respondents for specific performance of Babu's promise to sell the property to her, and obtained a decree that they should convey the property to her within one month in payment of Rs. 1,500. On appeal this decree was reversed and the suit was dismissed on the ground that Babu's agreement was inadmissible in evidence for want of registration. Plaintiff now appeals. It is agreed that as a contract for the sale of immoveable property does not create any interest in such property, such contract if in writing is not compulsorily registrable under section 17. Looking, however, at the substance of the matter it appears to me that the effect of the agreement set up would be to create a right of redemption of the property for Rs. 1,500 in favour of the appellant, whether absolutely as the agreement in its terms implies, or for a term

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of 10 years as appellant alleges was subsequently agreed between them orally. In either case I consider the writing falls within the meaning of section 17 (1) (b) of the Registration Act, and, therefore, requires registration. The case appears to me to be similar to *Mutha Venkatachelopati v. Pyanda Venkatachelopati* (1) and *Suraj Pershad v. Phul Singh* (2). On other grounds, moreover, I am of opinion that the suit must fail. Appellant alleges that about two months before the sale to respondents she borrowed Rs. 1,200 and took it to Ma Cho and offered to buy the property. There is no evidence whatever of this fact except appellant's bare word, but even she admits that upon Ma Cho advising her not to purchase with money borrowed at interest, she did not insist, but let the matter rest. Nothing more was done until respondents had bought the property. In my opinion, therefore, it cannot be said that there has ever been an acceptance of Babu's proposal to sell the property to appellant for Rs. 1,500. "An agreement to keep an offer open for a given time does not bind the person making the offer, but it operates as an intimation to the party addressed that no acceptance will be received after the lapse of the time named."* "An offer for instance to sell goods at a price named with a promise to keep it open to a certain day is *nudum pactum*, and can at any time before acceptance be re-called. Such promise does not prevent the person, who has made the offer, selling the goods meanwhile to a third person, unless by a distinct contract, founded on a distinct consideration, he has engaged not to do so. Thus where defendant offered to plaintiff certain wool for sale with three days' grace to make up his mind, and within three days plaintiff on going to accept the offer was told that the wool was sold to another, it was held there was no contract, because when the plaintiff signified his acceptance, the defendant did not agree."†

The appeal is dismissed with costs.

Appeal dismissed.

(1) 27 M. 348.

(2) A. W. N. (1906) 180.

*Cunningham and Shephard's Contract Act, 8th Edition, page 25.

†Cunningham and Shephard's Contract Act, 8th Edition, pages 22 and 23.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 109 OF 1915.

November 15, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerjee, Kt.
JAWAHIR MAL AND OTHERS—DEFENDANTS

—APPELLANTS

versus

UDAL RAM AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Mortgagee—Usufructuary mortgagee—Purchaser by mortgagee of mortgaged property—Merger.

Where a usufructuary mortgagee purchases the property in execution of his own decree on the basis of a simple mortgage, he becomes the absolute owner of the property and the mortgagee right ceases to exist by virtue of the law of merger. [p. 892, col. 1.]

First appeal from the order of the Subordinate Judge of Aligarh, dated the 3rd May 1915.

Mr. G. L. Agarwala, for the Appellants.

Mr. P. L. Banerji, for the Respondents.

JUDGMENT.—The question in this and the connected appeal is the same and arises under the following circumstances. One Jugal Kishore was in possession under a usufructuary mortgage dated November 1868. He had also a simple mortgage on the same property. Jugal Kishore brought a suit on foot of the latter mortgage, obtained a decree and purchased the property himself. Later on the defendants, who held a decree against a judgment-creditor of Jugal Kishore, attached the decree held by that judgment-creditor and in execution thereof applied for the attachment of the property of Jugal Kishore. It is admitted that under these circumstances the defendants were in the same position as if they themselves had a decree against Jugal Kishore. There can be no doubt that if they had attached "the interest of Jugal Kishore in the property" they would have a right to sell all the interest Jugal Kishore had. In other words, they would have been entitled to attach and bring to sale the absolute ownership which had become vested in Jugal Kishore. Instead, however, of attaching his interest they attached merely what they described as the "mortgagee rights" of Jugal Kishore. It was "mortgagee" rights which were put up to sale and according to the sale certificate it was "mortgagee" rights that were purchased by the defendants. The present suit is a suit by the plaintiffs, who are heirs of Jugal Kishore, asking for possession of the property and in the

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alternative that they should be allowed to redeem the mortgage. The Court of first instance dismissed the case upon a preliminary point. The lower Appellate Court overruling this preliminary ground remanded the case for decision on the merits. The defendants have appealed. It is contended on their behalf that when Jugal Kishore, who was a mortgagee under a usufructuary mortgage, put up the property of his mortgagor to sale and purchased the property, a merger in law took place and Jugal Kishore became the absolute owner and the mortgagee right ceased to exist. This no doubt is quite correct, but it does not help the defendants who are themselves responsible for only having attached and purchased "mortgagee" rights. Under the circumstances we think that the view taken by the Court below on this point was correct and accordingly its order of remand must be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL NO. 258
OF 1914.

November 16, 1915.

Present:—Mr. Justice Parlett.

MI AMIN NISSA AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

MI SURA BI AND OTHERS—DEFENDANTS—
RESPONDENTS.

*Evidence Act (I of 1872), ss. 65, 66—Redemption,
suit for—Mortgage-deed in mortgagee's possession—
Oral evidence, admissibility of.*

In a suit for redemption when the mortgagee is in possession of the mortgage-deed and fails to produce it, oral evidence is admissible under section 65 (a) read with proviso (2) to section 66 of the Evidence Act.

Mr. N. C. Sen, for the Appellants.

Mr. S. M. Bose, for the Respondents.

JUDGMENT.—I am at a loss to understand the District Judge's statement that there is nothing in the plaint about a mortgage-deed. The plaint itself is headed "a suit for recovery of 1.90 acres of land mortgaged by a deed" and the 1st paragraph expressly sets out that such a deed was executed.

The document would naturally be in the possession of the mortgagees, that is, the defendants, and from the nature of the case they must know that they would be required to produce it. Oral evidence was, therefore, admissible under section 65 (a) read with proviso (2) to section 66 of the Evidence Act.

Next, I do not understand the District Judge's reference to a doubt as to the identity of the land. The plaintiffs fully described and attached to their plaint a plan of the 1.90 acres of land they sought to redeem: the defendants alleged that this very land had been bought by them. The identity of the land was never in question.

Again, I do not understand the District Judge's doubt as to defendants having deposed that the witnesses to their deed were all dead. Their agent, Abdul Ali, who conducted the case for them, named them all unequivocally and said they were all dead. Finally as to the defendants having cited other witnesses, it is true that they cited six, whom they did not examine. The record makes it quite clear that they did not tender any of them for examination.

It remains, therefore, to consider the evidence on the record. The plaintiffs have produced two of the witnesses who were present at the mortgage and attested the deed and there appears no ground to disbelieve them. As against this defendants merely produce a deed of which there is not only no proof but which does not even purport to be signed by their alleged vendor. In my opinion the decision of the Township Court was correct. I reverse the decree of the District Court and restore that of the Township Court with costs throughout, Advocate's fees in this Court two gold mohurs.

Appeal allowed.

BHAGWATI SARAN SINGH v. RABI SINGH.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION NO. 6 OF 1911-12 OF

ALLAHABAD DISTRICT.

November 16, 1912.

Present:—Mr. Baillie, S. M.

B. BHAGWATI SARAN SINGH—

PLAINTIFF—APPELLANT

versus

RABI SINGH AND OTHERS—DEFENDANTS—

RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 36—Sir—Ex-proprietary rights—Adverse possession—Sir, character of, if changes.

Ex-proprietary rights can be claimed by any person who may be in possession of the *sir*, even if that person be a trespasser, specially when the adverse possession has ripened into ownership. *Sir* retains its character as such in the hands of an adverse owner.

Third appeal from the order of the Commissioner of the Allahabad Division, dated 13th January 1912, confirming that of the Collector of Allahabad District, in the case of determination of rent under section 36 of Act III of 1901.

JUDGMENT.—The question raised in this case is very simple and may be briefly disposed of. Appellant has by means of a foreclosure suit become the proprietor of the share to which the land now in question belongs. This share was formerly the property of one Sital Singh who died deeply in debt. His immediate heirs refused to take the inheritance and possession was taken by more distant relatives, who are now the respondents in this case. Sital Singh died 20 years ago. Respondents have since been in proprietary possession. On the foreclosure taking place they claim ex-proprietary rights in the *sir*. For appellant it is urged that not being the legal heirs of Sital Singh their possession was that of trespassers and the recorded *sir* cannot, therefore, be considered to be their *sir*.

I find nothing in the law to support this argument. Land which has acquired the *sir* character continues to be *sir* so long as it is so recorded, unless circumstances arise in which ex-proprietary rights may be claimed in it. Ex-proprietary rights may be claimed when land is transferred in execution of a decree or by voluntary alienation. No such transfer has ever taken place in regard to this land and,

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therefore, the *sir* in it still continues to be *sir*. Respondents have had possession, as already remarked, for 20 years. Their proprietary title is, so far as I can see, just as good as if they were Sital Singh's own sons. The position, therefore, is that respondents are the proprietors who were in possession until the foreclosure took place and that the land is *sir*. They are, therefore, entitled, as found by the Collector and the Commissioner, to ex-proprietary rights in it.

The appeal is dismissed with costs on appellant.

Pleader's fee Rs. 20.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION NO. 113 OF 1915.

November 24, 1915.

Present:—Mr. Justice Ormond.

YOO JOO SEIN AND ANOTHER—DEFENDANTS—

APPLICANTS

versus

MAUNG BA TIN AND ANOTHER—PLAINTIFFS

RESPONDENTS.

Small Causes Court—Jurisdiction—Damages for use and occupation, suit for—Title, determination of—Presumption from occupation—Rent.

A Court of Small Causes has jurisdiction to go into the question of title arising incidentally in a suit for damages for use and occupation. [p. 894, col. 1.]

A purchaser of immoveable property can sue its occupant for damages for use and occupation, if the occupant had occupied the premises with the consent of the previous owner but had been served with a notice that he would no longer be allowed to occupy it free of rent. A presumption to pay rent arises from occupation. [p. 894, col. 1.]

Mr. Halkar, for the Applicant.

Mr. Ba Shio, for the Respondents.

JUDGMENT.—This is an application by the defendants in revision from the judgment of the Small Cause Court passed against them for damages for use and occupation of a certain house. The plaintiffs bought the house from the previous owner by a registered transfer. The previous owner, according to the defendants, allowed them to occupy it free of rent in lieu of interest, which was payable on a loan owing by the previous owner to

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them. The defendants have no legal charge on the property. The plaintiffs served a notice on the defendants requesting them to vacate the premises and giving them notice that, if they did not do so, they would be charged Rs. 20 a month. The defendants knew that the plaintiffs were the owners of the property.

It is contended that the Small Cause Court had no jurisdiction to go into the question of the plaintiffs' title. The Court has jurisdiction to entertain a suit for damages for use and occupation and the question of title arises in this suit incidentally; therefore, it must be determined by the Small Cause Court in order that the Small Cause Court should determine the suit. It is urged that section 100 of the Transfer of Property Act applies and creates a charge on the property in favour of the defendants as against the plaintiffs, i.e., it makes a transaction which is not recognised by law, valid, which, of course, is absurd. The section does not apply. It is contended upon the authority of *Ramrick Dass v. Mohamed Yacubji Dudah* (1) that there being no express agreement between the plaintiffs and the defendants, i.e., no privity of contract, the plaintiffs' only remedy was to sue their vendor for possession and mesne profits. In that case, it was held that the defendant did not occupy by the permission or sufferance of the plaintiff. A presumption, however, of a contract to pay a reasonable sum arises from the defendants' occupation of the plaintiffs' property. The previous owner, by giving notice to the defendants that he would no longer allow them to occupy it free of rent, would have been entitled to sue for damages for use and occupation, and the plaintiffs having acquired the previous owner's title, they have that right. (See *Foa on Landlord and Tenant* at page 399 and the cases there cited.) No ground, therefore, is made out for this application which is dismissed with costs, two gold mohurs.

Application dismissed.

(1) 2 L. B. R. 122.

CALCUTTA HIGH COURT:
FIRST CIVIL APPEAL No. 493 OF 1913.
July 7, 1914.

Present: Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice N. R. Chatterjea.

SATIS CHANDRA GHOSE—DEFENDANT—

APPELLANT

versus

RAMESWARI DAS AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Execution—Ex parte decree—Sale—Auction-purchase, stranger or decree-holder, rights of—Ex parte decree set aside—Assignee from decree-holder purchaser, rights of, if affected—Bona fide purchaser for value without notice, plea of, applicability of.

A Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decrees though the sales may be subsequently set aside, where those purchasers are not parties to the suit and the decree has not been passed without jurisdiction. But the same measure of protection is not extended to purchasers who are themselves the decree-holders, nor to the purchasers from those decree-holders-purchasers. [p. 895, col. 2.]

Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan,

10 A. 166; 15 L. A. 12; 5 Sar. P. C. J. 129, explained.

Sheik Ismal Rowther v. Rajab Rowther, 30 M. 295;

17 M. L. J. 165; 2 M. L. T. 86, disapproved.

The defeasibility of the decree-holder's title to the property purchased in execution of an *ex parte* decree is of such common occurrence that the plea of a purchaser for value without notice hardly applies to his assignee. [p. 895, col. 2.]

Appeal against the decree of the first Subordinate Judge of 24 Perganahs, dated the 5th September 1913.

Babus Sarat Chandra Roy Choudhry and Bhul-b Chandra Roy, for the Appellant.

Babus Atul Krishna Roy, for the Respondents.

JUDGMENT.—The decision of this appeal admittedly turns on a point of law, and there is no contest as to the facts. Moreover, it has been agreed before us that the dispute should be decided by us notwithstanding any defects in procedure.

The question is whether the title of a purchaser from one who has bought at a sale in execution of his own decree is liable to be defeated where the decree has been subsequently set aside.

It was decided in *Sheik Ismal Rowther v. Rajab Rowther* (1) that where property sold in execution of a voidable decree is purchased by the decree-holder and by him sold for value to a third person, who has no notice of any defect in the decree,

(1) 30 M. 295; 17 M. L. J. 165; 2 M. L. T. 86.

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the equitable right to set aside such a decree cannot prevail against the rights of a subsequent purchaser for value without notice. If this decision be correct, then the present appeal must succeed.

But I find it difficult to reconcile this decision with what was said by the Privy Council in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (2). There sales were attacked which were effected under decrees that were subsequently set aside. Of the purchasers some had bought in execution of a decree to which they were strangers. Some were decree-holders who had purchased at a sale in execution of their own decree, and some were subsequently purchasers from such decree-holders. Those in the 3rd of these categories were in precisely the same position as the appellant in this case.

In delivering the opinion of the Privy Council Sir Barnes Peacock said: "Some of the defendants were decree-holders and some were persons who came in under them; but all the defendants who are in that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the defendants were not decree-holders, but merely purchasers under the execution and strangers to the decree upon which the execution issued." This passage is important and the rest of the opinion must be read in the light of the extended meaning it gives to the word "decree-holders." And when it is said that "a great distinction has been made between the case of *bona fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves," it has to be remembered who are included in the term decree-holders. It is on the strength of this distinction between those who are and those who are not decree-holders that the decision went in favour of the latter.

This appears to me to be the result of the language employed by their Lordships, and I am unable to accede to the argument that the result is so opposed to legal principles that we ought not to give complete effect to the language used.

The Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decrees though the sales may be subsequently set aside, where those purchasers are not parties to the suit and the decree has not been passed without jurisdiction.

But the same measure of protection is not extended to purchasers who are themselves the decree-holders; nor can the purchasers from such decree-holders claim that the Court owes them any duty, or to be within the policy which prompts the extension of protection to strangers. They have bought from one whose title is liable to be defeated and if the decision in *Zain-ul-Abdin Khan's* case (2) bears the meaning I have attributed to it, the title acquired by the purchaser from the decree-holder is similarly defeasible. And the defeasibility of a decree-holder's title where the decree is *ex parte* is of such common occurrence that the plea of a purchaser for value without notice hardly applies.

The appeal, which has been limited to this bare point of law, therefore, fails, as does the cross-objection, and the result is that we decline at this stage to interfere with the decree of the Subordinate Judge. But before we can finally dispose of the case, it is necessary that it should be determined whether the sale should be set aside as against the appellants, for it is their case that the decree and the sale to the decree-holder were not set aside in their presence. The parties agree that this should be determined on an issue in the suit.

We accordingly send down the following issue for determination:—

"Ought the *ex parte* decree and the sale to the decree-holder to be set aside to the prejudice of the appellants?"

The parties will be at liberty to adduce evidence on this and it will be open to the respondents to show that the appellants are bound by the orders that have been made. The return should be made in two months.

Issue sent down.

MI NYIN THA ME & MI NYO WUN ME.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 53 OF 1915.

December 9, 1915.

Present:—Mr. Justice Maung Kin.

MI NYIN THA ME AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

MI NYO WUN ME AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act I of 1908), O. XLI, r.

31—Judgment, contents of—Appellate Court, duty of.

An Appellate Court should not dispose of appeals coming before it in a judgment which does not show the points raised and the reason for its decision.

Saravana Pillai v. Sessa Reddi, 31 M. 469; 18 M. L. J. 34; 3 M. L. T. 71; *Assanullah v. Hafiz Mahomed Ali*, 10 C. 932 at p. 935, referred to.

Mr. J. E. Lambert, for the Appellants.

Mr. May Oung, for the Respondents.

JUDGMENT.—This is an appeal from the judgment and decree of the District Court of Kyaukpyn confirming the judgment and decree of the Township Court of Ramree.

The only ground of appeal is that the judgments of the lower Courts are unintelligible and not according to law. That the judgments are open to this criticism, Mr. May Oung, Counsel for the respondents, admitted at the hearing. He even suggested that both the judgments should be set aside and the lower Courts called upon to write proper judgments. I agree that they are not in accordance with law. But I do not think it necessary to set aside the judgment of the Township Court and order it to write a proper judgment. The lower Appellate Court being a Court of fact may deal with the case as it appears on the record. With regard to the judgment of the lower Appellate Court the proper course is to set aside its judgment and decree and remand the case to it to be disposed of according to law. See *Saravana Pillai v. Sessa Reddi* (1).

Order XLI, rule 31, provides that the judgment of the Appellate Court shall state (a) the points for determination, (b) the decision thereon, (c) the reasons for the decision and (d) when the decree appealed from is reversed or varied, the relief to which the appellant is entitled. These requirements are provided for in order, as stated in *Assanullah v. Hafiz Mahomed Ali* (2), to

(1) 31 M. 469; 18 M. L. J. 34; 3 M. L. T. 71.

(2) 10 C. 932 at p. 935.

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afford the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeded with a view to enable them to exercise, if they see fit and are so advised, the right of second appeal conferred by section 100 of the Code of Civil Procedure. An Appellate Court should not, therefore, dispose of appeals coming before it in a judgment which does not show the points raised and the reasons for its decision, for the effect of such a non-compliance with the law might be that the right of second appeal was altogether neutralized.

The judgment and decree of the lower Appellate Court are set aside and the case is remanded to it for disposal according to law. In dealing with the case, that Court will adopt the procedure laid down at page 471 of the judgment in *Madras case* cited above.

The costs of this appeal will abide the result.

Decree set aside.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 597 OF 1914.

August 24, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice N. R. Chatterjea.

ABDUL RAHAMAN JUDGMENT-DEBTOR—
APPELLANT

versus

SARAFAT ALI AND ANOTHER—

DECREE-HOLDER?—RESPONDENTS.

Execution—Sale, setting aside of—Court, power of, to take notice of events happening after institution of suit—Suit, events happening after institution of—Grounds—Ex parte decree, setting aside of, effect of, upon sale held thereunder—Decree-holder auction-purchaser under ex parte decree subsequently set aside, assignee of, rights of—Auction-purchaser stranger to suit, special protection afforded to—Re-trial of suit—Fresh decree—Sale, effect on.

A Court is competent to set aside a sale held in execution of a decree on a ground which was not mentioned in the application to set aside the sale and which did not in fact exist when that application was made. [p. 897, col. 2.]

A Court, may, in order to shorten litigation or to do complete justice between the parties, take notice of events which have happened since the institution of the proceedings and may afford relief to the parties on the basis of the altered conditions. [p. 897, col. 2.]

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Rai Charan Mandal v. Biswanath Mandal, 26 Ind. Cas. 410; 20 C. L. J. 107; *Hazari Mal v. Janaki Prasad*, 6 C. L. J. 92; *Ramyad Sahu v. Bindeswari Kumar Upadhyay*, 6 C. L. J. 102, referred to.

As soon as an *ex parte* decree is set aside, the sale held thereunder to the decree-holder, is cancelled and it is immaterial that the property has meanwhile been assigned away by the decree-holder auction-purchaser. A fresh decree subsequently made, does not validate the sale. [p. 897, col. 2; p. 898, col. 1.]

An assignee of a decree-holder auction-purchaser stands in no better position than his assignor. [p. 898, col. 1.]

Satis Chandra Ghose v. Rameswari Dasi, 31 Ind. Cas. 894; 22 C. L. J. 409; *Zain-ul-Abidin Khan v. Muhammad Asghar Ali Khan*, 15 I. A. 12; 10 A. 166 5 Sar. P. C. J. 129 referred to.

Sheik Isma' Rowther v. Rajub Rowther, 30 M. 295; 17 M. L. J. 165; 2 M. L. T. 186, dissented from.

The special protection afforded to a stranger who purchases at an execution sale, is not extended to an assignee of the decree-holder auction-purchaser. [p. 898, col. 1.]

Krishna Chandra Mandal v. Jogendra Narain Roy, 27 Ind. Cas. 139; 19 C. W. N. 537; 20 C. L. J. 469, referred to.

Appeal against the order of the District Judge of Noakhali, dated the 14th November 1913, reversing that of the Munsif of Sandwip, dated the 28th July 1913.

Babu Jyotis Chandra Hazra, for the Appellant.

Babu Kali Prosanna Piplai (for Moulvi A. K. Fuzul Huq), for the Respondents.

JUDGMENT.—We are invited in this appeal to consider whether a sale of the properties of the appellant in execution of an *ex parte* mortgage-decree, should stand confirmed. The sale was held on the 2nd November 1911 and was confirmed on the 13th December following. The decree-holder, who had himself become the purchaser, forthwith transferred the property to another person. On the 19th August 1912, the judgment-debtor applied to have the sale set aside; he alleged that the sale had been irregularly and fraudulently held and had caused him substantial injury. He joined as opposite parties to his application, both the decree-holder auction-purchaser and the assignee from him. At the same time, he instituted proceedings to have the *ex parte* decree itself set aside. On the 22nd February 1913, the application to set aside the *ex parte* decree was granted. Thus, on the 28th July 1913, when the Munsif took up for disposal, the application to set aside the sale, he found that the *ex parte* decree

had already been set aside. He consequently held that the sale must be set aside on the authority of the decision in *Set Umedmal v. Srinath Ray* (1), although in the interval, the decree-holder auction-purchaser had transferred the property to a stranger. In this view, he declined to take evidence as regards the merits of the case and set aside the sale without enquiry into the allegations of fraud, irregularity and substantial injury. On appeal by the assignee from the decree-holder auction-purchaser, the District Judge has reversed this order and has directed that the sale do stand good. He has held that the assignee from the decree-holder stands on a better footing than his assignor and is entitled to retain the property, notwithstanding the cancellation of the *ex parte* decree which was the foundation for the sale. The judgment-debtor has now appealed to this Court and has invited us to hold that the sale stood cancelled as soon as the *ex parte* decree was set aside and that it was immaterial that the property had meanwhile been assigned away by the decree-holder auction-purchaser. We are of opinion that this contention is well-founded and must prevail. In the first place, it is clear that the primary Court was competent to set aside the sale on a ground which was not mentioned in the application of the judgment-debtor and did not in fact exist when that application was made. It is well settled that the Court may, in order to shorten litigation or to do complete justice between the parties, take notice of events which have happened since the institution of the proceedings and may afford relief to the parties on the basis of the altered conditions. The decisions which recognise this principle, are reviewed in *Rai Charan Mandal v. Biswanath Mandal* (2) and reference may be made particularly to *Hazari Mal v. Janaki Prasad* (3) and *Ramyad Sahu v. Bindeswari Kumar Upadhyay* (4).

In the second place, it is clear that the effect of the cancellation of the *ex parte* decree on the execution sale held thereunder is not touched by the fact that the decree-holder auction-purchaser has assigned

(1) 27 C. 810; 4 C. W. N. 692.

(2) 26 Ind. Cas. 410; 20 C. L. J. 107

(3) 6 C. L. J. 92.

(4) 6 C. L. J. 102.

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away the property sold. As fully explained by Jenkins, C. J., in *Satis Chandra Ghose v. Rameswari Dasi* (5), the assignee stands in no better position than his assignor. This is borne out by the decision of the Judicial Committee in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (6), and it is plain that the contrary view adopted in *Sheik Ismail Rowther v. Rajab Rowther* (7), is supported neither by principle nor by authority. The theory whereby a special protection is afforded to a stranger who purchases at an execution sale, will be found expounded in the case of *Krishna Chandra Maudal v. Jogendra Narain Roy* (8); that rule cannot be extended to an assignee of the decree-holder auction-purchaser.

We are informed that on re-trial of the suit a decree has been made in favour of the plaintiff against the defendant; but as Maclean, C. J., pointed out in *Set Umedmal v. Srinath Ray* (1) that does not affect the question of the effect of the cancellation of the *ex parte* decree upon the sale held thereunder; as soon as the *ex parte* decree was set aside, the sale fell through, and the fresh decree subsequently made, could not possibly validate that sale. On this ground, the present case is distinguishable from the decisions in *Hazari Mal v. Janaki Prasad* (3) and *Ramyaal Sahu v. Bindeswari Kumar Upadhyay* (4), where the very decree which was the basis of the sale, though temporarily nullified, was ultimately maintained.

The result is that this appeal is allowed, the order of the District Judge set aside and that of the Court of first instance restored. Each party will pay his own costs throughout the proceedings.

Appeal allowed.

(5) 31 Ind. Cas. 894; 22 C. L. J. 409.

(6) 15 I. A. 12; 10 A. 166; 5 Ser. P. C. J. 129.

(7) 30 M. 295; 17 M. L. J. 165; 2 M. L. T. 186.

(8) 27 Ind. Cas. 139; 20 C. L. J. 469; 19 C. W. N. 587.

COURT OF THE BOARD OF REVENUE
UNITED PROVINCES.REVENUE PETITION NO. 17 OF 1912-13, OF
ETAWAH DISTRICT.

August 18, 1913.

Present:—Mr. Baillie, S. M., and
Mr. Tweedy, J. M.JANKI PRASAD—DEFENDANT—
APPLICANT

versus

Raja LOKENDER SHAH—PLAINTIFF—
RESPONDENT.*Agra Tenancy Act (II of 1901), s. 158—“Muafi khairati”, meaning of—Resumption—Revenue, assessment of.*

An entry with respect to a grant in the Agra Province to the effect that the land is “*Muafi khairati*”, means that the grant is an absolute one for charitable purposes and is not resumable, and entries to the contrary in subsequent village administration papers, cannot affect the circumstances under which the grant was made. [p. 899, col. 1.]

Where such land has been held for 50 years and upwards by two successors to the original grantee, it should be assessed to revenue only. [p. 899, col. 1.]

Application for revision of the order of the Commissioner, Allahabad Division, dated the 20th January 1913, confirming that of the Settlement Officer, Etawah, in a case of resumption of land.

JUDGMENT.

BAILLIE, S. M.—(August 14th 1913.)—This suit for resumption of land held rent free was heard by the Settlement Officer of Etawah. The land in question has without doubt been held rent free for more than 50 years and by more than two successors to the original grantee. The first record on the subject, is in the *wajib-ul-arz* of 1883 when the tenure was recorded as a charitable grant and the *wajib-ul-arz* contained a declaration by the *zemindar* that he would not resume within the period of Settlement. The provision in the *wajib-ul-arz* of 1872 was that when the *zemindar* desired to resume, he would apply to the Collector for assessment of rent. The Settlement Officer held that these facts indicated a grant resumable at the pleasure of the grantor. He, therefore, dispossessed the grantee under section 154 of the Tenancy Act. The questions raised in this case, are of general importance, inasmuch as the conclusions arrived at form precedents in regard to the action to be taken in regard to other charitable *muafis* in the Etawah District. I am unable to agree with the view taken by the Settlement Officer

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and accepted by the Commissioner. It is clear that under the terms of the *wajib-ul-arz* of 1833 the grant is not resumable at the pleasure of the grantor, nor can I consider that this *wajib-ul-arz* is evidence that it was a grant for a term. The declaration in the *wajib-ul-arz* was not made when the grant was given but was simply a statement of the view, the *zemindar* took in regard to his liability under a pre-existing grant. The grant had been made before and there is nothing to show that it was made for the period of Settlement or for any other period. The *zemindar* simply acknowledged that he would consider it binding for the period of Settlement. According to this *wajib-ul-arz*, the grant was not one which is resumable under section 154. The provision in the 1872 *wajib-ul-arz* in regard to the same tenure, deserves no consideration, because it is simply the statement of an interested party and inconsistent with the declaration of his predecessor-in-interest. I do not think that it can in any way be held that this is shown to be a resumable grant. I hold, therefore, that it was a grant to which section 158 applies. I consider that in the general importance of this ruling and in the confiscation of existing rights which the Settlement Officer's decision implies, there is ground for a revision.

I would allow this application and call for a report from the Settlement Officer as to the revenue payable in regard to this rent-free grant.

TWERDY, J. M.—I agree with the Senior Member's view. The entry in the *wajib-ul-arz* of 1833 is to the effect that the land is "Muafi Khairati". Throughout the Agra Province in my experience such an entry means that the grant is an absolute one for charitable purposes and is not resumable and entries in subsequent village administration papers cannot effect the circumstances under which the grant was made. The evidence is strong that it has been held for 50 years and upwards by two successors to the original grantee and I concur in the view that it should be assessed to revenue only.

Appeal allowed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL FROM ORDER NO. 99
OF 1915.

November 29, 1915.

Present:—Mr. Justice Tudball and
Mr. Justice Piggott.

RAM UGRAH PANDE AND OTHERS—
PLAINTIFFS—APPELLANTS
versus

ACHRAJ NATH PANDE AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sec. 11, cl. 17, 20—Arbitration—Question of title referred to arbitration—Award—Trial de novo—Proceedings before Civil Court—Limitation Act (IX of 1908), ss. 5, 14, Sch. I Art. 178.

After the death of a certain Hindu, disputes arose among the various branches of his family as to their title. One branch alleged separation and the other branch alleged that the family was still joint. It appeared that the family was possessed of shares in a number of villages in two Tahsils, some of the villages standing in the names of some of the members and others in the names of other members. An application for mutation of names was made in regard to each village. In the case of one Tahsil application for mutation was made to the Tahsildar while in the case of the other to the Assistant Collector. The parties subsequent to the institution of proceedings executed agreements to refer their disputes as to the title to the land, to arbitration. These agreements were placed before the respective officers and all files were sent to the arbitrator. The arbitrator filed an award. At a subsequent stage of the case, he was directed to file another award which he did in exactly the same terms and bearing a later date. The respondents were not satisfied with the award and the matter went up to the Board of Revenue, which sent the cases back to be tried *de novo* without regard to arbitration. Upon this, the appellants filed applications under clauses 17 and 20 of Schedule II, Code of Civil Procedure.

Held, (1) that clause 17 of Schedule II, Civil Procedure Code, could not operate in the circumstances of the present case as the facts had gone beyond the stage contemplated by that clause; [p. 901, col. 2.]

(2) that the application under clause 20, of Schedule II, Civil Procedure Code, was barred under Article 178, Schedule I, Limitation Act, as it was made more than a year after the date of the award and as it was impossible either under section 5 or section 14 of the Limitation Act to extend the time so as to enable the present application to be treated as made within time. [p. 901, cols. 1 & 2.]

First appeal from an order of the Second Additional Subordinate Judge of Basti.

Mr. Jung Bahadur Lal (for Mr. Durga Charan Banerji), for the Appellants.

Dr. Surendra Nath Sen (with him Mr. Lakshmi Narain Tiwari), for the Respondents.

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JUDGMENT.—This is an appeal arising out of an application made in the Court below, which was primarily based on clause 17 of the Second Schedule of the Code of Civil Procedure. While the matter was pending, an application for amendment was made and an alternative relief was asked for under clause 20 of the same Schedule. The lower Court has refused both the reliefs. The first relief which was claimed under clause 17, it rejected on the ground that an award had been made by the arbitrator on the basis of the agreement between the parties and that clause 17 could not apply, the matter having attained a stage beyond that contemplated by that clause. With regard to the relief claimed under clause 20, it rejected it on the ground that the application was barred by time under Article 178 of the first Schedule to the Limitation Act. The applicants have come here on appeal. The parties are the descendants of one Prag Pande. The latter had five sons, one of whom died childless. All the others have now died. Sheomangal has left three sons who are parties to the present dispute. Hansraj has left five sons and a widow who are also parties to the present dispute. Kedar Nath left a widow *Musammât* Sonkali and three daughters, of these the former alone is a party to the dispute. Gokul Nath has left a widow *Musammât* Dirka and three daughters and the former only is a party to this dispute. It appears that the family was possessed of shares in a number of villages lying in the two Tahsils of Basti and Khalilabad in the Basti District. Some of the villages stood in the names of some of the members, and others stood in the names of other members. After the death of Kedar Nath, a dispute arose amongst the various branches as to their title. One branch alleged separation, the other branch alleged that the family still remained joint. An application for mutation of names was made in regard to each village. In the case of the Basti villages, the applications were made in the regular way to the Tahsildar Assistant Collector. In the case of the Khalilabad villages, the applications appear to have been made in the Court of the Assistant Collector who was in charge of the *pargana*.

In the Basti cases, the 18th of November 1912 was fixed by the Tahsildar. In the Khalilabad cases, the 2nd of December was fixed by the Pargana Officer. On the 18th of November, the parties executed an agreement to refer their dispute as to the title to the land to the arbitration of one Rameswar Dat Man Tewari. This agreement clearly sets out that the parties have a dispute as to their title to the family property, that they refer the dispute to the arbitrator, that they will abide by his decision, that they will take possession of their various shares according to his decision and that they will cause mutation of names to be made according thereto. Apparently the agreement was put before the Tahsildar and was filed on the record of the case before him. He adjourned the mutation case clearly with a view to enable the parties to settle their dispute by means of arbitration. He fixed a date directing them to settle that dispute, but also laying down that if the disputes were not settled by the date so fixed, then they were to be prepared to produce evidence in connection with the mutation case. On the 2nd of December 1912, the date fixed by the Pargana Officer, in the case before him, a similar agreement written exactly in the same language and bearing date the 2nd of December 1912 was filed before the Pargana Officer of Khalilabad. Under orders of the Collector the, Pargana Officer of Khalilabad was directed to decide both sets of cases, namely, the Basti and the Khalilabad cases. The Pargana Officer of Khalilabad sent all his files to the Tahsildar of Basti and told him to send the agreement to arbitrate to the arbitrator. This clearly was done, for on the 13th of February 1913 the arbitrator filed an award bearing date the 8th of February 1913. It appears that at a subsequent stage of the case, he was directed to write out another award and that he did draw up an award worded exactly in the same language as the first one simply bearing a different date. One of the parties, the respondents to the present appeal, apparently was not pleased with the decision of the arbitrator. The mutation cases were fought up to the Board of Revenue which finally sent back the records of the mutation cases with directions to try them *de novo* without any reference whatsoever to the arbitration proceedings. The present appel-

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lants then filed the present application (out of which this appeal has arisen) in the Civil Court. Primarily as we have noted, it was an application under clause 17 of the Schedule asking that the agreement to arbitrate, of the 18th November 1912, should be filed in Court. Subsequently an alternative relief was prayed by the subsequent amendment asking that the award dated 8th February 1913 be filed in Court and that a decree be passed based on the same. We have heard considerable argument as to whether or not the Tahsildar of Basti or the Pargana Officer of Khalilabad had or had not power to refer the matter to the arbitrator. We have not been shown any written application by the parties to either of those officers asking them to make the reference to the arbitrator. It is quite clear that the agreement of the 18th of November 1912, was an agreement made entirely out of Court. It is an agreement to refer to the arbitrator, the disputed question of title, i. e., a question which the Revenue Court was not competent to decide in the cases then pending before it. It was not an agreement to refer the mutation case or cases to an arbitrator. It is an agreement on which the arbitrator, if the parties had referred the matter at once to him directly, would have been empowered to take the evidence of the parties and to make an award. It seems to us immaterial whether or not the Tahsildar or the Pargana Officer had or had not legal power as a Revenue Court to refer the agreement to the arbitrator. It is quite clear that the Tahsildar forwarded it to the latter with the full consent of the parties. If, therefore, there was any illegal reference under the Revenue Act it does not concern this present case. An agreement to arbitrate and a valid agreement was made out of Court and by the wish of the parties, it was sent on to the arbitrator by the Tahsildar, as indeed it might have been forwarded through any private person. It is an admitted fact that the arbitrator made an award. It is, therefore, quite clear that clause 17 of the second Schedule of the Civil Procedure Code cannot operate in the circumstances of the present case. The facts have gone beyond the stage contemplated by the clause. In regard to clause 20 of the Schedule, in so far as the application is based thereon, the question is whether or not the application is barred by time. Admittedly

Article 178 of the first Schedule to the Limitation Act applies and that lays down a period of six months from the date of the award. The present application was made more than a year after the date of the award. *Prima facie* it is, therefore, barred by limitation. A certain amount of stress has been laid on sections 5 and 14 of the Limitation Act. Section 5 clearly cannot apply. If the present proceedings be deemed to be based on an application and not to be a "suit," section 5 does not apply as that only relates to an appeal or an application for review of judgment or for leave to appeal or any other application to which this section may be made applicable by any enactment or rule for the time being in force. No enactment or rule can be shown which would make this section applicable to an application of the present description. On the other hand if the present matter be deemed to be a suit within the meaning of section 14, it is equally clear that the present appellants are not entitled to exclude the time during which they were prosecuting the mutation cases in the Revenue Court. The present application is an application to have an award filed and a decree passed on the basis of that award. The matter in controversy in the Revenue Court was not of this description. It was merely a mutation matter with a totally different cause of action as its basis. The present application is based upon the fact that there was an agreement to arbitrate and an award made upon that agreement. The two proceedings cannot be said to be founded on the same cause of action.

There remains the question which we need not decide, as to whether the proceeding in the Revenue Court was a suit within the meaning of section 14, although on that point there is a ruling in *Muhammad Subhanullah v. Secretary of State for India* (1) which is against the present appellants. It is, therefore, impossible for us either under section 5 or section 14 of the Limitation Act to extend the time so as to enable the present application to be treated as made within time. We note that the respondents plead before us in argument that both the agreement and the award

(1) A. W. N. (1904, 54; 26 A. 382.

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were *prima facie* legal and binding subject to any objection which could be raised on the ground of fraud or misconduct of the arbitrator etc. The Court below has found that both the agreement and the award were valid and that the present application was barred by time. With this we find ourselves in agreement. The result, therefore, is that the appeal fails and is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 44 OF 1912-13 OF
ALLAHABAD DISTRICT.
February 15, 1914.

Present:—Mr. Baillie, S. M.

BISHESHAR DASS AND ANOTHER—
PLAINTIFFS—APPLICANTS

versus

Musammal SAGHIRUNNISSA—DEFENDANT
—RESPONDENT.

Suit—Compromise—Decree, binding force of.

When a case is settled by compromise, the decision is as binding as if it had been decided after hearing evidence and it is not permissible to go behind that decision and enquire whether the decision might have been different if evidence had been adduced.

Application for revision of the order of the Commissioner, Allahabad Division, dated the 30th April 1913, confirming that of the Assistant Collector, Allahabad District, in a case of ejectment.

JUDGMENT.—The judgment of the Assistant Collector deals adequately and satisfactorily with this case. There was in the order of Munshi Abdur Rashid Khan, a judicial decision binding on parties that the land in question was held at a rent of Rs. 32 with ex-proprietary rights. When a case is settled by compromise, the decision is as binding as if it had been decided after hearing evidence and it is not permissible to go behind that decision and enquire whether the decision might have been different if evidence had been adduced. There is no ground for revision. The application is dismissed.

Application dismissed.

SITAL PRASAD V. LAL BAHADUR.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 91 OF 1914.

November 25, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

SITAL PRASAD—DEFENDANT—APPELLANT
versus

LAL BAHADUR AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Petition filed in mutation case as to adjustment of dispute—Registration, if necessary—Evidence—Petition, admissibility of—Registration Act (XVI of 1908), s. 17.

A petition filed in a mutation case in which the parties merely request the Revenue Court to effect mutation of names in accordance with an agreement come to between the parties out of Court, is not compulsorily registrable and is admissible in evidence in a subsequent civil suit to prove the adjustment of a dispute between the parties out of Court. [p. 903, col. 2; p. 904, col. 1.]

First appeal from the decision of the Subordinate Judge of Cawnpore.

Mr. M. L. Agarwala (with him Mr. Benode Behari), for the Appellant.

Mr. Kailas Nath Katju (with him Hon'ble Dr. Tej Bahadur Sapru), for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which one Lala Lal Bahadur claimed a declaration of his title to certain property which originally belonged to three brothers, Raja Lal, Ambika Prasad and Munna Lal. The plaintiff's claim was that he was the daughter's son of one Bhawani Sahai, the paternal grandfather of the three persons we have named. It appears that while this suit was pending, there were also pending in the Revenue Court proceedings for mutation of names. The application for mutation and the opposition thereto, were based on exactly the same considerations as in the civil suit. On the 23rd of October 1913, a petition was presented in the revenue matter signed by Lal Bahadur (plaintiff) and Sital Prasad (the contending defendant). This petition set forth that the revenue matter had been compromised in the manner set forth in the petition. The petition goes on to say that Lal Bahadur and Govind Prasad had agreed to recognise that Sital Prasad had a right to three-fourths of the property in dispute as *sapinda* to Raja Lal and Munna Lal. The Revenue Court acted on the petition and made entries accordingly. On the 21st of November 1913, the plaintiff presented a petition to

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the learned Judge before whom the present suit was pending, stating that the suit had been compromised and asking that a decree should be made under Order XXIII, rule 3 of the Code of Civil Procedure. He brought on to the file, the petition of the 23rd of October 1913, to which we have referred above. The defendant did not deny that he had joined in the petition, but said that he had done so as the result of fraud and undue influence. The Court below held that there was no fraud or undue influence and made a decree in the terms of the alleged adjustment.

In the present appeal, it is urged that the petition not being registered, was inadmissible having regard to the provision of section 17 of the Registration Act, XVI of 1908. The respondent contends that the petition to the Revenue Court was not a document that required registration and that it was admissible to prove that an adjustment of the civil suit had been made by the parties out of Court and that in the absence of fraud, it demonstrated that there had been an adjustment. From time to time, the admissibility of such petitions as evidence in subsequent proceedings in the Civil Courts, has been raised and there is undoubtedly some conflict of authority. Section 17 of the Registration Act (clause b) provides that "non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards to or in immoveable property" must be registered. It has been argued that these petitions are instruments requiring registration within the meaning of the section. In most, if not in all, of the cases heretofore decided in which the question has arisen, the petition was presented to the Revenue Court long before the Civil Court proceedings were instituted. It may perhaps fairly be said that in some of these cases, the party producing the petition of compromise, was attempting to use it for the purpose of showing that some right in immoveable property had either been "created, declared, assigned, limited or extinguished". If in the present case, the respondent was seeking to use the petition to show that a right in immoveable property had been "created, declared, assigned, limited or extinguished," it might have been urged with great force that if the document "pur-

ported or operated" to do any one or more of these things, it was inadmissible for want of registration and that if it did not so "purport or operate" it was inadmissible as irrelevant. In the present case we think that the petition of the 23rd of October 1913, was produced in the Court below merely for the purpose of showing that this very suit had been adjusted by the parties out of Court. This is clearly shown by the petition which the plaintiff filed in the Civil Court setting forth that there had been an adjustment. The petition of the 23rd of October, does not on the face of it purport to "create, declare, assign, limit or extinguish any right." It was merely a request to the Revenue Court to effect mutation of names in accordance with an agreement come to between the parties. The petition does not on the face of it even purport to be the agreement between the parties. It is simply a "petition" addressed to the Court. Order XXIII, rule 3, provides that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit. Prior to the passing of the present Code, it had been the practice of this Court not to act under the corresponding section 375 of the old Code, unless the parties were actually agreed that an adjustment had been made when the Court was asked to act. The other High Courts on the contrary had taken the view that it was open to one of the parties to prove the adjustment even when the other party denied it. The words of the present Order seem to indicate that the Legislature has thought well to adopt the practice prevailing in the other Courts and that the Court must now enquire whether or not there has been an adjustment out of Court. There was nothing to prevent the parties to the present suit coming to an oral agreement of adjustment. The only transactions relating to immoveable property which require to be made in writing are those specified in the Transfer of Property Act. If the parties had presented to the Civil Court a petition in the same terms as that presented to the Revenue Court, the Civil Court would undoubtedly have received it and acted upon it. We do not think that any one could have

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contended that such a petition required registration. Suppose that both parties had signed such a petition and that on the strength of it the respondent had asked the Court to act under Order XXIII, rule 3, suppose further that the applicant had opposed the Court so acting on the ground that he had been induced to sign the petition by fraud and that the Court had found that there was no fraud, we think it clear that the Court would have been bound to make a decree in terms of the adjustment and that the applicant could not have successfully contended that the signed petition was inadmissible for want of registration. We think that the petition (which both parties signed) to the Revenue Court was in the circumstances of the case admissible as evidence that the present suit had been adjusted out of Court. The significance to be attached to the evidence is of course another matter. In the present case when we consider that the mutation proceedings and the Civil Court suit were going on simultaneously and that it was exactly the same dispute, it is clear that the present suit was adjusted. It is quite clear that the petition in the revenue matter was made in pursuance of the agreement to adjust the dispute pending between the parties. In the natural course of events if Sital Prasad had kept good faith, he would have joined in a petition to the Civil Judge couched in exactly the same terms as the petition he had joined in, to the Revenue Court. We think that the Court below was justified in coming to the conclusion that the parties had adjusted the suit out of Court, and that being so, it was the duty of the learned Judge to make the decree in terms of that adjustment. We see no reason to differ from the view taken by the Court below on the question of undue influence and fraud, nor was it seriously urged that we should do so. We dismiss the appeal with costs including in this, Court fees on the higher scale. The decree will not issue until the deficiency is made good by the plaintiff-respondent.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL NO. 329
OF 1915.

CIVIL REVISION PETITION NO. 303 OF 1913.

December 1, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge.

GURDITTA MAL AND OTHERS—
PETITIONERS

v *vsus*

DHARI MAL—RESPONDENT.

Succession Certificate Act (VII of 1889), s. 4 (a) — Proof of representative title - Joint Hindu family, death of a member of—Survivors, whether require certificate to realize debts of family—Partnership—Death of a partner—Surviving partner, if requires certificate to entitle him to effects of deceased—Contract Act (IX of 1872), ss. 45, 263.

When one member of a joint undivided Hindu family dies, the other members succeed to him by survivorship and do not require any succession certificate in order to sue for debts due to the family [p. 905, col. 1.]

In the case of a partnership if a partner dies, the surviving partner does not succeed to the dead partner by survivorship and if the surviving partner claims to be entitled to the effects of the deceased person as due to himself alone, a succession certificate is required. [p. 905, col. 2; p. 906, col. 1.]

Petition, under Order XLVII, rule 1, Civil Procedure Code, for review of the judgment passed by the Hon'ble Sir Alfred Kensington, Kt., Chief Judge, on the 16th April 1915, in the civil revision case noted above.

Bakhshi Tek Chand, for the Petitioners.

Mr. Gokal Chand Narang, for the Respondent.

ORDER. In this case I am asked to review the judgment of the late Chief Judge dated the 16th April 1915, in which he allowed three revision petitions against the order of Mr. Barker, District Judge, Amritsar, dated 28th January 1913. My learned predecessor noted that it was unusual to interfere with an interlocutory order on the revision side and gave reasons for doing so in this instance. The reason why I have admitted this review is that it appears fairly clear that, when the learned Judge heard the case on the 1st November 1913, he did not hear any of the arguments of the respondents' Pleader, Mr. Tek Chand, but intended to fix the case for some early Saturday and then to hear the arguments. No date was fixed and about a year and a half afterwards, on

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16th April 1915, the learned Judge, without hearing anything further, disposed of the case and allowed the revisions. It seemed to me necessary in the interests of justice that the case should be re-heard and the arguments properly presented. I have now heard the revisions argued on the merits by both sides.

The questions in the case are, *first*, should this Court interfere on the revision side at all? *Second*, if so, is the finding and decision of Mr. Barker actually correct or incorrect? As to the former question, I do not think it would be right for me to run counter to my predecessor. The Divisional Judge's action is a matter of discretion, and my predecessor gave reasons for thinking that he should interfere, if the order of the lower Court was incorrect. I, therefore, pass by the first question. With regard to the second question, Mr. Barker's judgment is not very easy to interpret. He holds quite plainly that, at the time of Hari Mal's death, he and Dhari Mal are not proved to have constituted a joint Hindu family. From this finding, he deduces the consequence that a succession certificate must be produced by Dhari Mal before the suit can be proceeded with. This is in the last paragraph of his judgment. In the last paragraph but one, he mentions the documentary evidence of the plaintiff which he considers relevant and says that that evidence is insufficient to prove the existence of a joint undivided Hindu family, inasmuch as not one of these pieces of evidence shows "anything more than that" Hari Mal and Dhari Mal were joint proprietors of a firm dealing in *hundis*. He does not say whether it is his reasoned opinion that the sole surviving partner of a firm requires a succession certificate before he can bring a suit to recover a debt due to the firm, but this would appear to have been the impression in his mind. There can be no doubt that, where one member of a joint undivided Hindu family dies, the other members succeed to him by survivorship and do not require any succession certificate in order to sue for debts due to the family. Whether the same rule applies to the survivors of a partnership is not perhaps so clear. A partner having

died, the surviving partner does not succeed to the dead partner by survivorship, and so the case is quite different from that of a joint undivided Hindu family. On the contrary, if the dead partner has got sons, the surviving partner does not succeed to any part of the dead man's estate; and if the dead partner has no heirs nearer than the surviving partner, then the surviving partner succeeds *by inheritance*. Section 4 (a) of the Succession Certificate Act says: "No Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person *claiming to be entitled to the effects of the deceased person or any part thereof* except on the production by the person so claiming of a certificate granted under this Act." Section 45 of the Contract Act indicates that, when one of two joint promisees dies, their rights are thereafter enjoyed by the surviving promisee and the representative of the deceased promisee. On the other hand, under section 263 of the Contract Act, after dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership; and of course by law, a partnership is at once dissolved on the death of a partner. It is argued on the strength of this section that Dhari Mal, having been found by Mr. Barker to have been a partner with Hari Mal, has, subject to all equities, at all events a right to sue for debts due to the partnership, that being a necessary part of the business of winding up a partnership.

Now, if Dhari Mal in this case was suing simply as the surviving partner and was not denying to the other members of the family their right as heirs of the deceased Hari Mal, I would be inclined to say that no succession certificate was required because of the wording of section 4 (a) of the Succession Certificate Act, especially the words "claiming to be entitled to the effects of the deceased person." If Dhari Mal was suing in that way he would not be *claiming to be entitled to the effects of the deceased person as due to himself alone*. But here we find that the matter is highly controversial and that Dhari Mal's case is that the other brothers have no right in Hari Mal's estate whatever, and

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therefore it is clear that he is suing on the ground of being, along with Hari Mal, a member of a joint undivided Hindu family. In my opinion, therefore, on the finding of Mr. Barker, a succession certificate was required. I think if my learned predecessor had heard the arguments of both sides, he probably would have come to this conclusion himself.

For these reasons, I allow the review and dismiss the revision petition with costs throughout.

Review allowed.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 19 OF 1915.

November 26, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

RAM SARUP AND OTHERS—DEFENDANTS—
APPELLANTS

versus

JASWANT RAI AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Limitation Act (IX of 1908), s. 12, Sch. I, Art. 179—Application for leave to appeal to His Majesty—Limitation from what date to be computed—Time requisite for obtaining copy of decree, if excluded.

In computing the period of six months under Article 179 of the Limitation Act provided for an application for leave to appeal to His Majesty in Council, an applicant is entitled under section 12, clause (2), of the Limitation Act, to exclude the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree.

Section 12 (2) of the Limitation Act is general and applies to all applications for leave to appeal.

Application for leave to appeal to His Majesty in Council.

Messrs. Gulzarilal and Kai'as Nath Katin, for the Appellants.

Mr. Benode Behari, for the Respondents.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council. A point has been taken on behalf of the respondent that the application was not presented within time. Article 179 of the Limitation Act prescribes a period of limitation of six months from the date of the decree. Section 12, clause (2), of the Limitation Act (now in force) provides that in computing the period of limitation prescribed for an

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application "for leave to appeal", the day on which the judgment complained of, was pronounced and the time requisite for obtaining a copy of the decree shall be excluded. It is admitted that if this provision applies to an application for leave to appeal to His Majesty in Council, the application is within time. Prior to the passing of the present Limitation Act, appeals to His Majesty had to be brought within six months from the date of the decree and the applicant was not at liberty to exclude any time for the purpose of obtaining a copy of the decree. Under the old Act, this time was only allowed to applications for leave to appeal as a pauper; but the clause of the section as it now stands is general and appears to apply to all applications for leave to appeal. It is highly probable that the words "leave to appeal as a pauper" were omitted so as to include applications for leave to appeal in insolvency matters. But in construing the section, we must deal with the section as it now stands. On the plain words of the section, an applicant for leave to appeal is entitled to exclude the period referred to. In our opinion, the application is within time.

The value of the subject-matter of the suit in the Court below and of the proposed appeal to His Majesty in Council is upwards of Rs. 10,000. This Court did not affirm the decision of the Court of first instance. The case accordingly fulfils the requirements of section 110 of the Code of Civil Procedure and we so certify. We make no order as to costs.

Application granted.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 19 OF 1912-13 OF
ALLAHABAD DISTRICT.

July 24, 1913.

Present:—Mr. Baillie, S. M.

ELAHI BUX—DEFENDANT—APPELLANT

versus

NAND KISHORE—PLAINTIFF—
RESPONDENT.

Agri. Tenancy Act (II of 1901), s. 10—Sir, transfer of, by gift to one not a co-sharer, effect of.

Sir does not cease to be sir when it is transferred by a gift, whether the transfer be in favour of a

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person who is a co-sharer or in favour of one who is not a co-sharer.

Second appeal from the order of the Commissioner, Allahabad Division, dated the 6th December 1912, reversing that of the Assistant Collector of Allahabad District, in a case of ejectment.

JUDGMENT.—The land in question was recorded as *sir* at the last Settlement and has been continuously so recorded since. The Court of first instance held that it ceased to be *sir* when it was transferred by gift to a person not a co-sharer in the *mahal*. The Commissioner holds that this view is incorrect, that a transfer by gift does not deprive the land of its character of *sir* even though it is in favour of a person not a co-sharer.

There can be no doubt that the Commissioner's view is correct, that the transfer by gift has not the effect of creating exproprietary rights and so depriving the land of its character of *sir*.

The appeal must be dismissed.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 283 OF 1913.

November 29, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Ralique.

HAR NARAIN AND OTHERS—DEFENDANTS—
APPELLANTS

versus

BISHAMBHAR NATH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Hindu Law—Partition—Step-mother, share of—Mitakshara.

According to the Mitakshara School of Hindu Law a step-mother is entitled to a share equal to that of a son upon partition.

First appeal from a decree of the Subordinate Judge of Agra, dated the 24th June 1913.

Mr. Benode Behari, for the Appellants.

Mr. Sham Krishna Dar, for the Respondents.

JUDGMENT.—This appeal is connected with First Appeal No. 355 of 1914. It is a suit for partition brought by Bishambhar Nath and Musammatt Chirauji against Har Narain and his son Amba Prasad. Bisham-

bhar Nath is the brother of Har Narain. Musammatt Chirauji is the mother of Bishambhar Nath and step-mother of Har Narain. The only point which arises in the appeal, is the share to which Musammatt Chirauji is entitled upon partition. The defendants contend that she is only entitled to a share out of the share allotted on partition to her son. On the other hand, the plaintiffs contend that the property must be divided into three parts, one part should be allotted to Bishambhar Nath, one part to Musammatt Chirauji and a third part to Har Narain. The Court below has acceded to the contention of the plaintiffs. The defendants have appealed. Reliance was placed on the case of *Hemangini Dasi v. Kedar Nath Kunda Chowdhury* (1). This no doubt would be an authority in the appellants' favour if the present was a case governed by the Benares School of Law (*i. e.* Mitakshara), but it is quite clear that the case cited was one under the Bengal School of Law, namely, the Dayabhaga. This appears from the judgment in the case of *Chowdhury Thakur Prasad Shahi v. Musammatt Bhagwati Koor* (2). On the other hand, there are several authorities in favour of the plaintiff which refer to the Mitakshara School of Law [*See Damodar Misser v. Semabatty Misra* (3), *Damodar Das Maekhal v. Uttamram Maekhal* (4)]. The same point was expressly decided by this Court in the case of *Mathura Prasad v. Deoka* (5). In our opinion, the view taken by the Court below was correct and should be affirmed. We dismiss the appeal with costs including in this Court-fees on the higher scale.

Appeal dismissed.

(1) 16 C. 758; 16 I. A. 115; 13 Ind. Jur. 210; 5 Sar. P. C. J. 374.

(2) 1 C. L. J. 142 at p. 143.

(3) 8 C. 537 at pp. 542, 543; 10 C. L. R. 401; 6 Ind. Jur. 584.

(4) 17 B. 271.

(5) A. W. N. (1890) 124.

RUKMANI AMMAL v. ADVOCATE-GENERAL OF MADRAS.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 497 OF 1915.

August 19, 1915.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Napier.

RUKMANI AMMAL AND ANOTHER—
PETITIONERS

versus

THE ADVOCATE-GENERAL OF MADRAS
AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 5
—Receiver—Appointment of next friend of minor as
Receiver of his estate, whether legal—Power to appoint
Receiver, if includes also power to remove him—General
Clauses Act (X of 1897), s. 16—Burden of proof.

It is not illegal to appoint the next friend of a
minor also as a Receiver to manage his estate on his
behalf. [p. 904, col. 2.]

A power to appoint a Receiver does not of itself
include a power to remove the person so appointed,
and section 16 of the General Clauses Act has no
application to appointment of Receivers made by a
Court. [p. 909, col. 1.]

Where it is sought to remove a Receiver already
appointed the burden is upon the person applying
for the removal to prove the circumstances which
would justify it. [p. 904, col. 1.]

Taylor v. Oldham (1822) 1 Jacob 527; 37 E. R. 949
followed.

Petition, under section 115 of Act V of
1908, praying the High Court to revise
the order of the District Court of
Chingleput, in Civil Miscellaneous Petition
No. 681 of 1914 in Original Suit No. 5 of
1911.

FACTS.—The Advocate-General, Madras,
instituted a suit for settling a scheme for
the management of the Temple at Sriperum-
badoor, Chingleput District, and Rao Sahib
T. Namberumal Chettiar, a contractor in
Madras, was appointed Receiver pending the
disposal of the suit. Meanwhile the 1st defend-
ant (the *jeer* of the *mutt*) died. His
widows adopted a minor boy and he was
brought on record as the legal representa-
tive of the deceased defendant and Mr. T.
Namberumal Chettiar was appointed his
guardian. In November 1914, a petition
was put in to remove Mr. T. Namberumal
Chettiar from the Receivership on the
ground that he was appointed the
guardian of the minor and as such was interest-
ed in one of the parties, and could not, there-
fore, act as a Receiver. The District
Judge ordered his removal and the pre-
sent revision petition is against that order.

Mr. T. Rangachariar, for the Petitioners
for the guardian, contended that the fact of

his being appointed a guardian could not
disentitle him to be Receiver also of the
properties.

Messrs. P. R. Ganapathy Aiyar and S.
Sundararaja Aiyangar, for the Respondents,
pointed out that under section 16 of the
General Clauses Act, a Court could remove a
guardian appointed.

JUDGMENT.—In this case Mr. Namberu-
mal Chetty, the counter-petitioner, was
appointed Receiver on the 19th of November
1913. On the 14th December, the widows
against whom the suit was continued as
the legal representatives of their deceased
husband adopted a boy. The Receiver was
appointed guardian of the minor boy by
the widows. Thereupon this application was
made to the District Court to cancel Mr.
Namberumal Chettiar's appointment as
Receiver. The District Judge ordered his
removal on the sole ground that his position
as guardian is likely to impair his discharge
of duties as Receiver. He has not con-
sidered the allegations contained in the
affidavits filed before him. We do not think
that the mere fact that the Receiver is the
guardian of the boy whom the defendants
have adopted, is sufficient ground for his
removal from his appointment. Mr. Kerr
says that a next friend of a minor should
not be appointed as Receiver and in 24
Halsbury's Laws of England, the same state-
ment is made. On referring to the authority
which is quoted in support of the proposition,
we find that such a rule is not enunciated by
the learned Judges who decided the case.
See *Taylor v. Oldham* (1). We cannot uphold
the order on the ground on which it is
based. In this Court, affidavits and counter-
affidavits have been filed which make
definite allegations against the manager to
whom Mr. Namberumal Chettiar has en-
trusted his duties. On the other hand, the
manager has distinctly denied the allegations
contained in the affidavits filed before the
District Judge and in this Court. We think
that the District Judge should consider the
allegations made and come to a conclusion
whether the continuance of Mr. Namberumal
Chettiar is desirable in the interests of the
trust.

Mr. Ganapathy Aiyar objects to our juris-
diction on the ground that as the power to

(1) (1822) 1 Jacob 527; 37 E. R. 949.

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appoint, granted to the District Judge under Order XL of the Code of Civil Procedure includes the power to dismiss the appointee, this Court acting under section 115 of the Code of Civil Procedure and not under the Charter Act should not interfere. He relies upon section 16 of the General Clauses Act of 1897 for this argument. As at present advised, we are unable to hold that the power conferred by that section, would enable a Court appointing a Receiver to remove him. Mr. Ganapathy Aiyar also contended that *prima facie*, the appointment of a guardian as Receiver is not proper and it is for the party desiring to uphold the appointment to show the exceptional circumstances which would justify his continuance. But this is a case of an application to remove a person already appointed. It is on the party who invokes the aid of the Court to show that his continuance will prejudice the interests of the institution.

We think that the proper order to be passed is to set aside the one made by the District Judge and to direct him to make a fresh enquiry with reference to the allegations contained in the affidavits filed in this Court and in the Court below and to pass a final order.

Costs of both parties will come out of the estate.

Petition allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 162 of 1911.

December 9, 1915.

Present:—Mr. Justice Chevis and

Mr. Justice LeRossignol.

GULAB KHAN AND OTHERS—DEFENDANTS—

APPELLANTS

versus

Musammât CHIRAGH BIBI AND OTHERS

—PLAINTIFFS AND OTHERS—DEFENDANTS

—RESPONDENTS.

Custom *Gujars of Gujar Khan Tahsil, Rawalpindi District*—Alienation by Will of whole property by sonless proprietor to mother and her brother in presence of collaterals, validity of—Suit for declaration, maintainability of—Custom, proof of—Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), Art. 1.

Among *Gujars* of Gujar Khan Tahsil in the Rawalpindi District, a bequest of the whole of his property by a sonless *Gujar* to his mother and his maternal uncle in the presence of the collaterals, is invalid. [p. 910, col. 1.]

In a suit for a declaration by the collaterals of a person to the effect that the Will made by him of the whole of his property in favour of his mother and maternal uncle was invalid and would not affect the plaintiffs' rights after the death or remarriage of the mother, it was contended that the plaintiffs' suit was barred by time inasmuch as the Punjab Limitation (Ancestral Land Alienation) Act of 1900 did not deal with a suit such as the present which was launched only after the death of the alienor.

Held, overruling the objection, that the suit might adequately be described as a suit for a declaration that the alienation effected by the donor was void except for his life-time and that the alienation by Will would not affect the reversionary rights of the plaintiffs. [p. 910, col. 2.]

Custom is a fact which must be proved by authoritative pronouncement or by instances in which it has been followed; it cannot be established by dialectics. [p. 911, col. 1.]

Second appeal from the decree of the Divisional Judge, Rawalpindi Division, dated the 5th November 1911, reversing that of the District Judge, Rawalpindi, dated the 26th April 1911, dismissing the claim.

The Hon'ble Mr. Muhammad Shah, K.B., for the Appellants.

Mr. Nand Lal and Lala Madan Gopal, for the Hon'ble Mr. Shadi Lal, R.B., for the Respondents.

JUDGMENT.—In this case, Counsel for the respondents raises a preliminary objection that one Manga, one of the plaintiffs-appellants, has died and that the application to bring his representatives on to the record was not made within six months of his death. Counsel for the appellants admits that he is unable to meet the respondents' objection and he is willing that the appeal so far as Manga is concerned, should be held to have abated. Respondents then contended that since the appeal has abated as regards Manga, it has also abated so far as the remaining appellants are concerned. For this argument, respondents' Counsel were unable to find any justification. The suit brought was not based on any joint right, but on the several rights of all the plaintiffs. The suit could have been brought by the other plaintiffs exclusive of Manga and now that Manga retires from the appeal, there is no reason why it should not be continued by the plaintiffs

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who survive. Ghulam Hussain and Niaz Ali respondents have died whilst this appeal has been pending and their representatives have not been brought upon the record in time, but this point is of no importance for they are *pro forma* respondents, and the appeal can proceed without the inclusion of their representatives.

This case is brought by the near collaterals of Allah Ditta, *Gujar* of Gujar Khan Tahsil in the Rawalpindi District, for a declaration that the Will by which the said Allah Ditta on the 24th December 1899 bequeathed the whole of his property to his mother Musammal Kasim Bi and to his maternal uncle Gulab Khan is invalid and will not affect the plaintiffs' rights on the death or remarriage of Musammal Kasim Bi. Allah Ditta died shortly after making this Will and mutation was granted in accordance with the provisions of the Will in spite of the objections of the collaterals on the 26th February 1901. The first Court threw the burden of proving that by custom a sonless *Gujar* was not competent to make a testamentary disposition of the whole of his property, upon the plaintiffs and holding that the plaintiffs had not discharged the burden, it dismissed the suit. The Divisional Judge on appeal thought that the *onus* should be placed upon the defendants of proving that such a proprietor was competent in the presence of collaterals to alienate by Will the whole of his ancestral property and holding the defendant had not discharged the *onus*, he decreed for the plaintiffs.

Before this Court, Mr. Shafi for the appellants first contends that the *onus* should have been laid upon the plaintiffs and urges that if this Court holds that the Divisional Judge has rightly placed the *onus* still, as the *onus* was placed in the original Court upon the plaintiffs, a remand should in any case be granted by this Court in the event of the evidence upon the record being held insufficient to establish the defendants' contention.

Next, it was urged that the plaintiffs' suit was barred by time inasmuch as the Punjab Limitation Act of 1900 does not deal with a suit such as the present which is launched only after the death of the alienor. Mr. Shafi contends that

the language of Article 1 of the Punjab Limitation Act of 1900 precludes the idea that a suit for a declaration that an alienation shall be void except for the life-time of the alienor can be brought when that life-time has come to an end. The matter, however, has been considered in *Jivana v. Abdullah* (1). The correctness of that judgment is challenged and it is contended that the language of the Limitation Act must be very strictly construed and that if a suit is brought which does not satisfy the definition of the article of limitation which it is sought to apply, it must be held that the article does not apply to that suit.

After careful consideration of this matter, we see no reason for holding that the decision reported as *Jivana v. Abdullah* (1), is incorrect. The intention of the Legislature is very obvious and whatever difficulty arises, is due solely to the infelicitous nature of the language used. The suit now before us, might be described quite adequately, although loosely, as a suit for a declaration that the alienation effected by Allah Ditta, was void except for his life-time. But it might just as well be described as a suit for a declaration that the alienation by Will should not affect the reversionary rights of the plaintiffs, and that is clearly the intention of the plaintiffs.

They desire a decree declaring that the alienation shall be void against them as soon as they become entitled to the property affected.

We overrule the objection.

The next point is whether the custom on which defendants-appellants rely, has been established.

Defendants have produced thirteen instances, not all of the Gujar Khan Tahsil however, but we find that they go some way to establish a custom of gift or bequest by *Gujars* in favour of nephews or (more rarely) sisters' sons only.

Even after allowing that tribes in the western part of the Punjab are less restricted in the disposition of their ancestral property than the tribes of the Central Punjab, and after conceding that

(1) 2 Ind. Cas. 962; 64 P. R. 1909; 56 P. L. R. 1909; 62 P. W. R. 1909.

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there appears to be a custom warranting special favours to nephews or sisters' sons, we are unable to hold that there exists a custom justifying a gift or bequest of the whole estate to a mother and a mother's brother, who stand in relation to the donor or testator in a very different position from that held by a nephew or a sister's son.

Custom, moreover, is a fact which must be proved by authoritative pronouncement or by instances in which it has been followed; it cannot be established by dialectics.

We hold then that the custom contended for by the appellant, is not established and as defendants-appellants produced a considerable body of evidence before the first Court, we see no probability whatever that a remand would enable them to strengthen their position.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1525 OF 1914.

September 17, 1915.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Kumaraswami Sastri.

P. C. RAGHAVACHARIAR—PLAINTIFF—
APPELLANT

versus

ANANTHA REDDI AND OTHERS—DEFEND-
ANTS—RESPONDENTS.

*Attachment—Subsistence of attachment, how deter-
mined—Order not withdrawn—Presumption—Right to
subsistence of attachment acquired under old Code—
Civil Procedure Code (Act V of 1908), O. XXI, r. 57,
whether has retrospective effect.*

The question whether by reason of the disposal of a petition for execution, an attachment ceases to subsist, should be determined with reference to the facts of each case. [p. 911, col. 2.]

Unless an order of attachment is withdrawn or dealt with on the merits, the presumption is that it is in force. [p. 911, col. 2.]

Imtiaz Ali v. Bishambhar Das, 10 Ind. Cas. 245; 8 A. L. J. 619; *Daul Ali Shah v. Ram Prasad*, 30 Ind. Cas. 787; 37 A. 542; 13 A. L. J. 750, referred to.

A right to subsistence of attachment acquired under the old Code of Civil Procedure cannot be taken away by giving retrospective operation to Order XXI, rule 57 of the new Code. [p. 912, col. 1.]

Khande Subhaya v. Nara Subba Reddy, 27 Ind. Cas. 792; 2 L. W. 4; *Vaidiparthi Ramayya v. Korukonda Jagannadham*, 27 Ind. Cas. 568, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of North Arcot, in Appeal Suit No. 116 of 1913, preferred against that of the Court of the District Munsif of Ranipet, in Original Suit No. 735 of 1912.

Messrs. L. A. Gorindaraghava Aiyar and L. S. Venkataraghava Aiyar, for the Appellant.

Mr. C. V. Annathakrishna Aiyar, for the Respondents.

JUDGMENT.—Defendants Nos. 2 to 5 mortgaged to the 1st defendant certain properties. One Arunachella obtained a decree for money against the 1st defendant. An application for attachment was made on the 15th July. After notice to the debtors, the attachment was made on the 29th July. On the 10th August, the District Munsif dismissed the petition as "further steps were not taken." It is not clear what further steps were required to be taken by the attaching creditor. There is nothing in the order or in the papers before us to indicate that the creditor was guilty of any laches on his part and that the Court dismissed the petition on that ground. Under these circumstances, we must regard the dismissal as not having the effect of putting an end to the attachment. The Judicial Committee pointed out that the question whether by reason of the disposal of a petition, the attachment ceased to subsist, should be determined with reference to the facts of each case. We find no materials in this case for holding that the disposal was not for statistical purposes and was due to any neglect on the part of the creditor. The shortness of the time between the attachment and the dismissal, is an indication the other way. We are supported in this view by *Rungasami Chetti v. Periasami Mudali* (1). As pointed out in *Imtiaz Ali v. Bishambhar Das* (2) and *Daul Ali Shah v. Ram Prasad* (3), unless the order is withdrawn or dealt with on the merits, the presumption is that it is in force.

The second ground taken by the Subordinate Judge is equally untenable. There is no reason for holding that the new Code

(1) 17 M. 58; 3 M. L. J. 211.

(2) 10 Ind. Cas. 245; 8 A. L. J. 619.

(3) 30 Ind. Cas. 787; 13 A. L. J. 750; 37 A. 542.

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gave retrospective effect to the order passed in August 1907. This is not a matter of procedure only. The attaching creditor had acquired a right to subsistence of the attachment under the old Code. This right should not be taken away by giving retrospective operation to Order XXI, rule 57, of the new Code of Civil Procedure. The decisions in *Khande Subbayya v. Nara Subba Reddy* (4) and in *Vardiparthi Ramayya v. Korukonda Jayannadham* (5) support this view.

We must reverse the decree of the Subordinate Judge and remand the case to him for disposal on the merits not dealt with by him already. Costs will abide the result.

Appeal allowed; Suit remanded.

(4) 27 Ind. Cas. 792; 2 L. W. 4.

(5) 27 Ind. Cas. 568.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REFERENCE NO. 5 OF 1911-12 OF
FARRUKHABAD DISTRICT.

November 29, 1912.

Present:—Mr. Baillie, S. M.

PARAS RAM—PLAINTIFF—APPLICANT

versus

SHEOBARAN SINGH—DEFENDANT—

RESPONDENT.

Agra Tenancy Act (II of 1901), s. 176—Application for review, rejection of, by Assistant Collector, 2nd Class—Appeal, if maintainable—Civil Procedure Code (Act V of 1908), O. XLVII, r. 7.

Although under Order XLVII, rule 7, of the Civil Procedure Code, an order rejecting an application for review is not appealable, such an order, if passed by an Assistant Collector of the Second Class, is appealable to the Collector under section 176 of the Tenancy Act.

Reference made by the Commissioner of the Allahabad Division, submitting the record to set aside the order of the Collector who reversed the order of the Assistant Collector, 2nd Class, in a suit for arrears of rent.

FACTS.—A decree for arrears having been passed, the decree-holder applied for ejectment and notice under section 59, is

alleged to have been served. Money being not paid, an order for ejectment was passed. But before the order was carried out, the judgment-debtor applied for review of judgment to the Tahsildar who cancelled the order of ejectment. On appeal the Collector sent back the case, holding that the order of ejectment should not have been cancelled without giving the decree-holder an opportunity to show cause to the contrary. The Tahsildar after remand held that there were not sufficient grounds for reviewing his order of ejectment and maintained it.

The judgment-debtor appealed to the Collector and the objection taken by the decree-holder was that no appeal lay to the Collector. The Collector overruled the objection and held that the Tahsildar ought to have reviewed his order. The decree-holder went in revision to the Commissioner who in his order of reference to the Board said as follows:—"This application for review refers to a case in which a Tahsildar passed an order for the ejectment of a tenant under section 61 of the Tenancy Act. The Tahsildar was applied to review his order but he refused to do so. An appeal against the refusal was preferred to the Collector who accepted it, holding that the Tahsildar ought to have reviewed his order. The Collector granted the relief sought by the tenant. It is clear from Order XLVII, rule 7, that the Collector had no jurisdiction. The case will be submitted to the Board for orders."

JUDGMENT.—Under section 176 of the Tenancy Act any order passed by an Assistant Collector, 2nd Class, relating to the trial of any suit or application, is appealable to the Collector. Rule 7 of Order XLVII being inconsistent therefore, does not apply. There is no ground for revision. The application is dismissed.

Application dismissed.

MUHIUDDIN ROWTHER v. RANGACHARIAR.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 284 OF 1914.

September 7, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

Sheik MUHIUDDIN ROWTHER—

PETITIONER—APPELLANT

versus

RANGACHARIAR AND ANOTHER—

RESPONDENTS.

Civil Procedure Code Act V of 1908, O. XXI, r. 89
—Deposit by purchaser—Sale not confirmed—Person
applying to set aside sale, if can take advantage of
deposits.

Amounts paid by purchasers in Court auction
whose purchases have not been confirmed and which
amounts, therefore, cannot be withdrawn by the
decree-holder at his pleasure, cannot be taken
advantage of by any person who applies under
Order XXI, rule 89, of the Code of Civil Procedure.

Karunakara Menon v. Krishna Menon, 27 Ind. Cas.
952; 2 L. W. 196; 28 M. L. J. 262, followed.

Appeal against the order of the Court of
the Subordinate Judge of Mayavaram, in
Execution Appeal No. 137 of 1914, in
Original Suit No. 36 of 1910, on the file
of the Court of the Subordinate Judge of
Kumbakonam.

Mr. G. S. Ramachandra Aiyar, for the Ap-
pellant.

Messrs. T. R. Ramachandra Aiyar, T. R.
Krishnaswami Aiyar and S. Gopulaswami
Aiyangar, for the Respondents.

JUDGMENT.—In *Karunakara Menon v. Krishna Menon* (1), it was held that the payment by one judgment-debtor into Court of money which (according to the arguments of Mr. T. R. Ramachandra Aiyar for respondents in that case) could have been withdrawn from Court by the decree-holder at once, could not be taken advantage of by the other judgment-debtor in making his necessary deposit to support his application under Order XXI, rule 89, of the Code of Civil Procedure.

It follows, *a fortiori*, that amounts paid by purchasers in Court auction whose purchases have not been confirmed and which amounts, therefore, could not be withdrawn by the decree-holder at his pleasure, could not be taken advantage of by any person who applies under Order XXI, rule 89, of the Code of Civil Procedure.

(1) 27 Ind. Cas. 952; 2 L. W. 196; 28 M. L. J. 262.

GUZZU PAYIDAYYA v. VENKADARU VENKATA REDDI.

The appeal is, therefore, dismissed with
costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 525 OF 1914.

September 20, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

GUZZU PAYIDAYYA—DEFENDANT NO. 1

—PETITIONER

versus

VENKADARU VENKATA REDDI AND

ANOTHER—PLAINTIFF AND DEFENDANT NO. 2

—RESPONDENTS.

*Partnership—Dormant partner—Contract with firm,
suit on—Necessary party.*

A dormant partner never need be joined as a co-
plaintiff in an action on a contract entered into with
the firm or with one of its members. [*Id.* 913, col. 2.]

Kishen Parshad v. Har Narain Singh, 9 Ind. Cas.
739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M.
L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L.
R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45, followed.

Petition, under section 25 of Act IX of
1887, praying the High Court to revise
the decree of the Court of the Subordinate
Judge of Bezwada, in S. C. No. 607 of 1913.

Mr. K. G. Sarangapani Aiyangar for Mr.
V. Ramadoss, for the Petitioner.

Mr. V. Ramesam, for the Respondents.

JUDGMENT.—The Subordinate Judge
says that the plaintiff has got "only sub-
partners". The plaintiff in his evidence
says that they are his "lopayakari sharers." This may mean only that he has got assistants who get a share of the profits, or it may mean that they are dormant partners who can make claims against or under him.

As regards dormant partners, Lindley says at page 333 of his book: "But a dormant partner never need be joined as a co-plaintiff in an action on a contract entered into with the firm or with one of its members." [See also *Kishen Parshad v. Har Narain Singh* (1).]

I think, therefore, that the non-joinder of the plaintiff's immersed (which seems to be the literal meaning of *lopayakari*) sharers is not fatal to the suit.

(1) 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395; 38 I. A. 45.

FAZAL V. HASHMATI.

The contention that Exhibit A is a negotiable instrument and hence the 1st defendant is not bound by the 2nd defendant's signature therein, was not set up in the lower Court nor is it set out in the grounds of revision and I refuse to consider it. The last contention that the Subordinate Judge's refusal to grant an adjournment, was wrong, is not sought to be supported by even a printing of the order, of the petition for adjournment and of those portions of the B Diary which would show the numerous adjournments granted in this Small Cause Suit, which seems to have been filed in June 1912 though disposed of only in March 1914.

I dismiss the civil revision petition with costs.

Petition dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2425 OF 1915.

December 2, 1915.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge.

FAZAL—PLAINTIFF—APPELLANT

versus

Musammil HASHMATI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105 (1), O. XLIII, r. 1 (d)—Decree ex parte, order refusing to set aside, whether appealable—Order setting aside decree ex parte, appeal against, maintainability of—Error made in setting aside such decree, effect of.

While an appeal lies under Order XLIII, rule 1 (d), of the Civil Procedure Code against an order refusing to set aside a decree passed *ex parte*, no appeal lies against an order setting aside such a decree. Under section 105(1) of the Code, any error, etc., made by a Court in setting aside an *ex parte* decree is not an error, etc., "affecting the decision of the case" and, therefore, cannot be set forth as a ground of objection in the memorandum of appeal.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 31st May 1915, reversing that of the Subordinate Judge, first Class, Gurdaspur, dated the 15th April 1915, decreeing the claim.

Khawaja Zia-ud-Din, for the Appellant.
Dr. Muhammad Iqbal, for the Respondents.

SHEO MANGAL SINGH v. CHEDU.

JUDGMENT.—The case was admitted only on ground No. 2 and no other ground has been argued. The remaining grounds are either all disposed of by findings on questions of facts or are—grounds Nos. 1 and 3—clearly unsound. As regards ground No. 2, I find in favour of respondents—*Tasaddug Hussain v. Hayat-un-Nissa* (1). That ruling, of course, deals with the old Code of Civil Procedure, but the law has not been altered. I agree with the view taken in that ruling and hold that under the Civil Procedure Code while an appeal lies [Order XLIII, rule 1 (d)] against an order refusing to set aside a decree passed *ex parte*, no appeal lies against an order setting aside such a decree; and that, advertent to section 105 (1) of the Code, any error, etc., made by a Court in setting aside an *ex parte* decree is not an error, etc., "affecting the decision of the case" and, therefore, cannot be "set forth as a ground of objection in the memorandum of appeal." This being so, the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 25 A. 280; A. W. N. (1903) 39.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1541 OF 1914.

November 11, 1915.

Present:—Mr. Justice Piggott.

SHEO MANGAL SINGH—PLAINTIFF—
APPELLANT

versus

CHEDU AND OTHERS—DEFENDANTS—
RESPONDENTS.

Mortgage—Occupancy tenant—Mortgage of holding before Agra Tenancy Act (II of 1901)—Relinquishment by mortgagor, effect of.

An occupancy tenant who prior to the coming into force of the Agra Tenancy Act, 1901, mortgaged his holding for consideration and in a genuine way, and put the mortgagee in possession, cannot enter into a bargain with his *zamidar* so as to secure some collateral advantage for himself as consideration for the relinquishment of his holding, to the prejudice of the mortgagee whom he has himself put in possession. [p 916, col. 1.]

Second appeal from a decree of the District Judge of Mainpuri.

Messrs Lakshmi Narain and Baleshwari Prasad, for the Appellant.

SHEO MANGAL SINGH v. CHEDU.

Mr. Sital Prasad Ghosh, for the Respondents.

JUDGMENT.—This is plaintiff's appeal in a suit for ejectment originally filed in the Court of an Assistant Collector. The plaintiff is admittedly the *zemindar* of the land in suit. In his plaint, he describes the two defendants, Chedu son of Dan and Chiddu son of Matru, Kunjras, as non-occupancy tenants of the land in suit. The defendants filed a written statement in which they described themselves as mortgagees in possession on behalf of the tenant-in-chief who was a tenant with occupancy rights. On their plea Mithu son of Faqira was added as a defendant. The Assistant Collector came to the conclusion that there had been a mortgage by Faqira father of Mithu in favour of the original defendants and that this fact alone was sufficient to oust his jurisdiction. He dismissed the suit accordingly. The District Judge was obviously inclined to the opinion that the Assistant Collector was wrong on the question of jurisdiction. He has, however, rightly remarked that the question was one which might be passed over in his Court, in virtue of the provisions of section 197 of the Agra Tenancy Act (Local Act II of 1901). He was of opinion that he had materials on the record sufficient to determine the appeal. He has found that there was a mortgage by Faqira in favour of the original defendants, and that this fact alone was sufficient to protect the said defendants from ejectment during the period of the mortgage. The plaintiff's suit having thus been dismissed by both the Courts below, it is contended in second appeal to this Court that the findings of the Court of first appeal are not sufficient to dispose of the case. The facts apparent from the record are somewhat peculiar. It would seem that the land was conveyed to the fathers of the two original defendants by two distinct transactions. There was a mortgage by Faqira in the month of May 1897 in favour of Matru for a period of 15 years. Before this period had expired, Faqira executed another mortgage in favour of Dan for a period of 20 years. The record does not show that Dan and Matru are related, though they are members of the same caste, and it would seem that their sons, the two

defendants originally impleaded, are amicably in joint possession of the land in suit. After the death of Faqira, there was a suit for arrears of rent against Mithu which resulted in a decree in favour of the *zemindar*. If the latter had proceeded to eject Mithu for non-satisfaction of this decree, the mortgagees in possession would no doubt have had an opportunity of protecting themselves by paying into Court the amount of the decree money. It is not clear from the record whether any proceedings in ejectment had been commenced, but on the 29th of January 1911, Mithu relinquished his holding in favour of the plaintiff *zemindar*. Subsequently, Mithu himself brought a suit to get this relinquishment set aside, on the ground that it had been brought about by fraud or coercion and this suit failed. The learned District Judge has quoted authority for the position taken up by him, that Mithu was not entitled during the pendency of the mortgage in favour of Dan to relinquish his holding to the prejudice of the latter. It seems to me that there are two currents of opinion in this Court on this question. The matter came before a Full Bench recently in the case of *Birj Kumar Lal v. Sheo Kumar Misra* (1). In deciding that case, the Court laid stress on certain facts which had been concluded by the findings of the Court below. These were as follows:—(1) that the mortgage set up against the *zemindar* was for consideration and genuine; (2) that the object of the relinquishment was to defeat the mortgagee's rights. On these findings it was held that the Civil Court had rightly granted the mortgagee a declaration that the relinquishment by the tenant was ineffectual against him and an injunction restraining the *zemindar* from interfering with his possession. A number of authorities on the point are referred to by Tadboll, J., in his order in the case of *Jai Gopal Narain Singh v. Uma Dut* (2). It is clear that in some of the older cases of this Court, as for instance, *Rannu Rai v. Rafi-ul din* (3), the position had been broadly taken up that an occupancy tenant who, prior to the

(1) 29 Ind. Cas. 215; 37 A. 441; 13 A. L. J. 619.

(2) 10 Ind. Cas. 573; 8 A. L. J. 695.

(3) 27 A. 82; A. W. N. (1904) 170.

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coming into force of the Agra Tenancy Act (Local Act II of 1901), had made a usufructuary mortgage of his holding and put the mortgagee into possession, could not during the subsistence of this mortgage relinquish his holding to the prejudice of the mortgagee's rights. If the principle thus broadly laid down, is accepted as of universal application, it would seem that there was no necessity in the more recent ruling to which I have referred, to discuss such a question as the object of the relinquishment, or the existence of collusion between the mortgagor and the *zemindar*. I take it that the law is finally settled to this extent, that an occupancy tenant who has mortgaged his holding under the circumstances stated and put the mortgagee in possession, cannot enter into a bargain with his *zemindar* so as to secure some collateral advantage for himself as consideration for the relinquishment of his holding, to the prejudice of the mortgagee whom he has himself put in possession. Whether any broader principle than this can be laid down as applicable to all cases, seems to me at least open to argument. The mortgagees, by refusing or neglecting to pay rent regularly to the *zemindar*, might obviously put their mortgagor in a very unpleasant position. It is all very well to say, as has been done in this case, that the mortgagee would be driven in the last extremity to protect the occupancy tenant from ejectment by paying into Court the amount of any decree which the *zemindar* might have obtained against him, but there seems no good reason why the occupancy tenant, while not in possession and not enjoying any benefit from the produce of the land, should be put to the trouble of defending a series of suits for arrears of rent because the mortgagee in possession has not troubled himself to pay the rent regularly. If the conditions of the mortgage were such as to bind the mortgagee to pay rent regularly to the *zemindar*, I think the Courts might well grant the mortgagor equitable relief against any breach of such condition and permit him to protect himself from further trouble by relinquishing his holding. Without, therefore, committing myself to any further attempt to define the law on this point, I think I have said enough to justify

the conclusion that there should be some further findings of fact recorded, before the decision of the Courts below dismissing the plaintiff's suit, can be affirmed. I have to consider what issues should be remitted. In argument before me it has been suggested that the mortgages in favour of Dan and Matru have not been proved in accordance with law, and that there should be a finding both as to the factum of those mortgages and as to the passing of consideration. It does not seem to me that any plea to this effect can fairly be read into the memorandum of appeal filed by the plaintiff in this Court; nor do I think it is a plea which I should permit to be raised at this stage. The whole of the proceedings in the Courts below, and the findings of both those Courts, are based on the assumption that the defendants originally impleaded, were placed in possession by Faqira, as mortgagees in virtue of a *bona fide* mortgage or mortgages. As a matter of fact, the period of the mortgage in favour of Matru has expired, so that the only mortgage which can be set up in this case is that of 1901 in favour of Dan. As the case now stands before me, I do not think it necessary or advisable to call for any finding as to whether this mortgage was legally proved or was for consideration. I think the Courts below have virtually concluded these points in favour of the defendants.

There remains the question of the transactions connected with Mithu's relinquishment. I remit the following issues to the Courts below:—

(1) In relinquishing his rights as an occupancy tenant over the land in suit, did Mithu obtain for himself any collateral advantage from the plaintiff *zemindar*, or can it otherwise be said that the plaintiff and Mithu were acting in collusion to the prejudice of the original defendants?

(2) Were the original defendants, or either of them, as mortgagees of the land in suit, bound to pay the rent thereof regularly to the *zemindar*? Were they in any way responsible for the fact that the *zemindar* obtained a decree for arrears of rent against Mithu?

As the case has not been looked at in either of the Courts below from the point of view which I have taken, I think that the parties should be permitted to adduce evidence on these issues if they see fit to do

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so. The lower Appellate Court may record itself any additional evidence which the parties may offer, or cause the evidence to be taken by the Court of first instance but it must record its own findings. On return of the findings, 10 days will be allowed for objections.

Issues remitted.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 82 OF 1912.

February 13, 1913.

Present:—Justice Sir Ralph Benson, Kt., and
Mr. Justice Sundara Aiyar.
P. R. SAMBASIVA AIYAR AND ANOTHER—
PLAINTIFFS APPELLANTS

versus

MUHAMAD HUSSAIN ROWTHER AND
ANOTHER—DEFENDANT NO. 2 AND PLAINTIFF'S
LEGAL REPRESENTATIVE RESPONDENTS.

Decree against several defendants at different times
—Consolidated decree—Limitation—Limitation Act
(IX of 1908), ss. 14, 18.

A decree for money may be passed against different defendants at different times, and the decrees so passed are not treated as one consolidated decree. [p. 919, col. 1.]

An application by a judgment-debtor to record satisfaction of a decree made by him more than three years from the date of the decree as against him is barred, even though it may be within three months from the date of a revised decree as against defendants other than himself. The two decrees cannot be consolidated for purposes of limitation as one. [p. 918, col. 2.]

Ashfaq Hussain v. Gauri Sahai, 9 Ind. Cas. 975; 15 C. W. N. 370; 8 A. L. J. 332; 9 M. L. T. 385; 13 C. L. J. 351; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140 (P. C.); 33 A. 264, distinguished.

Appeal against the order of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 295 of 1910, preferred against that of the Court of the District Munsif of Kumbakonam, in Execution Appeal No. 21 of 1910, in Original Suit No. 450 of 1905.

FACTS of the case appear from the following judgment of the lower Appellate Court:—

"This appeal arises out of an application in execution of a decree. The District Munsif has held that the petition is barred

by time to record or recognise the discharge pleaded and in the absence of a valid discharge, the decree is executable, and has accordingly dismissed the petition. The 2nd defendant appeals.

2. The following facts must be borne in mind in dealing with the points argued on appeal. Plaintiff, Gopalasami Chettiar, sued in Original Suit No. 450 of 1905 and obtained a decree *ex parte* against defendants Nos. 1 to 3 and assigned the decree in favour of supplemental plaintiff, Natesa Aiyer. The assignee Natesa Aiyer got himself recognised as assignee-decree-holder and attached the properties of 1st defendant in the hands of 2nd defendant. It was then that 2nd defendant became aware of the decree *ex parte* and applied to have it set aside. The Court believed his allegations and restored the suit for re-trial. The assignee-decree-holder was also impleaded as supplemental plaintiff. On the defence of the 2nd defendant issues as to the liability of 2nd defendant, for the debts of his father's trade and as to satisfaction of the claim by the 3rd defendant, were raised. Plaintiff Gopalasami and his assignee, the present respondent, did not conduct the suit and allowed it to go by default. The Court, instead of dismissing the suit *in toto*, dismissed it as against 2nd defendant on the 27th November 1909. The present petition was put in on 5th January 1910 and the connected petition for the same relief in the shape of review, was put in on 3rd December 1909.

3. It is clear from the above resume of the facts that the 2nd defendant (appellant) was prevented by reason of fraudulent service of summons on him in the suit from the knowledge of the decree *ex parte* till the attachment made by the respondent brought the whole fraud to his notice. He immediately applies for setting aside the decree *ex parte*, and raises in the restored suit the question of the satisfaction of the claim too. The respondent frustrates an investigation of the satisfaction by allowing the suit to go by default. The lower Court ought to have dismissed the suit *in toto* after this conduct of the plaintiffs or at least gone into the question of satisfaction raised by issue III in the suit and recorded a finding thereon. The procedure adopted by the

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Court in dismissing the suit only as regards 2nd defendant alone has led to the 2nd defendant raising the question of the satisfaction over again in the execution proceedings. It will be seen that the respondent has by his own conduct prevented an adjudication on the question of satisfaction of the claim. I, therefore, hold that this petition presented within three months of the revised decree brought about by the fraudulent conduct of respondent is not barred by limitation under section 18 and Article 174 of the Limitation Act, 1908.

Section 14, clause (2), thereof also allows deduction of the period between the application to set aside decree *ex parte* and the revised decree as occupied by a proceeding in which 2nd defendant expected the same relief in good faith, but was thwarted by the strategic move of the plaintiffs in allowing the suit to go by default. In that view also, this petition is not barred.

4. There is no force in the contention that the order on the connected petition Miscellaneous Appeal No. 1928 of 1909 having become final by reason of there being no appeal therefrom, bars the present appeal as *res judicata*. The contention is as ingenious as it is unintelligible.

5. It was contended for the appellant that the revised decree must be taken to be a final decision in favour of the defence on the question of satisfaction also. The *onus* on that issue is on the defence and no evidence has been let in on the issue in question. The decree cannot be taken to be an adjudication at least on the merits to operate as *res judicata* outside the provisions of *res judicata* under section 11 of the Code of Civil Procedure. I, therefore, disallow the contention.

6. The other interesting questions argued as to whether respondent can rely on his recognition prior to his revised decree to continue execution, whether the attachment is a valid one by reason of the death of 1st defendant and is alive till after revised decree and whether the properties could be sold in execution in the hands of the 2nd defendant as properties of the 1st defendant by reason of the dismissal of the suit not covering the decree against the 1st defendant too, cannot be gone into at this stage without further evidence. They will all be consi-

dered in due course by the District Munsif if necessary.

7. I, therefore, set aside the order of the District Munsif, and remand the petition for disposal according to law after raising the issue as to the question of satisfaction, the validity of the recognition of respondent for purposes of the revised decree, and other questions as may legitimately arise on the petition. Costs to abide and be provided for in the revised order."

Mr. T. M. Krishnaswami Aiyar, for Mr. K. V. Krishnaswami Aiyar, for the Appellants.
Mr. G. S. Ramachandra Aiyar, for the Respondents.

JUDGMENT.—The object of the 1st respondent's petition to the Munsif was to get satisfaction of the decree recorded on the ground that the 3rd defendant discharged the amount due under it in 1906. The petition was presented in only 1910. *Prima facie*, the application was barred. We fail to see how section 14 or section 18 of the Limitation Act could save the application. In fact, the 1st respondent clearly stated before the Munsif that he did not rely on either of those sections. The prior proceedings relied on to attract section 14, had quite a different object in view. The fact that the 1st respondent then stated that the 3rd defendant had discharged the decree debt, would not make the section applicable. The 2nd defendant was admittedly aware of the alleged discharge in 1908. We cannot understand how the Subordinate Judge could imagine that section 18 could apply in the circumstances. The 1st respondent contends that the decree against the 1st and 3rd defendants and the subsequent revised decree with regard to the 2nd defendant, should be treated as one consolidated decree, and that his application was put in within three months from the date of the second decree and was, therefore, within time, and he relies on the judgment of the Privy Council in *Ashfaq Husain v. Gauri Sahai* (1). There the suit was on a mortgage and their Lordships held that the plaintiff was entitled to a joint decree for sale against all the defendants so as to enable the Court

(1) 9 Ind. Cas. 975; 33 A. 264; 8 A. L. J. 332; 15 C. W. N. 370; 9 M. L. T. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140 (P. C.).

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to sell the property effectually. It was on this ground that the two decrees were treated as a single decree and the application for sale, which was within three years from the date of the 2nd decree, was held to be not barred. This case is not similar to the one before the Privy Council. A decree for money may be passed against different defendants at different times, and there is no reason for treating the two decrees as one. The result of upholding the 1st respondent's contention, would lead to the anomaly of a decree which was passed in 1909 as capable of being discharged in 1906.

The 1st respondent contends that he is entitled to resist execution by the 2nd plaintiff Ananda Natesa Aiyar, who, he says, is not the real assignee of the decree. If so, his proper course is to resist any application that the assignee may present to execute the decree.

We reverse the order of the lower Appellate Court and restore the Munsif's order with costs here and in the lower Appellate Court.

Appeal allowed; Order reversed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1408 OF 1914.

November 8, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THE DISTRICT BOARD OF TANJORE—

PLAINTIFF—APPELLANT

versus

VYTHILINGA CHETTY—DEFENDANT—

RESPONDENT.

Lessor and lessee—Lease—Suit for possession—Promise to renew, effect of—Ejectment.

A covenant by a lessor to renew, even if legally enforceable against him, cannot be pleaded in bar to a suit for possession brought by him on the expiry of the term mentioned in the lease-deed.

Achutan Nambudri v. Koman Nair, 13 M. L. J. 217; *Kurri Veerareddi v. Kurri Bapireddi*, 29 M. 336; 16 M. L. J. 395; 1 M. L. T. 153; *Gopalan Nair v. Kunhan Menon*, 30 M. 300; 17 M. L. J. 189; 2 M. L. T. 161, followed.

A promise to renew contained in a lease-deed, cannot be treated as a promise not to eject on the expiry of the term.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 471 of

1913, preferred against that of the Court of the District Munsif of Valangiman at Kumbakonam, in Original Suit No. 49 of 1912.

Mr. L. A. Govindaraghava Aiyar, for the Appellant.

Mr. V. Ramasami Aiyangar, for the Respondent.

JUDGMENT.—Assuming (without deciding) that there is in this case a covenant by the lessor to renew which is legally enforceable against him in a suit for specific performance, such a covenant cannot be pleaded in bar to a suit for possession brought by the lessor on the expiry of the term mentioned in the lease-deed, *Exhibit E*. [See *Achutan Nambudri v. Koman Nair* (1); *Kurri Veerareddi v. Kurri Bapireddi* (2) and *Gopalan Nair v. Kunhan Menon* (3).] The covenant in *Exhibit E*, if enforceable against the lessor, would no doubt be a contract on his part to accept a registered renewal deed for rent for ten years on the same terms of *Exhibit I*, but such a contract does not contain a promise by the lessor not to eject the lessee on the expiry of the term even though the lessee did not execute the new rent deed on the expiry of the first term.

The lower Appellate Court's decree is reversed and that of the District Munsif restored with costs here and in the lower Appellate Court on the defendant.

Appeal allowed; Decree reversed.

(1) 13 M. L. J. 217.

(2) 29 M. 336; 16 M. L. J. 395; 1 M. L. T. 153.

(3) 30 M. 300; 17 M. L. J. 189; 2 M. L. T. 161.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1402 OF 1914.

November 29, 1915.

Present:—Justice Sir P. C. Banerji, Kt., and Mr. Justice Walsh.

BARATI LAL—DEFENDANT—APPELLANT

versus

SALIK RAM—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 6—Relinquishment—Reversionary rights—Settlement of disputed claim.

GNANAMBAL AMMAL v. VEERASAMI CHETTY.

One Bhagga Lal died possessed of certain property and his daughter-in-law got possession of it. On the death of the daughter-in-law, one Barati Lal made an application for mutation of names on the ground that he was the heir of Bhagga Lal. This application was opposed by Mohan Dei daughter of Bhagga Lal. The dispute resulted in execution of a document by which Barati Lal for a consideration of Rs. 5,000 and on receipt of certain immoveable property, abandoned his entire claim to the property recognizing Musammam Mohan Dei to be absolute owner of it.

Held, that the transaction was not a sale of the reversionary rights of Barati Lal, but was a settlement of disputed claims and was not void under section 6 of the Transfer of Property Act.

Second appeal from a decree of the District Judge of Shahjahanpur, dated the 21st September 1914.

The Hon'ble Dr. Tej Bahadur Sapru, for the Appellant.

The Hon'ble Mr. Gokul Prasad and Mr. Sarat Chandra Chowdhry, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff-respondent claimed possession of a house purchased by him from two persons, namely, Musammam Shamo and Khunni Lal. He purchased half the house from Musammam Shamo and the other half from Khunni Lal on different dates. There is no dispute in this appeal in respect to the half share purchased from Musammam Shamo. As regards the half share purchased from Khunni Lal the facts are these:—The share in question belonged to Bhagga Lal and after his death, was apparently in the possession of his daughter-in-law, the widow of a predeceased son. Upon her death, the appellant Barati Lal made an application in the Revenue Court for the entry of his name as the heir of Bhagga Lal and the owner of his property. This application was resisted by Musammam Mohan Dei, the daughter of Bhagga Lal, who asserted that her father was separate and that she was entitled to succeed to the property. The dispute resulted in the execution of a document on the 24th of May 1911 by Barati Lal which purported to be a deed of relinquishment. By that document, Barati Lal, for a consideration of Rs. 5,000 and on receipt of certain immoveable property, abandoned all his claim to the estate of Bhagga Lal, and recognized the title of Musammam Mohan Dei as absolute owner. Musammam Mohan Dei being dead, the property passed to her

husband Khunni Lal who sold it to the plaintiff. Barati Lal's contention was that the transaction of the 24th of May 1911 was a sale by him of his reversionary rights and was, therefore, invalid under the provisions of section 6 of the Transfer of Property Act. This contention found favour in the Court of first instance, but was overruled by the lower Appellate Court which decreed the claim of the plaintiff. In our opinion, the decision of the lower Appellate Court is correct. The learned Judge held that the transaction of the 24th of May 1911 was in fact and substance a settlement of disputed claims. We agree with this view. There was a claim put forward by Barati Lal to the property of Bhagga Lal as the person entitled to it upon the death of Bhagga Lal's daughter-in-law. That claim was denied by Musammam Mohan Dei. One party approached the other and upon receipt of consideration from Musammam Mohan Dei, Barati Lal abandoned his claim to the property. This was not a mere transfer of reversionary rights within the meaning of section 6 of the Transfer of Property Act. The case is very similar to that of *Mohammad Hashmat Ali v. Kaniz Fatima* (1). In this view, the appeal must fail, and it is unnecessary to consider the question of estoppel which was argued with great ability on behalf of the appellant. We dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

(1) 27 Ind. Cas. 701; 13 A. L. J. 110.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2613 OF 1913.

October 25, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

GNANAMBAL AMMAL—PLAINTIFF—

APPELLANT

versus

VEERASAMI CHETTY AND OTHERS—

DEFENDANTS—RESPONDENTS.

Execution—Decree against wrong legal representative—Sale in execution—Proper legal representative, whether can set aside sale Civil Procedure Code (Act V of 1908), s. 2 (11).

GNANAMBAL AMMAL v. VEERASAM CHETTY.

Decree-holders and purchasers in Court auction should not be deprived of their legitimate rights on bare technicalities when the merits are clearly in their favour. [p. 922, col. 2.]

General Manager of the Raj Dhurbhanga v. Maharajah Commar Ramaput Singh, 14 M. I. A. 605 at p. 612; 17 W. R. (P. C.) 459; 10 B. L. R. 294; 2 Suth P. C. J. 575; 3 Sar. P. C. J. 117; 20 E. R. 912, followed.

A decree-holder may select, from among several rival claimants to the estate of his judgment-debtor, any one whom he believes honestly to have the best *prima facie* title as legal representative and that representation, in the absence of fraud or collusion, will be sufficient to validate sales held in execution and to convey the title of the deceased judgment-debtor through such sales. [p. 923, col. 1.]

Kaliappan Servai Karan v. Vardarajulu, 3 Ind. Cas. 737; 6 M. L. T. 199; 19 M. L. J. 651; 33 M. 75; *Kali Charan Nath v. Sukhada Sundari Debi*, 30 Ind. Cas. 824; 20 C. W. N. 558; 22 C. L. J. 272, distinguished.

The term "legal representative" in section 2, clause (11), of the Code of Civil Procedure, 1908, includes any person who intermeddles with the estate of the deceased and the fact that this definition is not found in the old Code does not make it any the less applicable, based as it is on sound legal principles. [p. 923, col. 1.]

Ramasami Chettiar v. Oppilamani Chetti, 4 Ind. Cas. 1059; 6 M. L. T. 269; 19 M. L. J. 67; 33 M. 6, followed.

Siva Bhagiam v. Palani Padinachi, 4 M. 401, dissented from.

Where, therefore, the widow of a deceased testator was wrongly impleaded in a suit for the recovery of money due from him, and a decree having been obtained against her, the property, which under the terms of the Will belonged to some one else, was sold in execution and purchased by a third party and a suit was subsequently brought by the legatee to recover the property bequeathed to him:

Held, that the sale could not be set aside merely on the ground that the legatee was not a party to the decree obtained by the creditor. [p. 924, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Mayavaram, in Appeal Suit No. 622 of 1912, preferred against that of the Court of the District Munsif of Tiruvalur, in Original Suit No. 311 of 1911.

Mr. G. S. Ramaranda Aiyar, for the Appellant.

Mr. T. V. Muthukrishna Aiyar, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. Her paternal uncle Narayanasawmi Chetty died in March 1899 leaving a Will dated May 1898. Under the terms of that Will, the plaintiff lands (11 and odd acres) were given to the plaintiff and to the plaintiff's mother (the 2nd defendant). The plaintiff was to take 4 acres 36 cents absolute-

ly and the 2nd defendant to take the remaining 6 acres 15 cents for life with reversion to the plaintiff. Narayanasawmi Chetty also left a widow, the 3rd defendant, to whom other properties were left by his Will. He owed money at his death to one B. M. Marakayar. That creditor, not knowing the existence of the Will and having to bring his suit for the debt before it was barred, filed Small Cause Suit No. 1068 of 1899 soon after the death of Narayanasawmi Chetty treating his widow (3rd defendant) and his illegitimate son as the heirs and legal representatives of Narayanasawmi Chetty. He also found that the 3rd defendant was in possession of the plaintiff land item No. 2 (7 acres and 74 cents). He obtained a decree and in execution brought item No. 2 to sale and at that sale, the 5th defendant became the purchaser in 1901 and obtained possession as such Court auction-purchaser in July 1901 ejecting the 3rd defendant.

The executor mentioned in the Will (of Narayanasawmi Chetty) who is the 1st defendant in this suit, took no steps till 1903 to administer the Will or to get possession of Narayanasawmi Chetty's properties as executor. The plaintiff has brought this suit as a legatee under the Will of Narayanasawmi Chetty to recover 4 acres 36 cents out of the plaintiff 11 acres 1 cent, and her contention is that the decree obtained by the Marakayar creditor against the estate of Narayanasawmi Chetty in a suit to which neither the plaintiff nor the executor (1st defendant) was made a party defendant, was not binding on her or the estate and that the sale proceedings held in execution of that decree conveyed no title to the purchaser (5th defendant).

It is unnecessary to consider the plaintiff's claim to plaintiff item 1, as her dispute with the 4th defendant in respect of that item was abandoned (by a compromise) in the Court of first instance. Both the lower Courts dismissed the suit as against the 5th defendant and the plaintiff item No. 2 in his possession, on the ground that the decree of 1899 obtained by the creditor against the 3rd defendant (and against the testator's illegitimate son) and the execution proceedings in that suit were binding

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on the estate of the deceased and, therefore, on the plaintiff and on the 1st defendant.

Mr. G. S. Ramachandra Aiyar contended on the authority of *Kaliappan Servai Karan v. Vardarajulu* (1) that where a wrong person was impleaded as legal representative of a deceased debtor in a suit brought after the death of the debtor, execution could not validly issue against the properties which had vested in the proper legal representative and that the proper legal representatives in this case as regards the plaint item No. 2 were the legatees under the Will, namely, the plaintiff and the 2nd defendant. At least, that was how I understood the learned Vakil's argument at the commencement of this case. However, during the course of the argument, section 4 of the Probate and Administration Act came under discussion, that section stating that the "executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." Mr. G. S. Ramachandra Aiyar thereupon argued that as the executor, 1st defendant, was not made a party to the Small Cause Suit of 1899, the execution taken out against the plaint properties conveyed no title to the purchaser.

It is unnecessary for me to express a final opinion on the question decided in *Kaliappan Servai Karan v. Vardarajulu* (1). What was decided in that case, was that the true legal representative cannot, after the decree, be brought on the record for the purpose of execution and that the deceased debtor's property in his hands, cannot be attached and sold in that same suit. In *Kali Charan Nath v. Sukhada Sundari Debi* (2), Mookerjee, J., decided a similar case to that in *Kaliappan Servai Karan v. Vardarajulu* (1) on similar reasons and held that the remedy for the decree-holder who had obtained a decree against the wrong legal representative is "either to have the decree vacated, the suit restored" and the proper legal representative brought on the record

and a new decree made against him "or to institute a suit on the judgment and to obtain a decree thereon against" the true legal representative and then to execute the new decree against the property which had vested in the true legal representative. As regards these two cases, it seems to me with the greatest respect that they do not give sufficient weight to the observations of their Lordships of the Privy Council in several cases, that decree-holders and purchasers in Court auction, should not be deprived of their legitimate rights on bare technicalities where the merits are clearly in their favour. In *General Manager of the Raj Durbhanga v. Maharajah Comar Ramaput Singh* (3), their Lordships said: "These proceedings certainly illustrate what was said by Mr. Doyne and what has been often stated before, that the difficulties of a litigant in India begin when he has obtained a decree." In that case, A obtained a decree against B's widow, B having died pending the suit. The interest of the widow was sold in execution. The contention of the respondent was that the widow did not represent the estate as the deceased debtor had left a son. Their Lordships, however, held that the estate itself, that is, the right of the deceased debtor in the property was properly sold as that was intended to be sold and the proceedings had all been conducted *bona fide*. Mr. G. S. Ramachandra Aiyar, however, distinguished the present case and the case of *Kaliappan Servai Karan v. Vardarajulu* (1), from the Privy Council case and other similar cases on the ground that where the debtor's wrong representative was sued in the first instance (and was not brought in as a legal representative owing to the debtor's dying during the pendency of the suit), the sale of the deceased debtor's property in execution will not pass the debtor's interests. As I said before, *Kaliappan Servai Karan v. Vardarajulu* (1) decided only that execution proceedings, if objected to by the right representative who had not been made a party to the suit before decree, should be dismissed and not that if the wrong representative had been *bona fide* added or sued

(1) 3 Ind. Cas. 737; 33 M. 75; 6 M. L. T. 190; 19 M. E. J. 851.

(2) 30 Ind. Cas. 824; 22 C. L. J. 272; 20 C. W. N. 58.

(3) 14 M. L. A. 605 at p. 612; 17 W. R. (P. C.) 459; 10 B.I.L. R. (P. C.) 294; 2 Suth. P. C. J. 575; 3 Sar. P. C. J. 117; 20 E. R. 912.

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and a decree had been obtained and the property of the deceased had been brought to sale, the sale itself was invalid and could not affect the estate of the deceased. In that same volume a case *Ramasawmi Chettiar v. Oppilamani Chetti* (4), is reported which was argued by eminent Vakils on both sides and it was held therein that a decree-holder may select from among several rival claimants to the estate of his judgment-debtor, any one whom he believes honestly to have the best *prima facie* title as legal representative and that that representation in the absence of fraud or collusion will be sufficient to validate sales held in execution and to convey the title of the deceased judgment-debtor through such sales. The broad principle of the decision in that case clearly seems to me to apply to the present case.

I would further remark that under the definition of "legal representative" in the new Civil Procedure Code of 1908, the 3rd defendant might be properly treated till 1901 as the proper legal representative of her husband Narayanasawmy Chetty so far as the plaint item No. 2 is concerned and could be sued as such legal representative so as to obtain a valid decree against her in order to make item No. 2 validly liable for the satisfaction of the decree-debt. Section 2, clause 11, Civil Procedure Code says that "legal representative" includes any person who intermeddles with the estate of the deceased. Taking it that the 1st defendant was also a proper legal representative as the person in whom the estate legally vested, the 3rd defendant who was in possession of item No. 2 and, therefore, intermeddled with the estate, can likewise be treated as the "legal representative" of Narayanasawmy Chetty till she lost possession of item No. 2 in consequence of the delivery proceedings in 5th defendant's favour. No doubt, the definition of "legal representative" in the Act of 1908 was not found in the old Civil Procedure Code. But it seems to me that the definition is based on sound legal principles which were applicable even before the new Code was enacted. As regard the case in *Siva Bhagiam v. Palani Padiachi* (5)

was doubtless held in that case that a person who was in possession of the deceased's estate and who was sued as his legal representative, could not validly represent the estate so as to pass a valid title to the Court auction-purchaser who purchased the property in her hands in execution of the decree passed against her as such legal representative. With the greatest respect, I dissent from that ruling and I think it must be taken as impliedly overruled by the decision in *Ramasawmi Chettiar v. Oppilamani Chetty* (4).

In the result, I would dismiss the second appeal with costs.

NAPIER, J.—I agree. This case seems to me to be covered by the decision in *General Manager of the Raj Dhurbhanga v. Maharajah Kumar Ramput Singh* (3), it being a suit against the estate of the deceased.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 118 OF 1914.

November 16, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

P. MURUGESA CHETTI—DEPENDANT—
APPELLANT
versus

P. ARUMUGA CHETTI AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Madras High Court Fee Rules 1902, r. 17, nature of—Provisions to be strictly pursued—Order under rule, when to be made.

Rule 17 of the Madras High Court Fee Rules 1902, which provides that when the costs of an interlocutory order are not paid all proceedings in the suit or matter may be stayed or set aside, is a highly penal one and should be strictly pursued. An order under that rule can only be made on a summons in Chambers or on the hearing of an application by the party in default and not at the final hearing. [p. 924, cols. 1 & 2.]

Taycraft v. Grant, (1875) W. N. 201; *In re Wickham, Marony v. Taylor*, (1887) 35 Ch. D. 272; 56 L. J. Ch. 748; 57 L. T. 468; 35 W. R. 525, followed.

Appeal from the judgment of the Hon'ble Mr. Justice Bakewell, dated the 5th November 1914, in the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 49 of 1914.

FACTS.—One Murugesu Chetty brought a suit for partition of moveable and

(4) 4 Ind. Cas. 1059; 33 M. G. 6 M. L. T. 269; 19 M. L. J. 671.

(5) 4 M. 401.

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immoveable properties belonging to himself and his brother, and another suit was filed by the brother for ejectment of Murugesu Chetty who had occupied a portion of the family property. When the suits came on for hearing before Mr. Justice Bakewell, His Lordship ruled that the issues did not cover the whole case, and directed additional issues to be framed on payment of costs incurred up-to-date. The costs were not paid, and at the final hearing, His Lordship directed the additional issues to be struck out, and decreed the suit for the plaintiff. Defendant appealed against that decree.

Mr. V. Sivaprakasam Mudaliar, for the Appellant.

Mr. T. Ethiraya Mudaliar, for the Respondents.

JUDGMENT.—The defendant in this case applied for fresh issues which were granted on terms of paying the costs incurred up-to-date. The defendant did not pay them, and the learned Judge, when the case was set down for final disposal, first struck out the additional issues on 23rd October 1914, and afterwards on 5th November 1914 set aside the written statement of the defendant under rule 17 of the High Court Fee Rules 1902 for non-payment of the costs above referred to and decided the case *ex parte* on the plaintiffs' evidence. Under rule 17 of the High Court Fee Rules 1902, when the costs of an interlocutory order are not paid, the other side may apply by summons in Chambers or on the hearing of any application by the party in default that all or any proceedings in the suit or matter may be stayed or set aside, or that any subsequent steps taken by the party ordered to pay such costs, may be set aside for irregularity, and the Court may thereupon make such order as it thinks fit.

On appeal, it was argued before us that assuming the learned Judge was empowered to strike out the additional issues and set aside the written statement for non-payment of the costs of an interlocutory order, according to the provisions of the rule such an order could only be made on a summons in Chambers or on the hearing of an application by the party in default and not at the final hearing. The pro-

visions of this rule are highly penal, *Twycroft v. Grant* (1), *Twycroft v. Grant* (2) and should, therefore, be strictly pursued. In *In re Wickham, Marony v. Taylor* (3), Cotton, L. J., observed that the practice was to make orders of this kind on application properly made but not at the hearing, and Lindley, L. J., agreed that Kekewich, J., was wrong in ordering a stay for non-payment of costs at the hearing. The same principle applies to orders against the defendant for non-payment of costs and both are governed by the same rule. In these circumstances, we must set aside the decree and orders of the learned Judge and remand the case for disposal according to law. Costs of this appeal will abide the result.

Appeal allowed; Suit remanded.

(1) (1875) W. N. 201.

(2) (1875) W. N. 229.

(3) (1887) 35 Ch. D. 272; 56 L. J. Ch. 748; 57 L. T. 468; 35 W. R. 525.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 16 OF 1913.

September 6, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

RAMAKRISHNA PILLAI—PLAINTIFF—
APPELLANT

versus

MUTHUPERUMAL PILLAI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 157, O. XXI, r. 1—“Rules made,” meaning of—Interpretation of Statute—Rule abridging substantive right, if ultra vires—Civil Rules of Practice, rule 49, effect of—Printed copy of judgment not filed with memorandum of appeal—Appeal, whether time-barred.

Where a rule abridges a substantive right granted by a Statute, such a rule is *ultra vires*, unless the Statute itself empowers the rule-making authority to alter the provisions in the Statute. [p. 925, col. 2.]

Madurai Pillai v. Muthu Chetty, 22 Ind. Cas. 775; 15 M. L. T. 156; (1914) M. W. N. 216; 26 M. L. J. 227; 1 L. W. 172 (F. B.), followed.

Per *Sadasiva Aiyar, J.*—The expression “rules made” in section 157 of the Civil Procedure Code must mean rules properly and validly made, in other words, made with jurisdiction by the proper authority. [p. 926, col. 1.]

Rules which though purporting to be made under the old Code were beyond the powers given by the Code, do not become valid by reason of the fact that if they had been made under the new Code they would be valid. [p. 926, col. 1.]

Rule 49 of the Civil Rules of Practice seems to enact by implication that the production of a printed copy along with the memorandum of appeal

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is compulsory where the length of the judgment or order exceeds 700 words, and is *ultra vires*. [p. 625, col. 2.]

Per Napier, J.—(1) Rule 49 of the Civil Rules of Practice does not have the effect of making the presentation of a printed copy of a judgment compulsory when it is over 700 words. [p. 926, col. 2.]

(2) Filing a certified copy of a judgment with the memorandum of appeal, is a sufficient compliance with Order XLI, rule 1 of the Civil Procedure Code and is not forbidden by the Civil Rules of Practice. [p. 927, col. 1]

Where, therefore, an appeal is presented within the period of limitation and a certified copy of the judgment appealed against is filed along with the memorandum of appeal but a printed copy of the judgment is filed out of time, the appeal is not time-barred. [p. 926, col. 2; p. 927, col. 1]

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Sankaran Nair, in Second Appeal No. 863 of 1912, preferred against the decree of the District Court of Tinnevely, in Appeal Suit No.—of 1911 (Original Suit No. 204 of 1911, on the file of the Court of the Additional District Munsif of Tinnevely).

FACTS.—The appellant brought a suit for redemption of a mortgage against the mortgagors. The suit was dismissed on the ground that some other persons interested in the mortgaged properties were not made parties to the suit. An appeal to the District Court of Tinnevely was dismissed on the ground that the appellant had not produced a printed copy of the judgment as required by rule 49, Madras High Court Civil Rules of Practice, the District Judge declining to excuse the delay under section 5 of the Limitation Act. The plaintiff appealed to the High Court and Mr. Justice Sankaran Nair, in dismissing the appeal, held that the District Judge was right. Against that decree, the plaintiff presented this Letters Patent Appeal.

Messrs. N. C. Vijayaraghavachari and A. Srinivasachari, for Mr. C. S. Venkatachariar, for the Appellant.

Mr. M. D. Devadoss, for the Respondents.

JUDGMENT.

SADASIVA Aiyar, J.—Under the old Civil Procedure Code, section 652, the High Court had power to make rules to regulate the procedure in the mufussil Courts only so far as such rules were consistent with that Code. Section 541 of the old Code made it compulsory on the appellant to produce a

copy of the decree and a copy of the judgment (the latter unless dispensed with by the Appellate Court) along with the memorandum of appeal. I am inclined to hold that it is not consistent with that section to make any rule imposing a further obligation on the appellant that the copy which he produces, should be a printed copy. In *Madurai Pillai v. Muthu Chetty* (1), a Full Bench of this Court held that where a rule abridges a substantive right granted by the Statute, such a rule is *ultra vires*, unless the Statute itself empowers the rule-making authority to alter the provisions in the Statute. In that case, the substantive right in question was a right to have a trial by a Full Bench of the Presidency Small Cause Court. The right to appeal, which is the right in question in the present case, is clearly no less a substantive right.

Rule 49 of the Civil Rules of Practice was passed in pursuance of the powers given to the High Court by the old Civil Procedure Code. Though that rule does not expressly state that the production of a printed copy with the memorandum of appeal is compulsory where the judgment of the lower Court is more than 700 words in length, the sentence occurring therein that "in cases where the length of the judgment or order does not exceed 700 words, the production of a printed copy is not compulsory," seems to me to enact by an implication that such production is compulsory in the case of a judgment or order exceeding 700 words.

Taking it then that rule 49, when it was passed, was *ultra vires*, we have to consider the effect of section 157 of the present Civil Procedure Code which enacts, among other things, that rules made under the former Code of Civil Procedure shall, so far as they are consistent with the present Code of 1908, have the same force and effect as if they had been made under the present Code. Under the new Code, the power of the High Court to make rules is governed by sections 122 and 128. The difference between the old section 652 and the new sections 122 and 128, so far as

(1) 22 Ind. Cas. 775; 1 L. W. 172; 15 M. L. T. 156; (1914) M. W. N. 216; 26 M. L. J. 227 (F. B.).

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this question is concerned, is that while under section 652, the rules had to be consistent with *all* the provisions of the old Code, the new sections 122 and 128 empower the High Court to annul, alter or add to all or any of the rules framed in the First Schedule attached to the new Code. Section 541 of the old Code relating to the presentation of the appeal corresponds to Order XLI, rule 1, in the First Schedule of the new Code and hence the provision in Order XLI, rule 1, about producing a copy of the judgment might (according to sections 122 and 128) be validly changed by a rule of the High Court requiring a printed copy instead of an ordinary certified copy. Thus rule 42 of the Civil Rules of Practice, if it can be treated by virtue of section 157 to be a rule passed under the new Code, would be a valid rule. But does section 157 continue the rules passed under the repealed enactment, even though those rules were beyond the powers given to the High Court by the repealed enactment? In other words, are the rules, purporting to be framed under the old Code but beyond the powers given thereby, within the meaning of the expression 'rules made under any Code of Civil Procedure' occurring in section 157 of the new Code? Does not the word 'made' mean "validly made"? In *Re reference under Stamp Act; District Munsif of Tiruvallur* (2), the converse proposition was upheld, namely, that rules made under the old Civil Procedure Code, though inconsistent with an order of the new Civil Procedure Code, remained in force until new rules were framed under the new Civil Procedure Code. But I do not think that that ruling helps us much in the decision of the question whether rules which were invalidly framed under the old Code become valid if consistent with the new Code. I am inclined to hold that rules which, though purporting to be made under the old Code, were beyond the powers given by the old Code, do not become valid by reason of the fact that, if they had been made under the new Code, they would be valid. I think the expression 'rules made' in section 157 must mean rules properly and validly made, in other words, made with jurisdiction by the proper authority.

(2) 20 Ind. Cas. 775; 37 M. 17; 24 M. L. J. 637 (F. B.).

In the result and for the reasons above given I would allow the appeal and direct the District Judge to hear the appeal preferred to his Court, the appeal having been properly presented within the limitation period along with a certified copy of the judgment of the Court of first instance, though that copy was not a printed copy. Costs hitherto will abide.

NAPIER, J.—The District Judge has dismissed this appeal, holding that it is out of time and declining to extend the period under section 5 of the Limitation Act. It is common ground that if the manuscript copy of the judgment of the lower Court supplied by the Court and certified as correct and filed in the Appellate Court can be used, the appeal would be in time. The District Judge has held that the judgment being over 700 words and not being printed, it cannot be used, as its use is forbidden by the Civil Rules of Practice, 1905, rule 49, and this view is upheld by the learned Judge of this Court before whom the second appeal came on for hearing under Order XLI, rule 11. The appeal is filed under Order XLI, rule 1, which requires that the memorandum shall be accompanied by a copy of the decree and (unless dispensed with by the Court) of the judgment on which it is founded. If I thought that rule 49 of the Civil Rules of Practice had the effect contended for, I should think it necessary to consider whether so long as Order XLI (1) remains in its present form, the rule was not *ultra vires*; but I am of opinion that the rule has not that effect. It is true that the rule says in cases where the length of the judgment does not exceed 700 words, the production of a printed copy is not compulsory. The word "produced" is not to be found in the Code in this connection and, though it may be taken to mean produced for the purpose of an appeal, the rule does not make clear whether the production refers to the work of the copying department or the work of the appellant. Still less does it say that only a printed copy can be filed with the memorandum of appeal. The rule itself is a direction to the copying department and there is no rule that requires an intending appellant to apply specially for a copy for appeal pur-

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poses or forbids him to use a copy obtained for perusal for his appeal. Such a rule would properly appear in rules for procedure on appeal, not among rules for copies of records. It may be that the Court might refuse to take up an appeal until the appellant supplied it with a printed copy (I express no definite opinion on that point), but I am satisfied that filing a certified copy with the memorandum is a compliance with Order XLI (1) and is not forbidden by the Civil Rules of Practice. I would, therefore, allow this appeal and direct the District Judge to take the case on his file under Order XLI, rule 9.

Appeal allowed.

MADRAS HIGH COURT.
CIVIL APPEAL NO. 93 OF 1911.

August 11, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Tyabji.

HUSSAIN SAIB AND OTHERS—DEFENDANTS
Nos. 9 to 13—APPELLANTS

versus

HASSAN SAIB AND OTHERS—PLAINTIFF
AND DEFENDANTS NOS. 2 TO 8, 15, 16, 18
TO 52 AND THE LEGAL REPRESENTATIVES OF
DEFENDANT NO. 6—RESPONDENTS.

Muhammadian Law—Nawayat community—Two brothers and their descendants living and trading together as members of undivided family—Rights of parties inter se, how determined—Hindu Law, how far applicable—Hindu family firm and Muhammadan family firm, difference between—Contract Act (IX of 1872), s. 241—Act how far applicable to Hindu and Muhammadan family trading firms—Custom, connotation of.

Prior to 1845, one Haji Hassan, a Muhammadan belonging to the Nawayat community and trading separately on his own account, associated with him his younger brother, Hammed, in the trade. In 1845, on the eve of his departure to Mecca, he executed a document whereby, in the event of his not returning from his pilgrimage, he directed that Hammed should get one-eighth of his properties. Hassan returned from Mecca in 1848 and till 1866, when Hammed died, the two brothers lived together and traded together. Their relations were very cordial, Hammed's son marrying Hassan's daughter. Hassan died in 1870. During the life-time of the brothers properties were acquired indiscriminately in the name of either. Till 1910, the descendants of the two branches of the family lived together as if they were

members of an undivided family and trade was carried on as usual, the accounts standing in the name of one or the other of the representatives of the branches who happened to manage the trade for the time being. In 1910, the present suit was instituted by the members of the younger branch against the members of the elder branch for a partition. It was conceded by the defendants that Hammed and his heirs were entitled to one-eighth of the properties covered by the document of 1845:

Held, per Sadasiva Aiyar, J., (Tyabji, J., dissenting).—That all the properties ought to be equally divided between the heirs of the two branches of the family, inasmuch as from 1848 till the date of suit, the two brothers, their heirs and the heirs of their heirs had acted in such a manner as to show that they had all understood their rights as following from the properties being held in common ownership between the two branches for more than 60 years and the imperfect understanding or agreement between the two brothers which began in 1848, had become fully perfected by their own conduct and the conduct of their heirs. [p. 947, col. 1.]

Per Tyabji, J.—That Hammed and his heirs were entitled to one-eighth of the properties mentioned in the document of 1845, the remaining seven-eighths of the suit properties and all other properties acquired prior to 1870 belonging exclusively to Haji Hassan and his sons, and that the properties acquired after 1870 must be equally divided amongst the heirs of Haji Hassan and Hammed in accordance with Muhammadan Law. [p. 933, col. 1; p. 934, col. 2.]

The term 'joint family', when applied to parties governed by the Muhammadan Law of succession, presumably refers to a group of persons belonging originally to one family and living together without having partitioned such property as they have inherited from some common ancestor. Their continuing so to live, does not make their status different from what it would have been, had they not done so. Nor does the fact that they have not partitioned the property in any way, affect their rights therein or the legal incidents applicable to the property. No person can by birth derive an interest in the property belonging to his father during his life-time. The members of the group of persons so living together, do not form any legal unit. They are not necessarily heirs of one another. Property acquired by one of them does not necessarily form the property of the whole group. The group as constituted at any particular moment, is not the legal representative or the continuous successor in law of the persons who constituted the group in a previous generation. The result of this is that it cannot be said that all the property which at any time in the past belonged to the group as a whole, continues to belong to the persons now included, whether arbitrarily or according to agnatic descent, in the group. Membership of the group does not necessarily imply that a member has any share in all the property possessed by each of the other members, or kept in the possession of some person as the manager on behalf of all the group, whether such possession is held at their request or with their consent or merely with their acquiescence. [p. 935, cols. 1 & 2.]

Unlike under Hindu Law, under Muhammadan Law the mere fact that one person allows another

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to live with him and treat him as though he were a co-owner with himself of property which is shown initially to belong to him alone, cannot make the other a co-owner, though, if the origin and ownership of the property is not traced and it is not known which of them is the owner, such circumstances may raise a presumption of co-ownership. [p. 936, col. 2.]

The mode of living adopted by parties, cannot affect the law to which they are subject. [p. 937, col. 1.]

In the absence of any agreement to the contrary, express or implied from the conduct of the parties and their mode of life in any particular case, co-owners of property under Muhammadan Law, even if they live together, are expected to pay for their maintenance and other expenses out of their own shares in the property held in co-ownership. [p. 937, col. 2.]

Under Muhammadan Law, property acquired with the aid of what would be called 'ancestral property' according to the Mitakshara Law, does not become 'ancestral,' though acquisitions by co-owners with the aid of property held in co-ownership, do accede to that property. [p. 937, col. 2.]

The word 'custom', in its legal sense, necessarily connotes only such rules of conduct as affect rights and liabilities. The ways of living or the observances of a particular class of persons do not become customary rules of law merely because evidence of such ways and observances has to be adduced for the elucidation of the facts existing in any particular case. [p. 939, cols. 1 & 2.]

Though the provisions of the Indian Contract Act, 1872, are applicable to a Hindu family firm as well, yet in respect of such firms the incidents of the Act are affected by the peculiar doctrines of the joint Hindu family, which are impliedly incorporated in the law of Hindu ancestral firms. [p. 940, col. 1.]

The cases regarding Hindu family firms only lay down that, in the absence of a contract to the contrary, the Indian Contract Act must be presumed to govern the relations between the members of such a firm and that the contract to the contrary may be an implied contract, which may even be presumed from the mode of life resulting from the general personal law of the parties, especially when not presuming such an implied contract, would bring about inconsistencies and results not contemplated by the parties. [p. 940, cols. 1 & 2.]

In the case of Muhammadans, section 241 of the Indian Contract Act, 1872, has a direct operation, as in their case there is no contract to the contrary nor does their personal law operate so as to make them partners to any extent or otherwise to minimise the effect of the section on their rights. [p. 941, col. 2.]

Per Sadasiva Aiyar, J.—Many of the incidents of Hindu joint family system obtain by custom among the *Narayats*. [p. 943, col. 2.]

Except that the principle of survivorship and that of right by birth as well as that of exclusion of females, are inapplicable in considering the rights and liabilities of the persons on whom the business of a *Narayati* family has descended as heirs, in other respects, the principles and considerations applying

to the business of Hindu family firms, are applicable to the business carried on by a *Narayati* family. [p. 946, col. 1.]

Though the term 'undivided family' cannot properly be used to designate the relationship of the families of two *Narayati* Muhammadan brothers living together and trading together, yet the analogy of the business of a joint Hindu trading family is applicable to such a family. [p. 946, col. 2.]

Appeal against the decree of the District Court of South Canara in Original Suit No. 6 of 1910.

FACTS of the case appear from the judgment.

Messrs. *K. Srinivasa Iyengar* and *B. Sitarana Rau*, for the Appellants.—Under the document of 1845 (Exhibit XVI), *Hammed* was only entitled to one-eighth of the properties mentioned therein. The plaintiffs are not entitled to a share in any other properties as the theory of an undivided family is unknown to Muhammadan Law. There was nothing in the conduct of *Haji Hassan* to show that he admitted *Hammed* to co-ownership with him in all his properties. The mere living together of the members of the two branches, cannot confer on them the status of an undivided family. Further, no question of partnership can arise on the pleadings as they are based on co-ownership and not partnership.

Messrs. *K. Narain Rau* and *G. Annaji Rau*, for the 1st Respondent and *Mr. H. Balakrishna Rau*, for the 15th and 17th Respondents. The course of dealings between the parties and their conduct throughout clearly show that the parties constituted an undivided family. Any imperfection that might have originally existed, has become perfected by the subsequent conduct not only of the brothers, but also of their heirs and the heirs of these heirs. *Vide Mahomed Musa v. Aghore Kumar Ganguli* (1). The *Narayatis* have adopted several of the incidents of Hindu Law. *Vide Khatija v. Ismail* (2). The business must be treated as a family trade and all the heirs must be treated as partners. *Sudarsanam Maistri v. Narasimhulu Maistri* (3). The decree of the lower Court is, therefore, correct.

(1) 28 Ind. Cas. 930; 2 L. W. 258; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 17 Bom. L. R. 420; 42 C. 801; 21 C. L. J. 231; 28 M. L. J. 548 (P. C.).

(2) 12 M. 380.

(3) 25 M. 149 at 158; 11 M. L. J. 353.

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JUDGMENT.

TYABJI, J.—This appeal arises out of a suit which has been referred to as a suit for partition. In reality, its subject-matter consists of what might have given rise to several suits for partition, for administration and perhaps for dissolutions of partnership, relating to the estates of persons who lived and carried on business in the beginning and middle of the last century.

It is not disputed that the parties are governed by the Muhammadan Law of succession and inheritance. Whether their mode of life will affect the law applicable to the property acquired or inherited by them, is one of the many questions that will have to be considered.

I will deal in the first instance with the history of the family; and will then consider the rights of the parties in the circumstances and events that are proved.

In referring to the names of the parties, I shall try to adhere to the same corrupt form which the parties themselves seem to have adopted.

One Shavaki Abdul Rajack is admitted to have been the common ancestor of the parties chiefly concerned in this litigation. Shavaki Abdul Rajack had four sons: (1) Shiddi Bave; (2) Ismail Saheb; (3) Haji Hassan and (4) Hammed Saheb.

The parties to these proceedings are mostly the descendants of (3) and (4). The plaintiff is descended from the fourth of these, Hammed, and the contesting defendants Nos. 9 to 13 are descended from the third, Haji Hassan. They may be referred to as members of the younger and elder branches respectively. On the 10th of March 1818 the four sons of Shavaki Abdul Rajack effected what is referred to as a partition. Exhibits VI, VII, VIII, XI and XIV evidence that partition. Certain specific properties were then allotted to each of the said four sons of Shavaki Abdul Rajack in the life-time of the father. It does not appear from the evidence whether these four sons or any of them inherited any other property from their father on his death. It must be assumed for the purpose of this suit that they did not.

Shortly after the partition, the third of these sons, Haji Hassan, established a trading

firm on his own account. Later on, but at what exact time it is unnecessary to fix, his younger brother Hammed (the fourth son) worked in the firm established by the elder brother. Hammed brought no capital into the business, which was carried on exclusively with the property inherited or acquired by the elder brother through his own exertions.

Whether there were any clearly understood terms on which Hammed joined his brother's business, does not appear. There is, however, one circumstance to which great weight must be given; the terms in which several years after the two brothers had been working together in the firm the relationship between them is referred to by the elder with the unequivocal concurrence of the younger in Exhibit XVI. This document has been called by the learned District Judge a Will, and though its operation is not expressly made to depend upon the death of the executant, it has some of the features of a Will.

The genuineness of Exhibit XVI was attacked before us mainly on three grounds: (1) that it is not shown to have been produced on any occasion previous to this suit, though there have been disputes amongst the members of the family, notably in connection with the mutation of names on the deaths of Dodda Moidin, Dodda Hassan and Saana Hassan, when the document may well be expected to have been relied upon had it then existed; (2) that admittedly it was never given effect to; and (3) that by a comparison of signatures on Exhibit XVI with the signatures in Exhibits V, VII, VIII and XII, suspicion is cast on the former. Having given all weight to these objections, I see no reason to doubt that Exhibit XVI is genuine. That was the conclusion at which the learned Judge seems to have arrived. A comparison of the signatures seems to me to strengthen that conclusion.

Exhibit XVI is dated the 3rd September 1845. It purports to be executed by Haji Hassan, when he was about to start on a pilgrimage to Mecca. He refers to the partition of 1818 and states that the property that then came to his share (under Exhibit XIV) had been added to by his own self-exertions. He also mentions some other properties. The

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properties referred to in it, are altogether valued as equivalent of about Rs. 23,000. He then states: "As my younger brother Hammed Saheb has been with me till now, doing such acts as I directed him to do, and as he should remain when I start for Mecca, he shall get" one-eighth of the property. At the bottom of Exhibit XVI, it is stated that it is written "in the hand of Hammed Saheb with his own consent."

It has been the case of both parties that on its true construction, Exhibit XVI must be taken to have been executed in contemplation of the probability that Haji Hassan would not come back to take charge of the properties or the business and that, in any event, the younger brother would survive the elder. Neither of those expectations was realised. Haji Hassan did come back two or three years after he left, apparently before 1848; the accounts of 1848-49 refer to him. He lived till 1870—for 25 years after Exhibit XVI had been executed. His younger brother, Hammed, predeceased him by four years, dying in 1866.

Before dealing with the significance of Exhibit XVI, I shall conclude my reference to the history of the family. After the death of Haji Hassan, the members of both branches lived amicably, just as they would have done if they had been members of a joint and undivided Hindu family. The family group came in time to have three living houses at Souda in South Canara, where the firm was carrying on business; but the home of the family (in the words of the District Judge) remained in Manki in North Canara, from where they originally came. The firm (as I have already stated) was managed (1) by Haji Hassan and Hammed; (2) after the death of Haji Hassan, the management of the firm seems to have been with Dodda Moidin, the son of Haji Hassan, at least the whole of the properties were transferred to his name; (3) after the death of Dodda Moidin, Abdul Rajack, the eldest son of Hammed and son-in-law of Haji Hassan, seems to have been in management; (4) thereafter, there appears to have been two managers (i) Dodda Hassan, the

eldest paternal grandson of Haji Hassan and (ii) Sanna Hassan, the second son of Hammed and father-in-law of Dodda Hassan.

As to the manner in which the accounts stood: I. They stood solely in the name of Haji Hassan till 1870 II. Between 1871 and 1882, they stood jointly in the names of Dodda Moidin and Abdul Rajack. III. There seems to be no evidence as to the names in which the accounts stood between 1883 and 1897 (the learned Judge's remarks on page 37, lines 13—16, were admitted before us to be erroneous). IV. From 1897 to 1901, they stood in the name of the 9th defendant, Hussain Sahib, eldest male descendant of Haji Hassan, with the names of Muhammad Shiddik and Ali Sahib (who are the sons of Abdul Rajack, but who are also the maternal grandsons of Haji Hassan). V. From 1901, the name of the 11th defendant, a brother of the 9th defendant, is also inserted.

I shall have to refer in detail at a later stage to the evidence showing the feelings between the two branches of the family in 1897, when Dodda Hassan died leaving no sons but only a widow and daughter as his heirs. At present, I need not allude to them, as Mr. K. Srinivasa Aiyangar for the appellants conceded that the members of the younger branch were entitled to some share in the property in question, and because there were admissions to that effect binding upon his clients.

The question remains, in which properties the plaintiffs are entitled to share and to what share they are entitled. In connection with this question, I will refer first to Exhibit XVI which in my opinion is clear evidence that the property mentioned in it belonged at its date to Haji Hassan alone. As it was not given effect to, and as Haji Hassan survived Hammed, it might have been argued that it became ineffective and Hammed or his heirs acquired no interest in the said property by reason of Exhibit XVI [Cf. *Oomuttoonnissa Beebee v. Areefoonnissa Beebee* (4)]. It was, however, conceded by the contesting defendants that Hammed and his heirs ought to be given

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one-eighth of the property mentioned in Exhibit XVI.

I have already pointed out that Exhibit XVI refers specifically to identified properties, and that it is not intended to cover future acquisitions.

The property acquired by or on behalf of Haji Hassan between 1845 and 1870—for three years exclusively by the labours of Hammed, from 1848 to 1866 jointly by the two brothers, and for the last four years, exclusively by Haji Hassan—may be governed by one of three sets of considerations:—

(1) On the basis, that the said property must belong exclusively to Haji Hassan and his heirs, because Exhibit XVI, however favourably it is construed, cannot be taken to affect future acquisitions: even to the extent to which it goes, it was not given effect to by Haji Hassan, though he survived Hammed; or

(2) On the basis that Hammed must be given one-eighth share in the said property on the analogy of the provisions of Exhibit XVI as *quantum meruit* for his work in the firm; or

(3) On the basis that Hammed must be taken to have acquired a one-eighth share in the property mentioned in Exhibit XVI in 1845, that he ranked as a partner after that date and that as such under section 253 (2) of the Indian Contract Act, he became entitled to share equally in the profits of the partnership business after 1845.

The following considerations must, it seems to me, be borne in mind in arriving at a conclusion on this point:—

(1) Hammed brought no initial property to the firm which was established by his elder brother, Haji Hassan. It is true that Hammed may have had some property of his own; Exhibit XIV gives particulars of what was given to him in the partition of 1818. But the properties mentioned in Exhibit XVI are, it is clear, exclusively Haji Hassan's. It was clearly for the heirs of Hammed to trace out and show the origin of property which, as it is now suggested, belonged to Hammed and was at some time or other thrown in by him into the assets of Haji Hassan. It seems

to me much more likely that, as is usual amongst Muslim families, Hammed kept his own funds separate. Exhibit XVI certainly does not give countenance to the unusual course having been followed, of the elder brother having taken the comparatively small property of his younger brother into his flourishing firm, without there being any necessity for it. The accounts would have shown if this had been done and mention would in all probability have been made of it in Exhibit XVI.

2. Hammed worked with his brother as a dependent. No mention is made of his having brought any capital to the firm, or of his having been made a partner.

3. In 1845, the entire property was, with Hammed's consent, described as Haji Hassan's and only a one-eighth share therein is allotted to him as a favour by his elder brother.

4. Hammed does not seem to be made a partner of his elder brother by the terms of Exhibit XVI; it is merely provided that he shall get a part of the property in the same way in which the wife would get a similar part.

5. Hammed is spoken of as a dependent and, though it is contemplated that the firm would in future, i.e., after Haji Hassan's death or retirement, belong to the son of Haji Hassan, the nephew of Hammed, yet the uncle is referred to as the manager of his nephew's firm, and not as a partner in that firm. It would rarely happen that a younger brother in a Muslim family should be spoken of as a dependent of his elder brother, though they are both partners. It is much more difficult to think that the uncle should, in similar circumstances, be referred to in this depreciatory manner.

6. The origin of the properties being traced to Haji Hassan, it is for Hammed's heirs to prove the means by which a portion of the property became transferred to themselves. Joint acquisition may no doubt give a title to co-ownership on grounds similar to those on which the law as to partnership is based. But the terms of Exhibit XVI do not indicate a joint acquisition in such a sense as to require an equal division of the property acquired. On the other hand, I must concede that there is no

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indication that the firm as a going concern was considered as any great asset in itself, and this fact might render it easier to bring in the operation of section 253 (2); for, where the good-will of the firm is deemed to be the main instrument of acquisition, it might be that the proportion in which the assets of the firm are owned, would have to be considered the main factor in determining the proportion in which the properties acquired, were to be shared, rather than the fact of joint exertion; consequently, where a person has a proportionately small share in the assets of such a firm, the good-will of which is the main instrument of acquisition, there is less reason (in the absence of clear evidence) to presume that the main instrument of acquisition is owned in unequal proportions.

(7) Exhibit XVI does not refer to an immediate transfer of the one-eighth share of the property to Hammed. It is in the nature of directions that such a transfer should take place. It is sufficiently straining the effect of Exhibit XVI to say that Hammed's heirs are now entitled to get one-eighth of the property because Haji Hassan intended him to get as much; but it cannot, it seems to me, be construed to mean that the one-eighth had become Hammed's from its date. Hammed is mentioned in it as only one of the several persons entitled to share and that which he can claim under it, the widow and the rest can also claim.

(8) Exhibit XVI clearly shows that whatever may have been the terms on which Hammed worked in the firm of his brother, they were not partners; and that in 1845, Haji Hassan, with the consent of Hammed, laid down that the interests of Hammed in the property referred to in Exhibit XVI, should amount to a one-eighth share of that property, neither more nor less. No reference is made in Exhibit XVI to future earnings and acquisitions; and in accordance with its terms, the said share of the properties then in existence, was to form the consideration also for Hammed's continuing to work in the firm after Haji Hassan left for Mecca.

(9) The conduct of the two brothers and of the members of the family seems to me to have been such as would be expected from brothers between whom the business relations

referred to in Exhibit XVI were continued, and the treatment of the younger brother by his elder together with their conduct towards the other members of the family, do not appear to me to require the inference that the younger brother was given the higher status of partner. My consideration of the question is not unaffected by the fear that to hold otherwise would in one sense penalise cordial and considerate relations between brothers. It would imply that if two brothers trade or otherwise work together, one of whom alone contributes the capital, he may not permit the fact of their being brothers to colour the terms upon which they associate in their work; any treatment different from that which would be expected from strangers, would in that case involve a division of the acquisitions between the two brothers, which but for such treatment would be the property of one alone.

On a consideration of all this, I am clearly of opinion that the two brothers were not partners on equal terms, but that Haji Hassan was the sole owner of the firm and that the proper remuneration to be paid to Hammed for his work was in 1845 fixed upon between them at one-eighth of the assets then existing; but that he was not entitled to rank as a partner from 1845, nor on that basis to claim half of the future acquisitions.

I feel, however, much greater difficulty in deciding whether he ought not to continue receiving one-eighth of the acquisitions between 1845 and 1870. I have arrived at the conclusion that he ought not, for reasons which I have already indicated, to which I may add that (1) however proper it might now appear that Haji Hassan should have provided for a division of the future acquisitions, as a matter of fact he did not so provide, and (2) that Hammed and his family were, it would appear, living with Haji Hassan, who was bearing their expenses.

Hence after very careful consideration, it seems to me that the most proper view of the matter would be to hold that Exhibit XVI should be given effect to, but as on the death of Haji Hassan, so that (1) as conceded by the defendants, Hammed should have one-eighth of the properties mentioned in Exhibit XVI and (2) the properties acquired

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between 1845 and 1870 should be exclusively Haji Hassan's and his heirs.'

In this connection, our attention has been drawn to the fact that three of the properties are shown to have been purchased in the name of Hammed. Exhibits XVIII, XIX and XX refer to them. They are dated 1844, 1849 and 1848, respectively. The considerations for them were Rs. 280, Rs. 850 and Rs. 196. These properties were transferred to "Hammed Sahib, younger brother of Hassan Saib, of Souda" and to "Savada Hassan Sahib's brother, Hammed Sahib," and they were in 1866 (on the death of Hammed) transferred to the name of Dodda Moidin, the son of Haji Hassan. It seems to me that these facts indicate that the properties must be taken to have been acquired on behalf of Haji Hassan. They are not to be considered Hammed's separate property.

The next question, therefore, is as regards the ownership of the property acquired after 1870.

As I have already said, Hammed Sahib's heirs became entitled on the death of Haji Hassan to one-eighth of the property mentioned in Exhibit XVI. The heirs of Haji Hassan and Hammed, therefore, became co-owners of the property in the proportion of seven-eighths to one-eighth. It seems to me that the evidence discussed by the learned District Judge in detail, on the basis of which he has arrived at the finding that the family consisting of the plaintiff and defendants is joint and undivided, is sufficient to show that the two groups of heirs, namely, those of Haji Hassan and Hammed were jointly entitled to the property on their death.

I have mentioned in an earlier part of the judgment the disputes between the elder and younger branches of the family. The documents bearing on this point, may all be grouped together as arising from the proceedings relating to the mutation of names on the deaths of Dodda Moidin, Dodda Hassan (son and grandson of Haji Hassan) and of Sanna Hassan (son of Hammed). They establish in the first place, what is no doubt contested in some of the written statements but what, as I have already said, was not denied before us, that the plaintiff is entitled as of right to some share in the property which is the subject-matter of the suit and that the allowances paid for

maintenance and otherwise were not merely in the nature of charitable allowances. I shall consider them now in some detail.

(1) The genealogy, Exhibit D, was accepted by the members of both branches, who agree in representing themselves as belonging "to an undivided family (*aribaktha kutumba*)." This description would, if it is interpreted in its strict sense, exclude the females mentioned in the genealogy from any share in the family property. It is clear that their inclusion, in a family governed by the Hindu co-parcenary law, is meaningless, and in any case, such inexactness in referring to the status of the family and of the rights of the members constituting it, cannot prevail against the clear statement of all parties that the law of succession governing them is Mahamadan Law, according to which the females must be given their rights of inheritance. At the same time, these expressions do amount to an admission that all the males mentioned in the genealogy have an interest in the immoveable property; that such property was held in common; and that the fact that the *pattah* relating to it stood in the name of Haji Hassan who belonged to the elder branch of the family, was not considered by the members of that branch itself as assertive or indicative of the sole right of that branch in the properties concerned.

(2) In Exhibit E1 (September 1897), the 9th defendant, a member of the elder branch, says:—

"as shown in the annexed genealogical tree, we are all heirs, and there are heirs of the second branch, and being members of an undivided family not only the management of the lands but all the remaining managements are conducted jointly as a whole as family concern. — The *kathi* standing in the name of my father (Dodda Moidin) had been, after his death, transferred to the name of the eldest son of the deceased. As I alone am, after him, the senior member and as there remains property belonging to an undivided family, I alone am the *hukdar* for *kathi*..... Therefore as had been done from the time of our ancestors out of respectability, *kathi* should be entered in my name so as to be convenient to conduct all our proceedings.".....

(3) In Exhibit E2, dated 4th October 1897, Souda Hassan, the 9th defendant says:—

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as given in the genealogy herewith attached, the deceased has got near heirs. And there are heirs of branch two. The heirs of both the said branches are undivided.....Alli Sahib *rallat* [i.e., the son (of Abdul Rajack) the 15th defendant], being in Souda, manages the shop.....In the undivided family of the two branches and in our household, my father looked after the management till his death and all the members of the family (i.e., both branches) are supplied with necessities from our household."

(4) Again when the *patta* for the five properties in Kundapur taluk, was transferred to the name of the 8th defendant who was the paternal grand-daughter of Hammed Sahib, but married to Dodda Moidin, the paternal grandson of Haji Hassan and the elder brother of the 9th defendant, the 9th defendant put in an appeal petition, Exhibit F, in December 1897 in which he said:—

"That in consideration of personal status and property qualification, appellant has been appointed a member of Taluk Board and in deference to personal status of appellant even the elderly members, sons of Abdul Rajack, have given their consent to the *kudthala* being changed in the name of the appellant for the reason that the said properties both in Honnavar and Cundapoor Taluks, were acquired by appellant's grandfather, Haji Hassan Saiba, and appellant's father, Moidin Saiba." "That the said Sanna Moidin Saiba, though the eldest male member in the family, has been abandoned by other members of the family in his endeavours to secure the *kudthala* in his own name, because, he is not a well-wisher of the family and much less qualified to be *kudthaladar* and his consent to have the *kudthala* in the name of respondent is purely an act of vengeance and resentment, tending to the destruction of family properties."

Then followed a mediation. In the result out of five properties paying a total assessment of Rs. 451-8-10, properties bearing an assessment of Rs. 173-2-0 were agreed to be transferred to the 9th defendant's name and the remaining properties, bearing an assessment of Rs. 278-6-10, were agreed to be transferred to the 15th defendant's brother's name. The order Exhibit F2 was passed accordingly in October 1898.

(5) The 8th defendant herself in

Exhibits E5 and E9 seems to admit that the 9th defendant has a "right to manage" even in the very application by which she desires that the *patta* should be transferred to her name. But as the parties are governed by Muhammadan Law, the 8th defendant could not be under the necessity of having the properties to which she was entitled by inheritance managed by the 9th defendant. The reference to management by the 8th defendant and the terms in which the reference is made, throw light on the mode of life adopted by the parties.

(5) Finally, the abstinence on the part of the 9th defendant to assert any superior title in the ownership of the properties as against the members of the junior branch is specially noteworthy.

On a consideration of all the circumstances, my conclusion with reference to the properties acquired by the firm after 1870 is that they must be taken to have been acquired by the joint labours of the heirs of both the brothers. It seems to me, therefore, that section 253, clause (2), of the Indian Contract Act is applicable, and that the said acquisitions must be divided equally between the elder and the younger branches.

I must state here that it is conceded that at least one-eighth should be given to the heirs of Hammed Sahib. Moreover, the learned Pleaders for all the parties before us stated on behalf of their clients that none of them desired to claim anything either on their own behalf or on behalf of their ancestors by way of remuneration for conducting the affairs of the partnership firm originally established by Haji Hassan, and that all were agreed that they would claim only on the basis of inheritance from their ancestors and on the basis that in all other respects, the rights of all the parties concerned, stood on the same footing. If my view of the case is correct, this concession was very properly and wisely made. Otherwise it might have become necessary to determine:—

Who were entitled to share the acquisitions of property of the firm from time to time, after the death of Haji Hassan until the date of the suit

(a) as partners under section 253 (2) of the Indian Contract Act,

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(b) as having been admitted partners under section 247,

(c) as representatives of a deceased partner under section 241,

(d) as lenders under section 240, and

(e) as annuitants or receivers of portions of the profits under section 243.

The determination of these questions would have required a detailed examination of complicated accounts, and would probably have resulted in greater delay and expense than gain to any of the parties.

On the conclusions of fact at which I have arrived, and on the waiver by the parties of any claims they might have had on basis other than that of inheritance, it seems to me that the shares of the various members of the family will have to be determined in accordance with the Muhammadan Law of inheritance, in a mode similar to that adopted by the learned District Judge in paragraph 24 of his judgment. Owing to the admissions to which I have referred, the parties will be entitled to a proportionate share of all the properties acquired on behalf of the family group up to the time of the suit, as the share of Hammed in the properties by the aid of which acquisition after 1870 has been made has continued to remain in the firm.

I might have concluded my judgment here; but owing to the fact that my learned brother and I take different views, I must consider in the first instance the method of decision adopted by the learned District Judge and state in some detail my reasons for differing from him and my learned brother.

The learned District Judge has considered on the evidence whether the family of which the plaintiff and defendants formed members was a "joint family," and after a very careful examination of the evidence, he has answered that question in the affirmative. With great respect, however, it seems to me that this is an erroneous basis. In speaking of parties governed by the Muhammadan Law of succession, the expression "joint family" presumably refers to a group of persons belonging originally to one family, and living together without having partitioned such property as they have inherited from some common ancestor. Their continuing so to live does not make

their status different from what it would have been, had they not done so. Nor does the fact that they have not partitioned the property in any way, affect their rights therein, or the legal incidents applicable to the property.

No person can, by birth, derive an interest in the property belonging to his father during the latter's life-time. The members of the group of persons so living together (whether or not they are collectively styled a joint family) do not form any legal unit: they are not necessarily heirs of one another; property acquired by one of them does not necessarily form the property of the whole group. The group as constituted at any particular moment, is not the legal representative, or the continuous successor in law, of the persons who constituted the group in a previous generation. The result of this is, that it cannot be said that all the property which at any time in the past belonged to the group as a whole, continues to belong to the persons now included, whether arbitrarily or according to agnatic descent, in the group. The property may have devolved upon some members of the group to the exclusion of others, and may have partly devolved on strangers to the group. Strangers not forming members of the group, may be interested as heirs (even by marriage) of those who form the group, or be entitled to demand their share in the property possessed by the group. Hence, to hold that a person forms a member of such a group, does not necessarily imply that he has any share in all the property possessed by each of the other members, or kept in the possession of some person as the manager on behalf of all the group, whether such possession is held at their request, or with their consent, or merely with their acquiescence.

The question elaborately discussed by the learned Judge, whether or not the various members of the family considered themselves joint, and whether the plaintiff has been treated as a member of a joint family, may, no doubt, be important for the purpose of deciding whether the defendants have any property in their possession in which the plaintiff is entitled to share by inheritance or otherwise, and whether the plaintiff's rights are prevented from being

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barred by limitation. For, the fact that the plaintiff has been receiving maintenance and other allowances from the defendants till within a recent date of the suit, is evidence of the fact that the defendants have been admitting the existence, in their hands, of the property in which the plaintiff is interested. Before us, however, the plaintiff's right to some share in the property held by the contesting defendants, has not been questioned, and it has been conceded that his right is not barred except with reference to some particular classes of contentions to which I need not now allude, though both these questions were raised in the lower Court.

The view taken by the learned District Judge and accepted by my learned brother is that because there is a good deal of evidence pointing to the conclusion that the parties have considered themselves to be, and acted as though they were, members of an undivided Hindu family, therefore their rights must be similar to those of the members of a joint undivided Hindu family. I regret that I am unable to accept this conclusion. It is the case of neither party that the Hindu Law governs their property. It is expressly stated in the plaint as well as in the written statements of most of the defendants that Muhammadan Law governs them. In these circumstances, it seems to me difficult to see how the Hindu Law can be applicable. The Hindu Law of joint family property is also difficult to be applied on general grounds for two reasons:—

In a Mussalman family, daughters, wives and mothers become entitled to shares in the properties and not merely to maintenance. When a childless widow becomes entitled to a share in the property, her estate would entirely go out of the ownership of the family group, and after her death, her heirs would be her parents, or her sisters and brothers, or even remoter relations.

Apart from this difficulty, however, and even if we had only Hammed and Haji Hassan to consider, I am unable to understand, when once it is conclusively shown that certain properties belong to only one of them, how it is possible for the other

to acquire a share of it unless it is by means of transfer (with or without consideration) or devolution as heir. Hammed was not the heir of Haji Hassan and, therefore, the only way in which he could become entitled to a share in the property of his brother, would be by transfer in his life-time or bequest. There never has been any suggestion that Haji Hassan made a gift of half his property to Hammed.

My remarks do not refer of course to the question whether a property jointly acquired by the exertions of two persons, should not from the very start belong to them both jointly. I am not dealing with property so acquired, but with property such as is referred to in Exhibit XVI, which is shown to have been at the start the property of Haji Hassan alone.

I do not understand how in Muhammadan Law the mere fact that one person allows another to live with him and treats him as though he were co-owner with himself of property which is shown initially to belong to him alone, can make the other a co-owner. Such circumstances may raise a presumption of co-ownership when the origin and ownership of the property is not traced and when it is not known whether one is the owner or the other. But how can these circumstances avail to transfer the ownership, or to convert sole into joint ownership?

The presumption arising in Hindu Law from such facts as I have alluded to, is based, it seems to me, on incidents of the law which cannot be imported into Muhammadan Law. If two Hindu brothers after partition again live together, and throw their property together, the property may no doubt acquire new incidents in Hindu Law. From the fact of joint living, it may be inferred that the brothers had re-united and intended to hold property with rights of survivorship, etc. But how can a similar conclusion be drawn with reference to Mussalmans? Even if they were to throw together their property, each would, in the eye of the law, be entitled to his one half. If they have children, one cannot be the heir of the others; and the incident of survivor-

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ship cannot be introduced in the ownership of the property.

Hence it seems to me to be difficult to conceive by what process Hammed or his heirs can have acquired half a share in the property which is shown to have been Haji Hassan's sole property, as distinguished from property which was acquired by the joint exertions of Haji Hassan and Hammed or their heirs with the aid of joint property.

It seems to me with great respect that on the principles suggested by my learned brother, though it is admitted that Muhammadan Law governs the parties, in the same breath with which that admission is made the Hindu Law is in fact applied; and the reason that is alleged is that Haji Hassan and Hammed lived like members of a Hindu joint family. But in the first place, the mode of living cannot affect the law to which they are subject, and secondly the mode of life does not seem to me to be peculiarly Hindu, as I do not see how it differs from the mode in which Muslim brothers would live together, except that their heirs died without partitioning their estates. Such a state of circumstances is contemplated in the *Fatawa Alamgiri*, Cf. Baillie's Digest, Book XI, Chapter XI. Nor am I able to appreciate how there can be any estoppel. If I am right in taking Exhibit XVI as evidence that the property mentioned in it was Haji Hassan's, Hammed certainly knew that fact. Can Hammed then turn round and say to his brother, "True, this property was yours and I knew as well as you or any one else that I had no right over it, but you have been such a kind brother to me and been treating me as though I were co-owner of the property with you. Now, therefore, you are estopped from denying that I am entitled to half of the property." If this is the law, hospitality and kindness are virtues reserved to those who are willing to give away a moiety of their property to every guest whom they ask to make himself at home in their houses. As we are dealing with Muhammadan Law, it would not be merely brothers who would be able to claim this advantageous result from hospitality. It would be open to every stranger.

I now come to deal with the question how, when the parties are governed

by Muhammadan Law and have been living together without partitioning their property, the interest of each member must in my opinion be determined. In doing so, it seems to me that the following considerations have to be borne in mind: (1) Whether the plaintiff is entitled to any of the properties which are the subject of the suit by (a) inheritance, or (b) by acquisition, because the properties in the hands of the defendants were acquired by the exertions either of the plaintiff alone or of the plaintiff and the defendants; (2) whether the rights arising under these two heads, have to be diminished to the extent of any advances or payments that have to be debited to him. For, in Muhammadan Law co-owners of property, notwithstanding that they live together, would be expected to pay for their own maintenance, and other expense out of their own shares in the property held in co-ownership. This effect can, of course, be negatived by agreement and the existence of such an agreement may be presumed from the conduct of the parties and their mode of life in any particular case. It is conceded before us that in the present case such an agreement may be presumed.

Before I deal with joint acquisitions, I must distinguish acquisitions made exclusively by the exertions of any individual member which would ordinarily be his own property. The fact that the property in the hands of a person belonging to the group is obtained by inheritance and would under the Mitakshara Law be styled ancestral property, does not by itself fix with any special character fresh property acquired with the assistance of such "ancestral" property. Such fresh acquisitions do not of necessity belong to the group described as the joint family. If they belong to the group, it is only by reason of some such causes as I am going to mention. It is on this ground that it seems to me that the property acquired prior to 1870, must be considered to be Haji Hassan's, with merely a claim on the part of Hammed or his heirs to be given some remuneration for having assisted in the acquisition, a claim, which owing to the existence of Exhibit XVI and the concession of the defendants, is taken by me as amounting to one-eighth of the properties

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mentioned in Exhibit XVI. The question to which I have just alluded, may also arise in connection with properties claimed to have been acquired separately by the 11th and 22nd defendants amongst others.

Distinct from such separate acquisitions, are acquisitions made by the members of the family working together (e.g., by carrying on a joint trade) with property of which they are co-owners: such co-ownership may arise from the property having been inherited from a common ancestor, or from the fact that the parties are the legal representatives of those who were in the past partners in a firm. Acquisitions by co-owners, made with the assistance of property held in co-ownership, it seems hardly necessary to say, themselves become property held in co-ownership. It may also be that contribution to the funds necessary for making the acquisition possible was on the implied condition that the persons so contributing were to share in the fruits, even though they may not have actively or otherwise assisted in making the acquisitions. Such a contract may be implied from the conduct of the parties and their mode of life may supply evidence of such conduct. For, though no person can claim to be entitled as of right to carry on a business carried on by his father in partnership with other persons (in the same way as in a joint family or ancestral firm amongst Hindus governed by the Mitakshara Law), yet where a number of persons are living together united by ties of kinship and where the persons so living together, depend for their livelihood upon the profits of the business carried on by them or some of them, the relationship of partners can hardly be prevented from arising. Owing to the statements made to us by the learned Pleaders in Court, I have assumed that the parties in the present case admitted the existence of such implied contracts.

Mr. K. Srinivasa Aiyangar for the appellants strongly urged that no question of partnership can arise in the present case, the pleadings being on the footing of co-ownership and not of partnership. But the origin of partnership has itself been explained in Roman Law to be the "Consortium" of co-heirs. The exposition of this class of partnership in Roman Law is so suggestive that it may be here referred to with advantage.

Thus I find that Professor Roby, in his Treatise on Private Roman Law, Volume II, pages 127, 128, after defining "a partnership" as "a contract whereby two or more persons agree to work together for common profit, or to acquire and hold property in common, sharing the gains and the losses," continues: they "may combine only for one particular piece of business, or to carry on a continuous trade or enterprise, or they may even agree to put all they have, into a common stock and share each other's fortunes of whatever kind." He adds in a foot-note:—

"It is probable that this thoroughgoing partnership sprang from the position of brothers and sisters living together as joint heirs to their father. *Consortes* appears to have this special application. Gellius (i. 9) speaking of the Pythagoreans says, *quod quisque familiæ, pecuniæ, habebat, in medium debat, et coibatur zocietas inseparabilis, tamquam illud fuit anticum consortium, quod jure atque verbo Romano appellabatur 'Eroto non Cito' (erctum non-cito)*"

"Where there was no summons to divide the inheritance." Then Professor Roby's text continues:—

"In the absence of any wider intentions clearly shown, the partnership will be taken to relate only to business matters and to the gain and loss thence arising, in which case inheritances, legacies, gifts will be outside the contract."

This illustrates, *first*, that where a group of persons belonging to a family governed by Muhammadan Law, work together for the purpose of earning their livelihood and acquiring properties, the transition leading up to the formation of such a thoroughgoing partnership is extremely easy, and *secondly*, it indicates limitations on the scope of the partnership and points out a means for limiting the assets and liabilities of the firm, even in regard to the rights of members directly participating in the labours of carrying on the firm, or holding possession of its assets or profits or adding to its liabilities.

Here again, there is a certain analogy with the law governing a Hindu family firm, but it seems to me that the analogy is not complete. It is true that Hindu family firms are the partnerships which in India have the closest resemblance to such "thoroughgoing partnerships" amongst Mussalmans as we

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have to deal with in the present case. Their analogy is alluring, because the Hindu Law furnishes a simple method of determining the rights of the parties: under it the whole group continues to be a single legal entity making it unnecessary to trace out the legal results on the decease of each ancestor of the claimant. For reasons, however, which I shall state, it seems to me that this easy process is not available unless the parties are willing (as they are in the present case) to have each one of themselves treated as though he or she were a partner with the right to share in the profits of the firm (or future acquisitions) in the proportion of his or her interest in the assets of the firm, irrespective of sections 240, 241, 243, 247 and 253 (2) of the Indian Contract Act.

The learned District Judge has referred to *Khatija v. Ismail* (2) in the beginning of his judgment in the following terms:—

"The parties are *Navayats* the customs of which race are recorded in *Khatija v. Ismail* (2). Ordinarily *Navayats* follow the joint family system of the Hindus but conform to the Muhammadan Law in succession. The evidence in this case shows that these parties do the same and there is absolutely nothing to prove otherwise. I, therefore, find that they follow this custom."

The result of the decision in *Khatija v. Ismail* (2) seems to me to be stated too broadly in this passage. All that is there laid down is that amongst the *Navayats* "though the devolution and distribution of the property were regulated by the rules of Muhammadan Law, the Hindu system of managing joint family property by a male co-parcener was in vogue."

It need hardly be pointed out that the fact that a particular custom is relied upon and held by the Court to have been proved in one case, does not empower the Court to take judicial notice of it in another case; judicial notice may be taken only of a custom that has been repeatedly proved. In this case, no special custom was pleaded; nor is any general custom referred to in *Khatija v. Ismail* (2). But the word 'custom' frequently invites a confusion of ideas. In its legal sense, custom must of necessity connote only such rules of conduct as affect rights and liabilities. Evidence of the peculiar ways of living

adopted by any class of persons may have to be adduced for an elucidation of the facts existing in any particular case. But this does not make those ways of living or observances customary rules of law. There may, however, be sufficient evidence in the present case for holding that the particular family concerned, has adopted a way of living which is similar to that adopted by members of a joint Hindu family. But what is far more important is that the parties are agreed that their rights are to be governed by Muhammadan Law and that they have not adopted the Hindu Law of succession.

Is there any reason why the assets of the firm originally established by Haji Hassan and carried on by the ancestors of the plaintiff and the defendants, in which members of these branches have acted as partners or managers, should be governed by the law applicable to a Hindu joint family or ancestral firm governed by the Mitakshara Law? In order that this question may be answered, I must refer to rules governing such Hindu firms which may be relevant to the questions involved in the present litigation, and consider the reasons why such firms are governed by what in effect must be considered to be special rules of law.

The leading case relating to a Hindu joint family firm, seems to be *Ramlal Thakursidas v. Lakhmichand Muniram* (5). It does not seem to have been expressly noticed in the decisions following that case that it was decided in 1861, long prior to the passing of the Indian Contract Act. The learned Judges who decided the case say:

"Being a matter of contract between Hindus, the laws and usages of Hindus must govern the decision."

The principles laid down in the leading case seem, however, to have been given effect to in later decisions in the same way as if they were unaffected by that Act. Be this as it may, it seems to me that if the provisions of the Indian Contract Act were applied to the case of a joint family firm governed by the Hindu Law, the same result may be arrived at,

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at least in the great majority of the cases, as that to which the decisions lead us. The most important decisions seem to me to be reconcilable with the view that the Indian Contract Act applies to a Hindu family firm, but that the incidents of the Act are affected by the peculiar doctrines of the joint Hindu family, which doctrines are incorporated in the law of Hindu ancestral firms, just in the same way as the provisions contained in the articles of partnership relating to any particular firm may be incorporated. The Indian Contract Act in this view governs Hindu family firms as much as any other firm; but the incidents of a Hindu joint family firm are different from those of a firm not subject to the Hindu joint family law, just as, under the Act, a firm having one set of articles of partnership, will have different incidents from a firm having another set of articles. Thus, for instance, section 241 of the Act lays down that "a contract to the contrary" may prevent a particular result following. That same result is prevented from following in the case of a Hindu joint family firm by the fact that by the operation of the Hindu Law, the sons of a father become partners with him in his life-time by birth, and may continue to be partners after his death. If, on his death, they continue to carry on the business, the same results follow as though they had agreed to continue the firm as such partners. See *Samalbai Nathubhai v. Someshwar* (6). Similarly, the contract referred to in section 245, must have reference to the law governing the parties; and under section 247, a minor may be admitted by operation of the law to the benefits of the partnership, and may have his share in the property of the firm, but be free from personal liability for any obligations of the firm. See *Raghunathji Tarachand v. Bank of Bombay* (7).

Thus I take the decisions relating to Hindu joint family firms to show that the Indian Contract Act lays down that the relations between the members of the firm must be presumed to be to a certain effect, in the

absence of a contract to the contrary; that the contract to the contrary may be an implied contract; that such an implied contract may be presumed from the mode of life resulting from the general personal law of the parties, especially when not presuming such an implied contract, would bring about inconsistencies, and results unexpected by the parties themselves.

If this is so, then in any event, the Indian Contract Act must be looked to primarily for determining the incidents of the firm established by Haji Hassan, even though the mode of life adopted by the members of the family was that prevalent amongst members of a joint Hindu family. That fact, however, must be brought to bear upon the rules contained in the Indian Contract Act, and must not be made a medium for conducting all the incidents of a Hindu family firm into the present case. Thus the law of survivorship among co-parceners by which sons acquire an interest in the ancestral property of their father during the life-time of the father, does not find a place in Muhammadan Law; and widows and daughters take definite fractions in the estates of the deceased, and the property represented by those fractions, is not liable to be diminished by any subsequent conduct of the partners of the firm. The right of such ladies may under certain circumstances differ from the rights of those male members who assist in the business, and in the acquisition of property, because the latter would under the Indian Contract Act be entitled to be considered partners in regard to the acquisitions made by efforts in which they have joined, whereas females and such males as have not contributed their efforts in acquiring new properties, would not be partners.

Again, in the case of an ancestral firm whose members are governed by Muhammadan Law, one of the members may die leaving no heirs within the group of persons living together and working in the ancestral firm. His heirs, in the absence of descendants, may be collaterals who have had no dealings with the firm, or with the family group in which the deceased was included. In such a case the share of the deceased partner would nonetheless devolve upon the strangers, and would be subject to the provisions of section 241 of the Indian Contract Act,

(6) 5 B. 35.

(7) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

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whereas in the case of a Hindu joint co-parcenary property (whether or not consisting of a family firm), on the death of any of the members, his estate must necessarily devolve upon persons within the co-parcenary itself. Where one of the partners dies, the firm would ordinarily be considered to be dissolved. [Indian Contract Act, section 253 (10)]. But since the firm has been continuously carried on, there must, in the eye of the law, be considered to have been, on the death of each partner, a fresh contract, express or implied, to continue the firm. On the other hand, it does not follow that the heirs of the deceased partner should become partners in the firm by the very fact of such continuance of the firm, or by the fact that the assets of the firm include the share therein of the deceased partner which by his death has devolved on such heirs. The reason why the sons of a partner in a Hindu ancestral firm are on the death of their father taken to be partners in the firm, is that the sons are co-sharers and partners with their father in his life-time, that in fact, though as between the father and the other members of the firm, the father was one unit, that unit consists of himself and his sons who are co-parceners with him in the family property. *Samalbai Nathubhai v. Someshwar* (6). Even in regard to a firm governed by the Hindu joint family law, the limitations as to the liability incurred by a partner are indicated in *Bishambhar Nath v. Fateh Lal* (8) and *Chalamayya v. Varadappa* (9). The result of these two decisions seems to be the same as would have been arrived at by applying section 241 of the Indian Contract Act, though the section does not seem to have been expressly referred to and the circuitous method is followed of considering, in the first instance, persons to be partners, though they have not taken any active part in, nor had any concern with, the management of the firm directly or indirectly [See *Bishambhar Nath v. Fateh Lal* (8)] and then limiting the liabilities of such persons in a manner which could not be available to partners, but which would result from the application of section 241. If the liabilities of a partner are not incurred, then it would follow

that the rights under section 253 (2) cannot be claimed.

In the case of Mussalmans, section 241 of the Indian Contract Act has, it seems to me, a direct operation: in their case there is "no contract to the contrary," nor does their personal law operate so as to make them partners to any extent, or otherwise to minimise the effect of section 241 on their rights.

After it is determined, who from time to time are partners in such a firm, it is possible to say how the acquisitions and additions from time to time to the property of the firm are to be divided. As I have already said, all the heirs of Haji Hassan and Hammed were interested in the assets of the partnership, but they were not necessarily partners. The rights of the two different classes of persons would have had to be determined on different bases, but for the concessions to which I have referred. The rights of those who are held to be partners, would have been subject to the rule contained in section 253 (2) of the Indian Contract Act; and those of the heirs of Haji Hassan and Hammed who would have been held to be partners in the firm would have been considered under section 241 of the Indian Contract Act to have given a loan of their portion of the property to the partnership. But these details are not necessary in the present case. I have only stated these for making my view of the case clear, and for showing that there are no inherent insurmountable difficulties in the way of applying Muhammadan Law to the assets of the firm as well as adopting the Muhammadan Law of succession.

The result seems to be, therefore, that such cases must be considered, as indeed they are, a series of suits for administration, partition, and dissolution of partnerships. The rights of the parties must be determined with reference to the Muhammadan Law of inheritance and succession, and to the law contained in the Indian Contract Act relating to acquisitions made with joint labour, or by means of property in which more persons than one are interested or with property originally jointly acquired and held in co-ownership and subsequently continued to be held and utilised for further acquisitions by the survivors of the original co-owners on an implied agree-

(8) 29 A. 176; A. W. N. (1907) 1; 4 A. L. J. 95.

(9) 22 M. 116; 9 M. L. J. 3.

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ment with the heirs of the deceased co-owners.

It will be convenient to record the findings that should in my opinion be given on the issues:—

On issue (1), my answer would be, the parties are the heirs of two brothers who held certain properties in co-ownership; as such heirs, the parties are themselves co-owners of the properties originally owned by their ancestors, and properties acquired with the aid of those properties.

(2) The parties as such heirs, are entitled to share in the properties mentioned in the schedules to the plaint except in the shop of the 12th defendant.

(3) In the affirmative.

(4) In the affirmative.

(5). In the affirmative in the terms stated in my judgment.

(6) } These issues are argumentative,

(7) } and I think my judgment gives a sufficient answer. In my opinion, amongst parties governed by Muhammadan Law, there cannot be such undivided members of a joint family as to prevent their holding private property.

(8) In the affirmative.

(9) In the affirmative.

(10) Not barred.

(13) In the affirmative.

(12) } I agree with my learned brother's

(14) } remarks on the District Judge's view with reference to these two issues (see page 23 of the District Judge's judgment) and answer these two issues in the negative.

In my opinion, for the reasons which I regret I have not been able to state at less length, the case ought to be referred back to the District Judge for accounts being taken on the following basis:

(1) That Hammed Sabib was entitled to one-eighth of the properties referred to in Exhibit XVI;

(2) that seven-eighths of the said property and all other properties acquired prior to 1870, belong exclusively to Haji Hassan and his heirs;

(3) that the property acquired by the firm established by Haji Hassan after 1870 must be equally divided amongst the heirs of Haji Hassan and Hammed Sahib in accordance with Muhammadan Law.

I would make the costs of the parties come out of the estate, but with liberty to the learned District Judge to declare that any particular sets of costs were unnecessarily incurred and should be borne by the parties themselves.

On this basis, a preliminary decree for partition should, in my opinion, be made, which would be followed in due course by a final decree.

SADASIVA AYYAR, J.— As my learned brother's judgment deals with the preliminary facts and the relationship of the parties at length, I shall not repeat them. Whatever may have been the nature of the understanding between Hammed and Haji Hassan at the time when they commenced to work together, they agreed in 1845 that the interest of Hammed in the property referred to in Exhibit XVI, should amount to one-eighth share of that property. Exhibit XVI further shows that it was only if Haji Hassan failed to return from his pilgrimage that Exhibit XVI was intended to have effect.

Was the interest of Hammed in the assets of the firm that of a partner after Haji Hassan returned, that is, between 1848 and 1866, so that section 253 (2) of the Contract Act is brought into operation?

The conduct of the two brothers and of the members of the family after Haji Hassan's return in about 1848, seems to me to have been such as would be expected from brothers who consider themselves as equal partners of the business and equal co-owners of all their properties. If Haji Hassan and Hammed Sahib had been Hindu brothers, I think their conduct and the conduct of their descendants and heirs could lead to only one conclusion, namely, that they were equal partners and co-owners. In *Sudarsanam Maistri v. Narasimhulu Maistri* (3), Sir V. Bashyam Aiyanggr, J., uses the following expressions (in that case two out of five Hindu brothers carried on a business jointly):—

"It is not alleged that there was any express agreement of partnership, but that as the plaintiff regularly combined his labour with that of the 1st defendant in carrying on the contract business, an agree-

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ment of partnership should be implied between them, especially as they were related as brothers." "There being no express agreement between the brothers in regard to the contract business, the question that presents itself for consideration is whether, under the above circumstances, a contract of partnership should be implied or whether the proper inference to be drawn is that there was no legal relation between the brothers in respect of the business, but that the plaintiff regularly and systematically assisted his elder brother in carrying on the work in... expectation that his elder brother would deal with him generously if profits were realised from the business."

"In deciding this question one should of course have special regard to the social customs of the Hindus and to the fact that the plaintiff and the first defendant were brothers...that the nature of the business was such that combination of labour was more important for success than contribution of capital and that the plaintiff's association with his brother in the business for a period of *nearly six years was not casual but regular and continuous.*"

The learned Judge refers to several other circumstances, and then says: "Under these circumstances an agreement of partnership would be implied by law," and adverting to the principles of the law of estoppel embodied in section 115 of the Indian Evidence Act which is the same as the English Law, the learned Judge held that the first defendant in that case was estopped from denying that the plaintiff was an equal co-owner or partner. In the present case, there is no doubt one circumstance against Hammed Sahib, namely, that he agreed in 1845 to take one-eighth share of those properties belonging to his brother which were in existence in 1845 when his brother started on holy pilgrimage. It does not, however, appear that Hammed had not then other properties of his own. It is further clear that Exhibit XVI which seems to have been unearthed from old forgotten records, was never acted upon, evidently because the elder brother returned in 1848 and the relations between the two brothers became still more cordial than it was before in 1845, the son of the younger brother

marrying the daughter of the elder. All that appears afterwards is that the two brothers lived together as if they were members of a Hindu joint undivided family and that both equally managed the affairs of the business and conducted the transactions connected with the immoveable properties which were acquired mostly in the elder brother's name, though some properties of substantial value were also purchased in the younger brother's name. I do not forget that they were Mussalmans and not Hindus, but they were Mussalmans who belonged to a small sect called *Narayats*. Their customs are thus recorded in *Khatija v. Ismail* (2), by the late Mr. C. Gopalan Nayar, who was in his days one of the ablest members of the Subordinate Judicial Service:

"It has to be remembered that, though these people are Muhammadans by religion, they conform to Hindu customs and manners to a very great extent. They belong to a class called '*Narayats*' or new comers, being the descendants of a party of Arab merchants who migrated to Bhatkal near Goa some 770 years ago and took for their wives converts from the Hindu Konkani of the place. Konkani is still the home language of these people, and it is clear from the evidence of several witnesses that, like their Konkani neighbours, they are not over-fond of division. Though...the common ancestor died in 1856, *his estate was never divided among his heirs, but managed quite in the Hindu fashion by his eldest son...till his death in 1866 and since by the 1st defendant.* That such management was for the benefit of all the heirs of Sayyad Mahomed Sahib (the common ancestor) is indeed clear from the admission of the parties."

The learned Judges of this Court on appeal adopted the same view, namely, that many of the incidents of the joint family system obtained by custom among the *Narayats*. The evidence in the present case also clearly points to the same conclusion.

My learned brother Mr. Justice Spencer had in 1913, as District Judge of Tanjore, to consider a case between the members of a *Routher* family in Negapatam, the *Routher* community, while following the Muhammadan Law of inheritance, having also adopted many of the customs of the Hindus. (See pages 96 to 100 of the printed papers in Second Appeal No. 983 of 1913). In *Vella;*

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Mira Ravuttan v. Mira Moilin Ravuttan (10) the High Court observed :

"Although the technical rules of Hindu Law are not applicable to families of this tribe, the same presumption must arise from facts of a similar kind and the same principle must be equally held to govern cases of family partnership among Hindus and Muhammadans. The first defendant, having been managing member of the joint estate for a long series of years, must be presumed to have made these additions to the property from the joint estate, unless the contrary were shown."

In *Suddurtonnessa v. Majada Khatoun* (11), Markby, J., observed :—

"When a Muhammadan family adopts the customs of Hindus, it may do so subject to any modification of those customs which the members may consider desirable; and it must rest with the Judge who has to decide each particular case how far he should apply the rules of a Hindu joint family to the case of any Muhammadan joint family that comes before him."

Mr. Justice Spencer approved as District Judge the following remarks of the Subordinate Judge who tried that case which came up as Second Appeal No. 983 of 1913 to this Court:

"All the circumstances of this case show that living in the midst of a country where Hindu usages prevail, and being probably also of Hindu origin, the family has been following the Hindu usage in practice, with regard to joint living and joint enjoyment of property. In this state of things, the Courts have a discretion to apply such of the rules and presumptions of Hindu Law which are dictated by the circumstances of the case. It must accordingly be held that in this case, the plaintiff and the other sharers will be bound to contribute their shares of the debts which may be found to have been incurred for the family benefit and still outstanding. Although there is no rule of Muhammadan Law imposing such a charge, it may be fairly presumed that it is one of the incidents of the commensality that obtained in the family."

Myself and Mr. Justice Bakewell confirmed on second appeal the above decision of Mr. Justice Spencer given by him as District Judge of Tanjore.

In the present case not only did the two brothers Haji Hassan and Hammed Saheb live and conduct business amicably together between 1848 and 1865 when Hammed died, but the properties purchased in the name of either, were enjoyed by both. Exhibit XIX is a title-deed of a property purchased in the younger brother's name in 1849. Exhibits XVIII and XX are title-deeds of properties purchased in Hammed Saheb's name in 1844 and 1846. All these properties were treated as joint family properties by both brothers. [As even their Lordships of the Privy Council have used the expression "joint family" in more senses than one as pointed out by Sir C. Sankaran Nair, J., in *Rama Row v. Raja of Pittapur* (12)], I have ventured to use the expression joint family properties in the case of the Mussalman families without intending the expression to involve all the usual implications when applied to an undivided Hindu joint family. Upon the death of Haji Hassan in 1870, the whole property of the family, including these three properties, was registered in the name of Dodda Moideen, the son of Haji Hassan who was then the manager in Manki. The accounts of the business which had stood in the name of Haji Hassan alone, were carried on from 1871 to 1882 in the joint names of Dodda Moideen, son of the elder brother, and Abdul Rajack, the son of the younger brother. The names of other male members of the family were introduced into the accounts in subsequent years. In the genealogical tree, Exhibit B, prepared by the village officers of Honawar Taluk in 1889 and in the statement Exhibit C, taken from all the members of the family, it is implied that Haji Hassan and Hammed were co-owners, just as if they were two Hindu brothers who carried on business and acquired properties together. It is further implied that there should be a manager selected from among

(10) 2 M. H. C. R. 414.

(11) 3 C. 694; 2 C. L. R. 308.

(12) 29 Ind. Cas. 356; 26 M. L. J. 624; (1915) M. W. N. 369.

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the members of the family consisting of the heirs of the brothers as if those heirs constituted a joint Hindu family. The trade business was carried on at Souda, while the properties were acquired mostly in Manki. (As the District Judge says:

"Numbers of documents relating to the plaint properties have now been produced to show in whose names they were purchased and it is noticeable that the man on the spot and managing the business often took the document. Exhibit R of 1891 shows that Sanna Hassan received an amount decreed to Abdul Rajack. Exhibit Q of 1893 shows that Sanna Hassan who was then conducting the trade in Souda, obtained in his own name a succession certificate to collect the trade debts. Exhibits Y, BB and CC are documents to Sanna Hassan for old debts due to the trade and for rents due to the family. Exhibit DD is a document of 1904 to the 11th defendant, then managing the trade, in renewal of an old document, Exhibit Z, of 1856 to Abdul Rajack, showing that the manager for the time being, regardless of his branch, got documents in his own name; Exhibit T is similarly a document to Alli Sahib (15th defendant), reciting a prior debt due to his father Abdul Rajack; Exhibit AA, a document to the 11th defendant, refers to his uncle Abdul Rajack as the manager at Souda; and Exhibit W similarly refers to the 15th defendant."

These Exhibits distinctly tend to show that the two branches regarded themselves as equally entitled to all the properties standing in the name of any male member in either branch. The oral evidence is also to the same effect.

In the account XXII Series (See pages 100, 107, 108, etc., of the printed papers), salutations to Ganapathi and sometimes salutation to "Sri" occur, showing that the influence of Hindu customs has permeated the community to a rather extraordinary extent. Even in the case of Hindu joint family business, the law applicable is rather complex and by no means quite settled. In *Bishambhar Nath v. Fateh Lal* (8), it is said in page 185:

"A joint ancestral family business under the Hindu Law managed by the adult mem-

bers of the family differs from an ordinary contractual partnership. In the case of the latter, each partner is a contracting party, all the partners holding themselves out as trading on the credit of their combined and separate funds, whereas in the case of a joint family ancestral business, there is no contract of partnership whatever between the members of the joint family. The family frequently contains amongst its members, minors who acquired their interests in the business by birth. Indeed it may be safely assumed that in most of the existing Hindu joint family trading firms, the parties, now interested in them acquired their interest by birth and not by contract. Admittedly, minor members are liable to the extent of their respective interests in the joint family property for the acts of the managers of the joint family business. But we do not think that their liability extends further. If any of the members of a joint family, happen to have separate estates, we know of no good reason why such separate estates should be held so liable."

Of course, "the legal individuality of a co-parcener is not merged in the manager, so far as the co-parcener's self-acquired or other separate property is concerned." [See *Chalamayya v. Varadappa* (9)]. Thus in a Hindu joint family business in which the minor agnates get interests as soon as they are born, the sections of the Contract Act relating to the dissolution of a partnership by the death of a partner and the necessity of the consent of a male member to make him liable as a partner even to the extent of the interest of his deceased father in the family partnership business for debts contracted after his father's death, are not applicable. In a Hindu joint family partnership business, it is only the male agnates that become partners (though not in the full sense of the expression "partner") liable to the extent of the funds of the partnership business. The matter is further complicated in the case of this *Narayat* community by the female heirs and the numerous members of each heir (whether male or female) under the Muhammadan Law, of a member of the original partnership, obtaining an interest in the partnership business on the death of each member of the family firm and of any heir of that member. But I think

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that till an heir or the heir of an heir repudiates all further rights and liabilities arising from the future transactions of the firm, he or she becomes and continues a partner in the sense that though he or she may not be personally liable for the debts of the firm, his or her interest in the partnership assets, continues liable till a partition is effected or till a repudiation takes place. As said in some cases, the minor who gets an interest in a Hindu partnership firm by birth, cannot be considered a partner in the sense that he becomes personally liable on his attaining majority for the debts of the firm contracted during his minority, but still he might be termed a partner in a real sense as his share and interest in the family business is liable for the debts contracted by the managing partners. In the case of *Navayat* families, I think that the expressions 'joint family' and 'undivided family' are used in a very loose manner as if female heirs also are members of the 'joint family' or 'undivided family.' But, so long as the family business is continued without break and though female heirs and minor heirs and heirs belonging to other families, may not be partners in the strict sense of the term, their interests in the firm's assets continue liable and the value of their interests fluctuates according to the prosperity or otherwise of the firm. I, therefore, venture to think that sections 241, 249 and 253, (clause 10) and similar sections of the Contract Act may not be inapplicable to the business carried on by a *Navayat* family as a family business though the principle of survivorship and that of right by birth, ought not to be imported in considering the rights and liabilities of the persons to whom the business of a *Navayat* family has descended as heirs. I think that in most other respects, the principles and considerations applying to the business of Hindu family firms can be made applicable. On a careful perusal of Exhibits E1 and E2 and several other documents in this case, it seems to me clear that not only males in the family but all the members (male and female) in the two branches and all the heirs and the heirs of the heirs of the original two brothers Haji Hassan and Hammed Sahib have been treated by all the interested persons as members of a "joint undivided family" that is, that as the heirs and heirs of heirs in both branches have been always recognised as

jointly interested in the partnership business and in all the properties acquired forming the assets of the business. I am inclined to think that if accounts have to be taken and if only working male partners are to be treated as partners in the future business on the death of each male heir, it might become a hopeless task for even the most clear-headed Judge to find out the facts and settle the rights on anything like a satisfactory basis after the lapse of even a single generation. I believe it is not quite a secret that I am not over fond of the Mitakshara joint family system with its theories as to rights by birth, survivorship, exclusion of females from inheritance (speaking generally), discouragement of claims to separate and self-acquired properties, etc., nor am I at all for the Mussalmans adopting the modern Hindu Laws of succession and inheritance or the Marumakkattayam family system, still less am I for the Muhammadan Law (which follows more closely the religious rules laid down in the Holy Quran) being given up by the Mussalmans for the later Hindu Law which has departed (through the influence of decadent custom) far from the original religious sources of the same law. While I do not agree with the District Judge that the words "undivided family" could be properly used as regards members of these two Mussalman families, I have no doubt that the business at Souda should be treated on the analogy of the business of a joint Hindu trading family, that all the properties must be treated as if they were partly belongings of the two brothers Haji Hassan and Hammed as equal co-owners and partly the accretions to such properties held in co-ownership. I am aware that neither the principle of survivorship which was introduced by the Mitakshara in the case of joint Hindu family where one of the coparceners dies without a male issue, nor the principle of exclusion of females (with some exceptions) from succession in Hindu Law can be applied to these Mussalman families. There is also no question of right by birth. But other presumptions of common sense arising from the mode of their living, might, in my opinion, be safely applied. That customs, even modifying the Muhammadan Law, can be applied to Mussalmans is clear from *Muhammad Umar Khan v. Muhammad Niaz-ud-Din*

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Khan (13). It was argued that the properties which had been acquired before 1870, should be divided between the two branches in the proportion of seven-eighths and one eighth. But in respect of even some of the properties acquired before 1870 in the name of Hammed, the *pattah* was transferred to Hassan's son's name, thus showing that no distinction was made even as regards those properties between the rights of the two branches.

It was finally argued that at least the properties which belonged to Haji Hassan in 1845, should be divided into seven-eighths and one-eighth. But it seems to me that all the properties were treated as if they belonged to two Hindu brothers after 1848 and it is not wholly improbable that Hammed might have mixed up whatever properties he had in 1848 (there is no evidence worth the name to show that he was an absolute pauper when he began to assist his brother) with his brother's properties inextricably. I think that this is a case in which both equity and convenience require that the principles on which Scottish Courts act and which were approved of in the recent case in *Mahomed Musa v. Aghore Kumar Ganguli* (1) should be applied in this case. Actings and conduct of parties might give rise to estoppel where such actings and conduct have produced alterations of circumstances so great that without great loss and inconvenience, the parties cannot be put back in their original positions. I think that from 1848 till this suit was brought, the two brothers, their heirs and the heirs of their heirs have acted in such a manner that the decree passed by the District Judge can be fully justified on the basis that all parties have understood their rights as following from the properties being held in common ownership between the two branches for more than 60 years and the imperfect understanding or agreement between the two brothers which began in 1848, has become fully perfected by their own conduct and the conduct of their heirs.

The learned District Judge, while admitting that the plaintiff has not proved that any debt was incurred by his father in building a house which is now treated as family property, and that the 22nd defendant also has not proved that he has incurred certain debts in acquiring property treated as family property, has allowed these two parties to prove in execution proceedings that they have incurred such debts. I think he was wrong in allowing these claims to be proved afterwards, and he ought to have disallowed those claims for want of proof. As regards the debt alleged to have been incurred for maintenance (after the date of this suit) by the plaintiff's branch, this also cannot be allowed as the 9th defendant's liability, after the suit is brought, is only to be held accountable for half the net income of the family received by him after the date of suit and not to be tendering maintenance amount to the plaintiff's branch. The decree passed by the District Judge is further defective in not providing for the necessary accounts to be taken and in not reserving liberty to the parties to make applications connected with the taking of the accounts, the issuing of the necessary commissions for making partition and so on. Subject to the modifications above referred to, I would confirm the lower Court's decree with costs to be paid by the appellants to the contesting respondents.

BY THE COURT.—Under section 98 of the Civil Procedure Code, the decision of the District Judge on issues 12 and 14 is set aside and the issues are decided in the negative. The District Judge's decree will also be modified by adding directions to take the necessary accounts and by giving permission to the parties to make applications in connection with the taking of accounts. In other respects, the decree will stand confirmed with costs of the contesting respondents. The clerical errors pointed out in grounds 38 and 40 of the Appeal Memorandum will also be corrected by the lower Court.

Decree modified.

(13) 13 Ind. Cas. 344; 39 C. 418; 6 P. W. R. 1912; (1912) M. W. N. 77; 11 M. L. T. 76; 9 A.L.J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458; 126 P. R. 1912; 39 I. A. 19.

MAUNG PO SAING v. MAUNG SAN MIN.

LOWER BURMA CHIEF COURT.
SPECIAL CIVIL SECOND APPEAL No. 10
OF 1915.

August 30, 1915.

Present:—Mr. Justice Parlett.

MAUNG PO SAING AND OTHERS—
APPELLANTS

versus

MAUNG SAN MIN AND OTHERS

—RESPONDENTS.

Burmese Buddhist Law—Widow's power of disposal.

Under the Burmese Buddhist Law, a widow has an absolute power of disposing of the whole property subject to the right of others.

Ma Sein Ton v. Ma Son, 30 Ind. Cas. 588, referred to.

Mr. Ba Thein, for the Appellants.

JUDGMENT.—The land in suit belonged to San Ya and Ma Min Tha. After Maung San Ya's death a decree was obtained against Ma Min Tha in execution of which the land was sold, and it passed into the hands of the 3rd appellant Maung Po Myaing. The respondents who are the children of Maung San Ya and Ma Min Tha sued to recover half the land, on the ground that Ma Min Tha's interest in it was only one-half. The suit was dismissed, but on appeal, was decreed, following the rulings that the widow's absolute right of disposal extended to only one-half of the joint property of herself and her late husband. A Full Bench of this Court has now ruled in *Ma Sein Ton v. Ma Son* (1), that, subject to restrictions which do not apply to the present case, she has a right of disposal over the whole property. The plaintiffs accordingly had no right of action and their suit must be dismissed. The decree of the Divisional Court is reversed and that of the Sub-Divisional Court restored with costs throughout. Advocate's fees in this Court two gold mohurs.

Appeal accepted.

(1) 30 Ind. Cas. 588.

In re DWARKADAS TEJBHANDAS.

BOMBAY HIGH COURT.
INSOLVENCY No. 216 OF 1912.
September 27, 1915.

Present:—Mr. Justice Davar.

In re DWARKADAS TEJBHANDAS.
NARSOOMAL GOKALDAS—CREDITOR.

Presidency Towns Insolvency Act (III of 1909), s. 17—Suit against adjudicated insolvent—Leave of Court, when to be obtained.

The leave contemplated under section 17 of the Presidency Towns Insolvency Act is leave which ought to be obtained before the commencement of a suit and cannot be granted after the same is filed.

Application made in Insolvency No. 216 of 1912, in the matter of Dwarkadas Tejbhandas and others adjudged insolvents.

Mr. Strangman, for the Applicant.

JUDGMENT.—Dwarkadas Tejbhandas Khusberam Tejbhandas and Girdhardas Tejbhandas, who were then trading in the name of Tejbhandas Dwarkadas, were on the 11th of April 1912, on the application of some of their creditors, adjudicated insolvents in this Court and by an order made on such adjudication, all their property vested in the Official Assignee. From the date of the adjudication up to the present time, nothing seems to have been done. The adjudicated Insolvents have not even been called upon to file their schedule.

It appears that the firm of Nursoomal Gokaldas, who claim to be the insolvents' creditors for Rs 7,100, in entire ignorance of the fact that their debtors had been adjudicated insolvents, filed three suits in the Shikarpur Court in 1915 to recover the sums of moneys which they alleged were due to them. When the suits came on the Judge's Board for hearing, the insolvents objected to the suits going on, on the ground that the plaintiffs therein had not obtained the leave of the Court under section 17 of the Presidency Towns Insolvency Act before filing suits against them. The learned Subordinate Judge while recognising the force of the objection, seems to have been of opinion that the defect could be cured by the plaintiffs therein obtaining the necessary leave even after the institution of the suit and he adjourned the hearing of the suits to enable the plaintiffs therein to apply for leave under section 17 to this Court.

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Mr. Strangman on behalf of the plaintiffs in these Shikarpur suits, now applies for leave to continue the suits. The question for decision is "have I power as Judge dealing with insolvency proceedings under the Presidency Towns Insolvency Act, to grant leave under section 17 after the suits have been instituted."

The question has been fully argued before me by the learned Counsel for the applicants and I regret to say I feel more than ever convinced that the view I expressed on a previous occasion, is the only possible view to take of the provisions of this section. I use the word *regret* advisedly because I feel that my decision if correct, will entail much hardship on the applicants. They filed the suits without any knowledge that their debtors had been adjudicated insolvents and if the suits now fail, not only would they be prejudiced in costs but it is possible that it may be argued that their claims are barred by the Law of Limitation. This is undoubtedly a case of great hardship.

The words of the section are so clear and unambiguous that there is no possibility of construing them in any way other than that leave must be obtained before the commencement of the action.

Omitting words that do not apply to this case, the section runs as follows:—

"No creditor to whom the insolvent is indebted in respect of any debt provable in insolvency, shall during the pendency of the insolvency proceedings...commence any suit...except with the leave of the Court."

The words of the section are so clear and explicit that they leave no room for any construction other than the one I have placed upon them. No creditor shall commence a suit except with leave. This provision clearly negatives the suggestion that a suit commenced without leave can be continued by obtaining leave at any stage thereof.

Mr. Strangman has cited two English cases on the analogy of which he asked me to give him leave now. These cases have no bearing on the question before me. I have to construe a section of an Indian

Act. The language of that section is so clear and emphatic that it can bear only one construction and it seems to me futile to invoke the assistance of cases decided under the provisions of other laws of another country.

The learned Counsel for the applicants has stated to me that Brother Macleod gave leave under section 171 of the Indian Companies Act after a suit had been filed without leave and he has relied on the fact that the phraseology of the two sections is the same. I have, however, nothing before me to show under what circumstances such leave was granted and what were the facts of that case. If the matter had been argued before the learned Judge and he had decided the point after considering the section, there would be some judgment showing the reasons for a decision which obviously would appear to be in conflict with the language of the section and I would have considered the judgment with great respect but there is nothing before me which affects my judgment in the present case.

It is quite clear to my mind that the leave contemplated under section 17 of the Presidency Towns Insolvency Act is leave which ought to be obtained before commencement of a suit and cannot be granted after the same is filed.

I must, therefore, refuse the application.

Application rejected.

Attorneys for the Appellant: Messrs. Mulla and Mulla.

PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

November 3, 1915.

Present:—Viscount Haldane, Lord Wrenbury

Sir John Edge and Mr. Ameer Ali.

A. K. A. S. JAMAL—APPELLANT

versus

MOOLLA DAWOOD, SONS, & Co.,—

RESPONDENTS.

Contract Act (IX of 1872), ss. 73, 107, applicability of—Contract for sale of negotiable securities—Breach of contract—Damages, measure of—Difference between contract price and market price at date of breach—Purchaser, right of.

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In a contract for sale of negotiable securities, the measure of damages for breach is the difference between the contract price and the market price at the date of the breach. If the seller holds on to the securities after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises. [p. 964, cols. 1 & 2.]

A plaintiff who sues for damages for breach of a contract for sale of negotiable securities owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect, but the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. But the fact that by reason of the loss of the contract which the defendant fails to perform the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract. [p. 964, col. 2.]

Sections 73 and 107 of the Contract Act do not apply to such a case. [p. 965, col. 1.]

Appeal from a judgment and decree of the Chief Court of Lower Burma, dated July 24th, 1913; reported in 25 Ind. Cas. 799, affirming a judgment and decree of the same Court (Original Side) dated June 8th, 1913.

FACTS.—The facts material to the case have been sufficiently set forth in their Lordships' judgment.

No evidence was given of the market value of the shares on or about December 30th, 1911, or at any other time. The Court of first instance decided against the appellant on the ground that the appellant had the option to re-sell and having exercised his option, could not claim damages. This was confirmed by the Appellate Court.

Sir Erle Richards: The point in this appeal is a very short one, and it is a point purely of law; it is a point as to the measure of damages on the failure to accept shares. The point is shortly this. My clients, the appellants, contracted to sell shares and those shares were to be delivered at one date some months after the various contracts. When the time came, the shares were tendered; they had fallen very much in value; the respondents refused to take the shares, and we, therefore, sued and claimed as damages the difference between the contract price and the market price on the date of breach. I submit to your Lordships that that is an absolutely

well-founded elementary proposition of the law of damages, but the Court of Appeal have said that that is not the measure of damages, that you must look and see what the seller does afterwards with the shares. My position is that I could have held on to those shares or sold them all at once, or do as I did, nurse them and sell them in small quantities afterwards; it had nothing to do with the buyer after breach; my damages, as I submit to your Lordships were fixed at that time.

[**LORD WRENBURY:** He may take the shares as his own and sue for the difference as damages, and then he may do what he likes with the shares.]

Sir Erle Richards: Yes; that is what I did; after I started the suit claiming the difference between the contract price and the price at the date of breach as damages, I sold them off in small quantities. I am going to submit to your Lordships that it is a simple proposition of law that the measure of damages is what I have said, namely, the difference between the contract price and the market price on the date of breach. That is so, as I shall submit under the Indian Contract Act and under the Indian Law and all the authorities.

[**LORD HALDANE:** The whole question is whether you have to give credit for the profit you made on the re-sale of the shares?]

Sir Erle Richards: Yes.

[**LORD HALDANE:** That is the whole point?]

[**LORD WRENBURY:** I suppose the position is that on the 30th December you were entitled to take either of two courses. You could have said, "I shall keep the shares and charge you the difference between the contract price and the market price, and these properties will be mine." You could have said, "the shares are actually yours; I am going to avail myself of a clause in the contract and sell them." That must mean, "I am going to sell them as yours"; the man does not want authority to sell his own shares; if he is going to re-sell he sells the risk to somebody else.]

Sir Erle Richards: Would it be quite so; was not the auction option in the contract note a way of fixing the damages? I do not think the shares could have been held to pass,

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[LORD WRENBURY: The legal title would not pass; I said "contractually."]

Sir Erle Richards: I thought that one view and the true view of that contract note was that it gave the seller a way of fixing the damages; he could sell by auction. My view on that contract note, which I submit for your Lordship's consideration is, that it is giving a remedy to the seller if he likes to settle the damages.

[LORD HALDANE: An extra remedy?]

Sir Erle Richards: An extra remedy, and it is certainly a severe remedy; of course he may not have the money to hold the shares.

[LORD HALDANE: Your point is that there are two remedies. One which the ordinary law gives, the difference between the market price and the price fixed by the contract, and the other loss on the re-sale, and that the second is an option.]

Sir Erle Richards: Yes.

[LORD HALDANE: Your case is, the whole of the relations between you and the purchaser came to an end on the date of due delivery.]

Sir Erle Richards: Yes, that is it. I have various remedies and I have adopted this one.

[LORD HALDANE: What does section 107 of the Indian Contract Act say?]

Sir Erle Richards: Section 107 is a section which gives the seller who has a right of lien or stoppage *in transitu*, a right of sale.

[MR. AMEER ALI: When the buyer refuses to take.]

Sir Erle Richards: That comes at the end of a series of sections which deal with the seller's lien.

[LORD HALDANE: The buyer must bear any loss under that, but is not entitled to any profit.]

Sir Erle Richards: Yes, and the buyer is not entitled to any profit which occurs by such re-sale.

[LORD HALDANE: I suppose that means he is to get the benefit of any profit in diminution of loss which diminishes what otherwise would be the loss.]

Sir Erle Richards: I think I should have to say that would not be a loss.

[LORD HALDANE: I think that is only what it means.]

Sir Erle Richards: It is only where there is a right of lien or stoppage *in transitu*. It was on that point that I asked your Lordship to glance at the sections before that, which begin at section 95. It is a budget of sections beginning with "seller's lien" and it deals with what lien a seller has. If your Lordship passes on, you come to the seller's right of stoppage *in transitu* or stoppage *in transit*, as it is called in the Indian Act. I think that begins at section 99.

[LORD HALDANE: Does this apply to shares?]

[MR. AMEER ALI: To everything.]

[LORD HALDANE: If so, there is a lien on shares for the price.]

Sir Erle Richards: If the property has passed, but I do not think the property had passed. With great respect I doubt whether section 107 applies to this case at all.

[LORD HALDANE: I suppose you say that no property ever passed, and there was no question of lien.]

Sir Erle Richards: That is why I called attention to the earlier sections of the Act where it is dealing with seller's lien and stoppage *in transit*, and it gives the seller in those two cases certain rights. It says in section 107, in those two cases of lien and stoppage, he has a right which he would not have at common law, to sell.

[LORD WRENBURY: Where the seller is in peril, he is protected by a lien on the goods or by a right of stoppage *in transitu*, but this seller never sold the shares or parted with them; they were registered in his name.]

[MR. AMEER ALI: Does the Indian Contract Act make any difference with regard to property?]

Sir Erle Richards: I do not think so. Shares are included in the definition of goods. I think, the whole point is covered by section 73. My comment and my submission for your Lordships' consideration is that section 107 does not apply to this case.

[LORD HALDANE: You have a lien when the goods are *in transitu* or when in the purchaser's hands still.]

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Sir Erle Richards: Then he gets a statutory right to sell, but it does not apply to the ordinary case of non-delivery at all I should have thought. That is my submission.

[LORD WRENBURY: Assume for a moment that it does apply, the section provides that the buyer is not entitled to make a profit.]

Sir Erle Richards: I think that must be so. I think that is the construction. It is before your Lordships

[LORD HALDANE: It would hit you if that section applied, because you would have to give credit for the diminution in loss occasioned by the shares being sold at a profit.]

Sir Erle Richards: I am really not concerned with that, I submit.

[LORD HALDANE: That is your other point, but if you were concerned with it, would not there be something in it? Would not it wipe out all the damages?]

[SIR JOHN EDGE: It would wipe out a great part of the damage; the buyer then would only lose if the seller made any loss on the result.]

Sir Erle Richards: I have a considerable balance that I have recovered at any rate. What I say is that section 107 has nothing to do with it, and does not apply at all; and as my learned friend, Mr. Coltman, is good enough to point out, it has always been construed that section 107 is an alternative remedy which you can apply if you like.

The cases referred to in the Chief Court's judgment are of a wholly different character. One is a case of wrongful dismissal, where a man was dismissed two years before the expiration of his contract, and the Court said he must not take as damages all the profits he would have derived from the payments for his services for those two years, because he had his personal freedom for those two years, and he must find out what that was worth and deduct that. These are all cases with reference to a contract which is running on.

[SIR JOHN EDGE: The charter-party case is nothing to do with it].

Sir Erle Richards: The rule, I submit, is perfectly clear where you have a mercantile security.

[LORD HALDANE: There is apt to be a good deal of confusion in dealing with these cases on the measure of damages; for instance, certain special rules have been laid down in the case of a breach of covenant to repair or to carry out the terms of a building lease. Again, in some of the shipping cases and charter-party cases, a different rule has been laid down. The whole matter came before the House of Lords in a case I remember of the *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited* (1), where we examined the question as to when you can take mitigating circumstances into account in estimating the measure of damages.]

Sir Erle Richards: May I remind your Lordship of a later case in which your Lordship gave judgment, *Williams Brothers v. Ed. T. Agius Limited* (2)?

[LORD HALDANE: That was a case in which we considered in the House of Lords the rule in *Rodocanachi v. Milburn* (3); that is the other way round. That is a case where a man contracts to buy and sues for breach of contract to sell to him, and it is held that the measure of damages is what he has to pay in the market on the day on which he gets the goods; that is not to be interfered with by anything subsequent. There are the special cases dealt with in the earlier case in the House of Lords of the *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London, Limited* (1). You say it is the analogy of *Rodocanachi v. Milburn* (3).]

Sir Erle Richards: I think it has always been laid down quite clearly, I submit it has, that in dealing with the breach of contract of sale of a mercantile security, you go by the market price and have the damages at the time.

[LORD HALDANE: You cannot lay it down rigidly; in the case in the House of Lords it was held that the *British Westinghouse Company* contracted to supply certain motors to the *Metropolitan Electric Railway* (1) (1912) A. C. 673; 81 L. J. K. B. 132; 107 L. T. 325; 56 S. J. 734.
(2) (1914) A. C. 510; 83 L. J. K. B. 715; 110 L. T. 865; 19 Com. Cas. 200, 58 S. J. 377; 30 T. L. R. 351.
(3) 18 Q. B. D. 67; 56 L. J. Q. B. 202; 56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100.

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Company and they had broken their contract, they had not supplied the quantity in time; thereupon the Electric Railway Company were really very glad, because they discovered in the meantime that there were other motors which had been invented since and put on the market which very greatly reduced the working cost, and the breach of their contract enabled them to refuse to go on with the Westinghouse Company and to buy the other motors which saved them a great deal of money. The breach of contract was a great profit, and we held that that must be taken into account because the transactions were so interconnected.]

Sir Erle Richards: I remember that case and I have it here.

[LORD HALDANE: That was an exception to the general rule. We said there were other exceptions; a covenant to repair, for instance, stood on a different footing.]

Sir Erle Richards: The landlord may have pulled down his house, but he is entitled to recover.

[LORD HALDANE: We held you take that into account; we did not touch the ordinary rule in *Rodocanachi v. Milburn* (3), the action for the sale of goods; in *Williams Brothers v. Ed. T. Agius Limited* (2), we affirmed that.]

Sir Erle Richards: I am obliged to your Lordship; I do not know that I need discuss it further, because I submit to your Lordships that *William Brothers v. Ed. T. Agius Limited* (2), affirmed the rule, and your Lordship in that case affirmed the judgment of Lord Esher in a case called *Rodocanachi v. Milburn* (3).

[LORD HALDANE: That, as I said, was the other way round.]

Sir Erle Richards: Yes, but it is still the same principle, I thought perhaps the one way of putting it, is that where you have got a perfectly clear case of market value, then you have got your damages absolutely ascertained, in the case of the motors, and so on, but where you have got no market value you have to look at something which will help you to find market value.

[LORD HALDANE: Where is the motors case reported?]

Sir Erle Richards: In (1912) A. C. 673. I think I might begin the submission I wish to make on the point of law by referring to the Indian Contract Act, which of course

governs here, and I submit, it puts the rule quite clearly if your Lordship would be kind enough to refer to section 73 of that Act. I shall submit to your Lordship that *British Westinghouse* case (1) is on another point.

[LORD HALDANE: I do not suggest it is not, but what I want is to get the principle quite clear. It is not the case that in every instance of delivery, you have simply to look at the price in the market and compare it with the other price; there are exceptions, and in the *British Westinghouse* case (1), one of the exceptions was recognised. That does not at all necessarily touch the case you are dealing with. This is the way it was laid down on page 688:—"The quantum of damage is a question of fact, and the only guidance the law can give, is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The Judges who give guidance to Juries in these cases, have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity. Subject to these observations, I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get, is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps." In other words, you were bound to sell these shares as on the day when the contract was broken you could not have waited and, if they had gone down further, claimed more. Then in the words of Lord Justice James in *Dunkirk Colliery Company v. Lever* (4), "The person who has broken the contract, is not to be exposed to additional cost by

(4) 9 Ch. D. 20; 59 L. T. 239; 26 W. R. 841.

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reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business". As Lord Justice James indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business, he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered, may be taken into account even though there was no duty on him to act. Just as when you sell the shares on the day when they ought to have been taken by the plaintiff, you can recover that loss on that day, so if they rise in value on that day, it would go in reduction of the damages. Then: *Staniforth v. Lyall* (5) illustrates this rule. *Staniforth v. Lyall* (5) was the case of a chartered ship where the charterers were to load her; the ship went to New Zealand, but found neither agent nor cargo there, and there was no one there to put goods on board; the owners of the ship made another voyage and they made a profit on that voyage and it was held that that must be taken into account, that they had done what reasonable and prudent people would have done; they did not lay up the ship in New Zealand but they took it back by another route, and because that was the natural and proper course which a prudent business man would take, if they made money, they were held to account for it. In that case, we examined a number of decisions and distinguished them; I need not read it all, but you will notice what is said there. We say there: "The cases as to the measure of damages for breach of a covenant by a lessee to deliver up the demised premises in repair, illustrate yet another class of authorities in which the qualifying rule has been excluded." And we held that in the case in question, it being the natural and reasonable course for the Railway Company as business people to get new motors at

once, and they having made a profit in doing it, it was analogous to what have been your situation if the shares had gone up in value, that there was no damage. I do not think this affects the rule in *Rodocanachi v. Milburn* (3) at all; it was not intended to.

Sir Erle Richards: I submit it was not intended to, and your Lordship will not forget that you re-affirmed *Rodocanachi v. Milburn* (3), two years afterwards, in *Williams Brothers v. Ed. T. Agius Limited* (2). The real point was somewhat analogous to this in this general way that the question was whether the measure of damages was to be the difference between the contract price and the market price or whether you had to look at what happened with regard to re-sale, and so on. It was complicated by the question whether some of the parties had made contracts varying their liability; there was a question of fact about a contract given by a broker Ghiron, and it was very complicated.]

[LORD HALDANE: The pivot is in the last few lines of the first part of the headnote. A contracted to sell to W and W contracted to sell to somebody else, and the question was whether damages ought to have been paid by A to W.]

Sir Erle Richards: May I say on this case that Lord Haldane, I think, has summed up this point at page 520? I am rather anxious to avoid the other question; that deals with the question about the broker's authority. If you would kindly turn to page 520, you will, see Lord Haldane says this:—"My Lords, it was argued for the respondents that, even assuming the appellants to be entitled to claim full damages, from the respondents without deduction, the principle laid down by the Court of Appeal in *Rodocanachi v. Milburn* (3), which was accepted by the Courts below as binding them, was wrong. In that case, it was held that in estimating the damages for non-delivery of goods under a contract, the market value at the date of the breach was the decisive element. In the judgment delivered by Lord Escher, he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance, a contract entered into by the plaintiff with a third party. He said

(5) 7 Bing. 169; 4 M. & P. 529; 9 L. J. (o. s.) C. P. 23; 131 E. R. 65; 83 R. R. 420.

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that if the plaintiff had sold the goods before the breach for more than the market price at that date, he could not recover on that footing, and that it would, therefore, be unjust if the market price did not govern when he had sold for less. This decision is quite in harmony with what was recently said in this House in *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited* (1), where it was pointed out that a subsequent transaction, if it is to be taken into account in mitigating damages, must be one which arises out of transactions naturally attributable to the consequence of the breach, and must not be of an independent character. I agree with the statement of the law in *Rodocanachi v. Milburn* (3), and with the view of this part of the present case taken by all the learned Judges in the Courts below. I will only add on this point that I do not think that the law so laid down, has been affected by section 51 of the Sale of Goods Act, 1893. By sub-section 3 of the section, the general principle is recognised as the rule which obtains *prima facie*, and I do not find in sub-section 2 anything inconsistent with this recognition."

[LORD HALDANE: My recollection is that Lord Moulton put it very concisely at page 530.]

Sir Erle Richards: I was going to ask your Lordship to refer to that.

[LORD HALDANE: "If these were the only facts of the case, the contention of the respondents would be precisely that view of the damages, in the case of an article purchaseable in the market, which was negatived by the decision in *Rodocanachi v. Milburn* (3). That case rests on the sound ground that it is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price." You see what I said was this: The goods are not delivered, the buyer cannot come and say, in making his claim,—before the date of delivery, I sold them at a higher price and I lost profit by the non-delivery. On the other hand, the seller is not entitled to say,—the buyer has sold at a loss and that is to be taken into account on the other side.]

Sir Erle Richards: I was going to read that, but I should have begun a little earlier on page 530, where his Lordship says: "Inasmuch as this is a plain case of a failure to deliver a specified quantity of an article obtainable in the market, the measure of damages is well established. The case comes under the rule laid down in the case of *Rodocanachi v. Milburn* (3), and regularly and repeatedly followed ever since, and ultimately embodied in the Sale of Goods Act, 1893, section 51, sub section 3." I do rely upon *Rodocanachi v. Milburn* (3) because that was the case where the question was whether it was the market value of the goods; it was a case of a purchaser not getting delivery, but the same principle must apply, I suppose.

[LORD HALDANE: They are all subject to what was said by Lord Justice James in the *Dunkirk Colliery Company v. Lever* (4) quoted in the *British Westinghouse* case (1), that the business man, when a business contract is broken, must do the best he can to diminish the loss. In your case you say you did the best, which was to go into the market on the day when delivery ought to have been taken of the shares and to sell them, and you did that. That is your case. Then as I say according to *Rodocanachi v. Milburn* (3), and these other authorities, the defendant had nothing whatever to do with what you did subsequent to the breach. That is the way you put it?]

Sir Erle Richards: Yes, and I say that *Rodocanachi v. Milburn* (3), is in my favour on that view and *Rodocanachi v. Milburn* (3), has the authority of the House of Lords.

Now, my Lords might I call your attention to the sections of the Indian Contract Act? I want to refer to section 73.

[SIR JOHN EDGE: I suppose a higher measure of damages might exist than the market price, if one man had said to the other, I want to buy 500 tons, or whatever it may be, to deliver under a contract at such and such a price that I have already got. That would be a different case.]

Sir Erle Richards: That was the case of the shoes going to Paris.

[SIR JOHN EDGE: The market price would not come in there and you have given notice.]

Sir Erle Richards: Yes, however, let me read section 73.

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[MR. AMEER ALI: What was the meaning of your two letters that you were going to resell them? Will you explain that before you read the section?]

Sir Erle Richards: Frankly I stand on my letter of the 26th February.

[MR. AMEER ALI: You do not stand on the previous letters?]

Sir Erle Richards: No, I now stand on my letter of the 26th February. These negotiations were going on and I took action on the 26th February. Would your Lordships look at section 73 of the Indian Contract Act? It is Act IX of 1872; it is headed "Of the Consequences of Breach of Contract." "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. When an obligation resembling those created by contract, has been incurred and has not been discharged, any person injured by the failure to discharge it, is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract." Then, "Explanation. In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract, must be taken into account."

[LORD HALDANE: That is the principle recognised in the *British Westinghouse* case (1).]

Sir Erle Richards: Yes.

[SIR JOHN EDGE: Also the ship case; they sent the ship to New Zealand and with a homeward charter-party and the charterer refused to take her at New Zealand, the owner did not send the ship home empty; he got another voyage.]

[LORD HALDANE: And as they did make a profit, it was a diminution of the damages.]

[SIR JOHN EDGE: The charter cases do not apply.]

[LORD HALDANE: Just as in the *British Westinghouse* case (1), the Railway Company

got a great advantage, you might, if the shares had gone up very much on the day you resold, because your business was to get the best price on that day.]

Sir Erle Richards: Then I should have had nothing to complain of, but I chose to take the speculation myself, would your Lordship kindly look at the first illustration to section 73: "A contracts to sell and deliver 50 maunds of saltpetre to B at a certain price, to be paid on delivery. A breaks his promise. B is entitled to receive from A by way of compensation the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered."

[LORD HALDANE: That is *Redocanachi v. Milburn* (3).]

Sir Erle Richards: Yes, but I submit to your Lordship, it covers me precisely; it says you are to take the market price.

[LORD WRENBURY: This is the vendor.]

Sir Erle Richards: Yes, but I think there can be no difference.

[LORD WRENBURY: I do not say there is, but it is not this case.]

[LORD HALDANE: It is just the other way on.]

Sir Erle Richards: The same measure of damages must surely apply as between vendor and purchaser. Perhaps, I might read Sir Frederick Pollock's note upon this; he has written a book upon the Indian Contract Act.

[SIR JOHN EDGE: Is it usual to refer to a living author in that way? We have hesitated to adopt it here.]

Sir Erle Richards: Then I will not read it. There is always a difficulty about applying that rule here, for instance, Mr. Mayne is fortunately still alive.

[LORD WRENBURY: Counsel is always capable of getting over that; he says I am not going to read it as Sir Frederick Pollock's opinion, but I will take this as part of my argument.]

[LORD HALDANE: It is not right to read the text-books of living authors, but if there is any point, you can give it to us as part of your argument.]

Sir Erle Richards: It is only saying just what I have said, that the market price is to govern, and he quotes authorities some of

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which I can refer to. I submit that covers my case absolutely.

[LORD HALDANE: The illustrations (c) and (d) seem to be very much in point.]

Sir Erle Richards: I was going to read those: "(c) A contracts to buy of B at a stated price 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time but A informs B that he will not accept it." There you have the market price at the time of breach; that is what I rely upon, the same as in (a).]

[LORD HALDANE: You say the principle upon which all those sections rest and upon which *Rodocanachi v. Milburn* (3), rests, is not a denial of what Lord Justice James said about there being the duty of the person whose right is violated to take such reasonable steps as he can, to mitigate the damage to the person who has broken his contract, but they rest on this that it is the proper course for a person who has contracted to sell goods and whose goods have not been accepted, to go into the market as soon as he learns that the contract is broken and to resell the goods; then he discharges the duty of mitigating loss as far as he can, and when he has done that, he can recover the difference and will have to account for the profit if perchance, he has made a profit.]

Sir Erle Richards: I am obliged. That is all his duty and all he has to do in the way of mitigating damages in that case where there is a market.

[LORD HALDANE: After that, if there has been a sale which is quite unconnected with this transaction, or if there has been an opportunity of sale quite unconnected with the transaction, it does not come into account.]

Sir Erle Richards: That really is my whole position. I have read illustration (c) but I think your Lordships will have noticed illustration (d) also.

[MR. AMBER ALI: At what intervals did you sell the shares?]

Sir Erle Richards: The sales went on right up to November, in the year of action; your Lordship will find it on the last page of the record.

[SIR JOHN EDGE: I should like you to draw attention to illustration (d).]

Sir Erle Richards: I was going to read that: "A contracts to buy B's ships for Rs. 60,000 but breaks his promise. A must pay to B by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise." Lord Haldane put it that the prudent man who has to realise then has done his duty so far as mitigation of damages is concerned, and he has no other duty. In other cases, he may have to do more, but when you have the case of a marketable security, it is a thing that has a price in the market and his only duty is to realise then.

[LORD HALDANE: If he makes losses by holding on after the date of the breach of contract, he cannot recover the extra loss.]

Sir Erle Richards: No.

[LORD HALDANE: It seems to me all the Chief Justice says is, he gives illustrations of certain cases where the duty of the plaintiff was held to have bound him to take a course which led to mitigation, which mitigation reduced the damages.]

Sir Erle Richards: Yes, I should rather like to refer to the first case he cites, because it is a case which is cited in the books; it is a decision of Lord Denman, Mr. Justice Patteson, Mr. Justice Coleridge and Mr. Justice Erle. It is the case of *Pott v. Flather* (6), which he mentions on page 60, line 4. This is a case the Chief Justice greatly relied upon and I submit, it is in my favour. The headnote is this: "Plaintiffs, on the 20th of October 1845, sold the defendant twenty railway shares at 25s. premium, no day being mentioned for the delivery of the scrip. On the 21st of October, the shares had fallen to 14s. premium, and on that day, but after business hours, the defendant gave the plaintiffs notice that he should not take the shares. On the 22nd, the shares were at 8s. premium, and the price continued to fall till the 6th of December, when the plaintiffs sold the shares at 17s. discount. An action being brought for breach of the defendant's contract:—Held, that the proper measure of damages was the difference in price between the 20th and 22nd of October." There was

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a case where the vendor held on for a time and a loss resulted, and they held he could not recover. Mr. Justice Patteson on page 368 says: "In an action for not delivering, the plaintiff is not bound to purchase other goods, and yet the measure of damages must be the difference in price between the time of the contract and the time of the delivery. But here you can hardly contend that you might wait for any period in order to sell. If the shares had risen in value, and there had, therefore, eventually been a profit on them, your argument would go to show that the defendant could have sued the plaintiffs for the difference. If the plaintiffs could wait for any time in order to see how the market would turn, the reciprocity would be all on one side." The judgments are not reported, but it came to this, that they allowed damages as on the date of the breach and said that must be the rule.

[LORD HALDANE: I suppose what they have said against you here is, you did not sell upon the day when the shares should have been taken. You said, my rights are ascertained, henceforth, we treat the shares as ours, they have never been appropriated to you, they are our shares; you sold them afterwards and you put the money in your pocket. The question is whether that is so connected with the original transaction and arises out of it that it can be deemed to be part of it. That is an instance of the *British Westinghouse* case (1).]

Sir Erle Richards: Yes, I submit it does not and that clearly was not the suggestion of the defendant in his written statement, but I submit I have no obligation to sell at all.

[SIR JOHN EDGE: Some of these shares were sold actually in the August and October following.]

Sir Erle Richards: We sold some through the May; we were able to nurse these shares; the first lot we sold at a loss.

[SIR JOHN EDGE: You sold in July, again in August and again in October.]

Sir Erle Richards: Yes. My Lords, I have very little more to say; I think I have made my point. I submit the business of a vendor of marketable securities when his buyer will not accept—I take that case in order to eliminate other questions—is this: he can

do what he likes with the shares; he is not bound to sell them at all. For the purpose of assessing the damages, you assume that he has sold; that is for the purpose of getting the measure of damages, because that is what I apprehend, we must do to mitigate the loss, but he is not bound to sell; it was open to him to hold them to this day if he liked; there is no obligation on a man to sell at all, and it is said in one of the cases if he does not sell and loses on the risk, he cannot recover it from the buyer. The positions as between him and the seller are fixed once and for all on the result which a prudent man would have obtained if he sold on the day of the breach. That is the whole point, I think.

[LORD WRENBURY: The proposition is this, is it not: Breach of contract by purchaser; the vendor says, I agree there has been breach of contract, contractually these shares were yours, the purchasers, but you have broken it, they are not yours now, they are mine; they are mine, and I have also a right in damages against you. I have two things, *first*, the shares, and *secondly*, a right in damages, and as from that moment, the shares are his and not the purchaser's. If they go up, so much the better for him, if they go down, so much the worse for him; that is his affair.]

Sir Erle Richards: Yes.

[LORD HALDANE: And in estimating the damages, he is bound to do what a prudent person would have done at the date of the breach. He can say it is only a question of estimating the damages: that is my claim for damages and I limit it to that, and then the shares being his by a transaction quite unconnected with the contract of sale, if he makes a profit or makes a loss, so much the worse for him in the second case, so much the better for him in the first case.]

Sir Erle Richards: Really that is my main point.

[SIR JOHN EDGE: You sold in April under the market price of the 30th December; you are not claiming the loss on that.]

Sir Erle Richards: No.

[SIR JOHN EDGE: In April you sold at 4s.]

Sir Erle Richards: Yes.

[SIR JOHN EDGE: The market price at

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the time of the breach was 4s. 3d. you would not be entitled to claim the extra 3d.]

Sir Erle Richards: No.

[LORD HALDANE: Where there is a profit arising by something done naturally in the same transaction, as, for instance, what the Railway Company did in the *British Westinghouse* case (1), or as for instance, what was done in *Staniforth v. Lyall* (5), where the charterers did not take delivery of the ship when it arrived in New Zealand and where the owner made the other voyage and made a profit, there you must bring that into account, but when you have sold or estimated your loss on the day on which the contract is broken, then you have done all that a prudent person is called on to do; you have fulfilled your duty, henceforth the shares are yours and you claim the damages. That is your argument.]

Sir Erle Richards: Yes. I say, of course, if there was a profit arising from what a prudent man would have done in mitigation of damages in selling, I must give credit for that, but as I took the course I did, my case is that the whole matter is crystallised on the day of the breach and you have only to look at what a prudent man would do. I submit whether he elects to hold them or give them away or sell them, are not matters you should take into consideration in estimating the measure of damages. I submit that is fixed once for all by the market value on the day of the breach.

Mr. Coltman: My Lords, I only desire to add a very few words to what my learned leader has said, and these few words will be addressed to section 73 of the Indian Contract Act and the illustrations. I desire to point out that if the judgment of the Appellate Side of the Chief Court of Lower Burma is right, that will make it necessary to add further provisions to section 73, because that would involve this, that in every case you would have to make an enquiry as to what the plaintiff had done with the goods or the shares which he had retained right up to the date of trial, instead of ascertaining the damages in the way set out in the section. That would certainly be a surprising doctrine to introduce, certainly in India, and I think here. As I say, it would really make these illustrations entirely

inconclusive illustrations: (c) would have to be qualified by saying that that would be the measure of damages provided the seller had not at any day before the trial in fact sold the goods for a higher price than the market price on the day of the breach. With regard to the question of his suggested doctrine of election in this case, I would only say one word, and that is, that it was not proved or suggested that the defendant was in any way prejudiced by the change of mind on the part of the plaintiff, because the market price was the same.

[LORD HALDANE: I do not quite know what election means. When a man has two alternatives and is bound to one or other of those alternatives and has to elect between them and he cannot have both, then he elects for one and he may be held to that, but here you say, I suppose, that in no sense is this a case of election.]

Mr. Coltman: I do say in no sense is it a case of election, and on that my position is strengthened because it cannot be suggested that my change of mind in any way prejudiced the defendant.

[LORD WRENCH: Is not this point out somewhat in this way: Under the contract, the buyer was entitled to do something and he elected and said I am going to do it, but, did not, whereupon the purchaser says, I am entitled to the profit of your doing something else. I do not see much sequence of argument in that. It is quite true he said, I am going to re-sell, and if he re-sold, he had to re-sell by auction, but he never did re-sell by auction. What happens? It is said, because he re-sold somehow else; I am entitled to the profits.]

[LORD HALDANE:—He was under no obligation to sell by auction and he put himself under none.]

Mr. Coltman: If your Lordship pleases. That is all I have to say.

Mr. Frank Dodd: My Lords, I appear on behalf of the respondents to this appeal, and I would call your Lordships' attention to what would be the effect, I can only point it out as a consequence, of a successful appeal in this case, namely, that a very well known rule of law would be entirely broken because the rule of law in this and all Courts is that the damages for the breach of a contract, especially

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of a mercantile contract, must be such a sum as will compensate the person against whom the breach has been made for any loss or damage which he has suffered and which naturally flowed from the breach.

[LORD HALDANE: But you must have some day at which the settlement is ascertained.]

Mr. Frank Dodd: I am going to suggest that, I am not endeavouring to evade it, there must be a date.

[LORD HALDANE: I only took exception to your statement of the principle because the date is the material point, and you did not mention the date.]

Mr. Frank Dodd: I was going to say a reasonable date is an absolutely essential point. I cannot go on and assume that because the man took the shares to himself, and kept them for a twelve-month and then, and then only, was able to make a profit, that I am entitled to come at the end of that period and say that that part of that profit belonged to me and was mine.

[LORD HALDANE: Any more than he would be entitled to claim the loss if he waited twelve-months and made a loss?]

Mr. Frank Dodd: Exactly so. There is no dispute about the breach on the 30th or 31st December, the due date; there can be no dispute about the intention of the appellant after that date, it is manifested by his letters which go on to the 4th January.

[LORD HALDANE: You reminded me that the date of due delivery was the 30th December; the date on which the first actual sale was made was what?]

Mr. Frank Dodd: The 28th February.

[LORD HALDANE: More than two months later?]

Mr. Frank Dodd: Exactly two months later.

[LORD HALDANE: The damages claimed, of course are on the 30th December, as ascertained on that date?]

Mr. Frank Dodd: Yes.

[LORD HALDANE: Now there were sales upon the 28th February: What do you say about that?]

Mr. Frank Dodd: There was one in March, the proceedings commenced in March, and I say all those proceedings, certainly up to the proceedings on the 22nd March, were proceedings pursuant to the notice given on the 30th December and repeated down

to the 4th January pending the negotiations which had been taking place between the parties.

[LORD WRENBURY: The 26th February was quite the other way. On the 26th February, the vendor in substance said: I am not going to sell, I am going to claim the difference between market price and contract price against you on the 30th December?]

Mr. Frank Dodd: The letter says so; at that time I suggest he had no right to go back: I want to suggest that.

[LORD HALDANE: You are going to put the case I understand it in this way, that the duty of a prudent man was to take whatever was the right course. On the 30th December, he might, if he had liked, have said: I will take the market value and claim on that footing, and if I suffer loss subsequently that is for me to bear, not for the defendant. But he may also say: The prudent course to take is to hold the shares and watch my opportunity; it is better for you and me that I should do that, and then he subsequently sells; you have to make out that it is *mutu cont extu* with the original transaction.]

[LORD WRENBURY: Do you say he said, I am going to hold the shares and sell them for your benefit only if the market rises?]

Mr. Frank Dodd: I cannot say he said that.

[LORD WRENBURY: He said, "I am going to sell by auction on the 2nd", three days hence.]

Mr. Frank Dodd: Then on the 4th January he said, "We shall follow the course indicated, but did not"; there were negotiations going on for the purpose so far as I can make out, until the 26th February.

[LORD HALDANE: I do not think he is to be tied to his statement that he was going to sell by auction, except as an admission that that was a course a reasonable and prudent man would have taken; he was under no contract or duty.]

[LORD WRENBURY: His understanding of it was, "I am going to sell by auction," and I apprehend if you could say if he had sold by auction, he would have

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got 5s. 6d. then you would have a very good case.]

Mr. *Frank Dodd*: I am not bound to use the words "by auction." By his contract he is limited to auction. By the 107th section of the Indian Contract Act he is entitled to sell, which is a different matter. Certainly the learned Judge in the first instance seems to have been clearly of opinion that what they were doing was a sale under the 107th section. The Officiating Chief Justice mentions it in his judgment. My point is this, if there was a time limit of sales of any kind at all it was clearly passed over until the 26th February. I think the sale in November is shown on the other side to have been of a large block of shares part of which shares were Mr. Jamal's who had nothing to do with this transaction. There were 1299 out of the last block in November; that admittedly had nothing to do with this.

[SIR JOHN EDGE: When do you say these people ought to have sold?]

Mr. *Frank Dodd*: They could not sell while negotiations were going on.

[SIR JOHN EDGE: If there were no negotiations going on, when must they have sold?]

Mr. *Frank Dodd*: If there had been none they should have sold on the day after the 4th January.

[SIR JOHN EDGE: They might have endeavoured to sell at once.]

[LORD HALDANE: On the 30th December.]

Mr. *Frank Dodd*: I should say they could have sold on the 1st January.

[SIR JOHN EDGE: It is not in dispute that the difference between the market price and the contract price on the 1st January is 4s 3d.]

Mr. *Frank Dodd*: May I correct myself? They could not have sold on the 1st January because three of the contracts were made pursuant to the rules of the Rangoon Stock Exchange and they had to wait till the next sale day on the Stock Exchange.

[MR. AMEER ALI: On the 4th January; they gave seven days by the letter.]

Mr. *Frank Dodd*: Yes, after that they seem to have negotiated, and certainly while negotiations were going on they could not have possibly sold.

[SIR JOHN EDGE: I am not so sure of that. When do you say they were bound to sell?]

Mr. *Frank Dodd*: Bound to sell at any reasonable time after the parties were completely at issue.

[SIR JOHN EDGE: At any reasonable time after the issue was joined in this suit.]

Mr. *Frank Dodd*: No, after the parties were at issue and it was obvious a settlement could not be arrived at.

[SIR JOHN EDGE: They were at issue on the 26th of February.]

Mr. *Frank Dodd*: On the 28th of February these gentlemen started and sold some.

[LORD HALDANE: Is it your case that they got into negotiations and they came to an agreement that what a prudent person would do would be to negotiate and not to sell on the 30th of December or immediately thereafter, but to go on and wait for an opportunity? Is that your case?]

Mr. *Frank Dodd*: I would like your Lordships, if I dared, to accept that as my case, but I dare not say that to your Lordships.

[SIR JOHN EDGE: I want to understand your case. On your case if the market price of the shares had fallen to 3s. on the 28th of February, would they have been enabled to claim the difference between the 3s. and the 12s. from you?]

Mr. *Frank Dodd*: I think so.

[LORD HALDANE: You must say that.]

Mr. *Frank Dodd*: I do say it.

[LORD HALDANE: You cannot help yourself. Then you get so very near all the things that were put by Lord Justice Brett in *Rodocanachi v. Milburn* (3) as difficulties.]

Mr. *Frank Dodd*: The question is if there is a breach of a contract and by a course of contract between the two parties the date for determining the right which accrued upon the breach of contract has been postponed, on whichever side it falls that postponement is an element which must be considered in the judgment. It is

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perfectly clear in this case that 4s. 3d. was the price on the 28th of February and it was on the 30th of December?

[LORD HALDANE: Now, just let us see, to get at distinctly what happened: Shall we take your case on the documents on the letters? In the letter of the 30th of December the Solicitors say that the seller will be forced to sell the shares by public auction on or about the 2nd proximo; that is the proposal, but they did not do that.]

Mr. Frank Dodd: He could not unless there was a public auction sale.

[LORD WRENBURY: It is "on or about."]

Mr. Frank Dodd: There is to be a public auction sale in three of the contracts.

[LORD WRENBURY: He says he will sell on or about.]

Mr. Frank Dodd: Yes.

[LORD HALDANE: You said he could not sell on the 2nd.]

Mr. Frank Dodd: He would have to wait until there was a sale. I admit his right to sell if there had been no negotiations pending on the 1st January if he had the means of complying with the contract.

[SIR JOHN EDGE: Where do you raise this point in your written statement?]

[LORD HALDANE: He does not raise it.]

Mr. Frank Dodd: No, I do not raise it.

[LORD HALDANE: Anything that is argued we will take as open on the somewhat general terms of the written statement. You did not raise that.]

Mr. Frank Dodd: No.

[SIR JOHN EDGE: You simply deny the proposition of the other side, you put them to proof.]

Mr. Frank Dodd: According to the rules of pleading, we never plead to damages.

[SIR JOHN EDGE: I am perfectly well aware of that: You were pleading an alternative arrangement by which his right to charge you with a breach of contract was postponed. Where did you plead that?]

Mr. Frank Dodd: It is not pleaded.

[SIR JOHN EDGE: That you would have to plead; that would be a confession and avoidance, would it not?]

Mr. Frank Dodd: I doubt whether it was a material plea, with the pleadings put in, as they were after the matters had been going on.

[SIR JOHN EDGE: It probably would have been material to the decision of the case, but you now allege that owing to some arrangement or negotiation going on between them he could not elect to treat the contract as broken on the 30th of December; he would have to wait until after the 26th of February.]

Mr. Frank Dodd: My Lords, I do not want to go through the cases with regard to that, and I agree, if I may respectfully say so, with the suggestion that this is a case which might be discussed purely and simply according to the Indian Law, and in that Indian Law at all events the rule as to contract price and market price has not been so embodied as it has been embodied into the English Law, because you cannot find that rule in any part of the Indian Contract Act, although it appears in its double form in sections 50 and 51 of the English Sale of Goods Act, 1893. Certainly the rule is one which was commonly regarded as a rule between vendor and purchaser but which is not in fact a rule between vendor and purchaser. In India you must come according to section 73. I will not ask your Lordships to let me read that again because you have already heard it. That only says that he shall have the damages which reasonably and naturally follow from the purchase, without any assistance of a fixed rule that *prima facie* the damages are to be calculated as the difference between the two respective prices. This is absolutely and definitely fixed as the first thing to be considered by any Tribunal and if you remember the date of the judgment, which is in December, long after the whole of these sales had been passed; I submit with great respect any Judge charging an English Jury in a similar case to this would have called attention to the fact that this man had made these profits and the Jury might have had that question put to them.

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[SIR JOHN EDGE: He probably would have landed them in the Court of Appeal.]

Mr. Frank Dodd: No, if he called the attention of the Jury to the question as to whether or not the man had taken these over as his own shares and took his own risk, I think he would not have landed them in the Court of Appeal if he had called the attention of the Jury to that, or if the Judge acting as a Jury in this case had properly directed himself or called attention to the fact that this sum which they awarded, the absolute loss out of pocket, was the real measure of damages which Mr. Jamal the appellant here had suffered.

L (Their Lordships conferred).

Sir Erle Richards was not called upon to reply.

JUDGMENT.

LORD WRENBURY.—Under six contracts made at various dates between April and August 1911 the plaintiff (the appellant) was seller to the defendants of certain 23,500 shares at prices amounting in the aggregate to Rs. 1,84,125-10. The date for delivery was the 20th December 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran: "by auction at the Exchange at the next meeting," &c.

By the 30th December the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding: "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo, responsible for all losses sustained thereby." The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs. 75,925-10, and called for a transfer of the shares. On the 2nd January 1912 the seller repudiated the claim to a set-off, and repeated: "We have now to give you notice that our client intends to re-sell

these shares and to institute a suit against you for the recovery of any loss which may result from that course." The purchasers stopped payment of the cheques, and nothing turns upon the fact that they were given.

Negotiations ensued between the parties which extended to 26th February 1912. On that day the seller, by his agents, wrote to the purchasers a letter as follows:—

"71, Phayre Street, Rangoon,

"26th February 1912.

"Messrs. Moolla Dawood and Sons.

"Dear Sirs,

"We are instructed by Mr. A. K. A. S. Jamal that he had not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company, Limited, at your request, in order that his claim might, if possible, be settled. It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 1,09,219-6 is paid to him by way of compensation before the end of this week.

"The amount claimed is arrived at by deducting Rs. 74,906-4, the value of 23,500 shares at 4s. 3d., from Rs. 1,84,125-10, the agreed price of the shares.

"Yours faithfully,

"GILES AND COLTMAN."

The 4s. 3d. a share there mentioned was the market price of the shares on the 30th December.

On the 22nd March the seller commenced a suit to recover Rs. 1,09,218-12 as damages for breach measured by the difference between the contract price of the shares and their market price (4s. 3d. a share) on the date of the breach, the 30th December 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs. 1,09,219-6 mentioned in the letter.

Immediately after the letter of the 26th February 1912, viz., on the 28th February, the seller commenced to make sale of the shares. He sold them all at various dates from the 28th February onwards. In one

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case the sale was at less than 4s. 3d. (viz., at 4s.). In one case it was at 4s. 3d. In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realised, by giving him credit in reduction of the damages for the increased prices in fact realised over the market price at the 30th December, the date of the breach. The appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to re-sale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was in their Lordships' opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price, but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original Judge that the plaintiff's letters of the 30th December and 2nd January amounted to an election to take a measure of damages to be arrived at by a re-sale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to re-sale.

The question, therefore, is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is and if the purchaser is entitled to the benefit

of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth v. Lyall* (5) is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract. *Yates v. Whyte* (7), *Bradburn v. Great Western Railway* (8) and *Jebson v. East and West India Dock Co.* (9).

The decision in *Rodocanachi v. Milburn* (3), that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams Brothers v. Ed. T. Agius Limited* (2). The breach in *Rodocanachi v. Milburn* (3) was breach by the seller to deliver, but in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer.

The respondents further contend that sections 73 and 107 of the Indian Contract Act, or one of them, is in their favour. As regards section 107 their Lordships are unable to see that it has any application in

(7) (1838) 4 Bing (N. C.) 272; 5 Scott 640; 7 L. J. C. P. 116; 44 R. R. 708; 132 E. R. 793.

(8) (1874) 10 Ex 1; 44 L. J. Ex. 9; 31 L. T. 464; 23 W. R. 68.

(9) (1875) 10 C. P. 300; 44 L. J. C. P. 181; 32 L. T. 327; 23 W. R. 624; 2 Asp. M. C. 505.

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the present case. It deals with cases in which a seller has a lien on goods or has stopped them *in transitu*. The section follows upon sections dealing with those subject-matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares.

As regards section 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the Officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares, and became entitled to damages such as the law allows. The first of these two properties, *viz.*, the shares, he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the original Court and in the Appeal Court discharged, and judgment entered for the plaintiff according to his plaint, and that the respondents ought to pay the costs in the Courts below and of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. Arnold and Sons.

Solicitors for the Respondents: Messrs. Bramall and White.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No 4 OF 1913.

June 30, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Richardson.

Mokunt KRISHN DOYAL GIR—

PLAINTIFF—APPELLANT

versus

IRSHAD ALI KHAN AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Bengal Revenue Sales Act (XI of 1859), s. 23—Revenue sale of estate and in arrears, effect of—Suit for recovery—Limitation—Letters Patent, s. 15—Judgment, meaning of—Criminal Procedure Code (Act I of 1898), s. 145, order under, admissibility of Evidence—Admission, value of—Limitation Act (IX of 1908), Sec. 1, Act. 142—Civil Procedure Code (Act V of 1908), s. 98—Appeal—Difference of opinion on some points—Peaceful.

Where a share of an estate, being in arrears of revenue was sold by the Collector under Act XI of 1859 and was purchased by the defendant, who thereupon dispossessed the proprietor:

Held, (Per Curiam), that Article 142 of the Limitation Act, 1908, governed the proprietor's suit for recovery of its possession [p. 972, col. 2; p. 978, col. 1.]

Per Jenkins, C. J.—The value in fact of that which is in form an admission must depend upon the surrounding circumstances. [p. 971, col. 1.]

Where there is no arrear of revenue in respect of an estate, there is no condition justifying its sale and a suit for setting aside the sale is not necessary. [p. 972, col. 2.]

Per Mookerjee, J.—The term 'judgment' as used in clause 15 of the Letters Patent signifies what is now understood by the term "decree" or "order." [p. 973, col. 1.]

In the matter of the petition of Huruck Singh, 11 W. R. 107 and *Huruck Singh v. Toolsee Ram*, 12 W. R. 454; 5 B. L. R. 47, referred to.

Where in an appeal the Judges of the Appellate Court are agreed that the decree of the Court below is erroneous to a certain extent, but as to the rest they are equally divided in opinion, the decree appealed from is bound to be reversed to that extent only but as to the rest it is confirmed under section 98, Civil Procedure Code. [p. 973, col. 2.]

Hussini Begum v. Collector of Murzafargarh, 11 A. 176; A. W. N. (1889) 27; 13 Ind. Jur. 316; *Jehangir v. Secretary of State*, 6 Bom. L. R. 31 at p. 207, distinguished.

Appaji Bhira v. Shiral Khubchand, 3 B. 204; *Sri Gridharaji Maharaj Tickait v. Parashotum*, 10 C. 814; *Lala Surja Prasad v. Golab Chand*, 27 C. 724; 4 C. W. N. 701; *Ashutosh Roy v. Harinarain Singh*, 3 C. L. J. 143; *Devchand v. Hirchand*, 13 B. 449; *Keshu v. Pandurang v. Vinayak Hari*, 18 B. 355; *Bammidi Bayya Naidu v. Bammidi Paradesi Naidu*, 10 Ind. Cas. 75; 21 M. L. J. 344; 35 M. 216; 10 M. L. T. 533, applied.

Section 22 of Act XI of 1859 applies not only where the sale has been irregularly conducted, but also where the sale has been illegal as held in contravention of an express provision for exemption, but the principle has no application where the pro-

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erty sold is not in arrear; the existence of an arrear is a condition precedent to the exercise of statutory authority by the Collector. A sale which is beyond the statutory authority vested in a Collector cannot prejudice the rights of the proprietor. [p. 977, cols. 1 & 2.]

Balkishn Das v. Simpson, 25 L. A. 151; 25 C. 833; 2 C. W. N. 513; *Harkha Singh v. Banaidhar Singh*, 25 C. 876; 2 C. W. N. 360; *Jogendra Mohan Sen v. Uma Nath Guha*, 35 C. 636; 8 C. L. J. 41; 12 C. W. N. 646; *Mohamed Jan v. Ganga Bichan Singh*, 10 Ind. Cas. 272; 15 C. W. N. 143; 9 M. L. J. 346; 8 A. L. J. 480; 13 Bom. L. R. 43; (1911) 2 M. W. N. 277; 21 M. L. J. 1148; 13 C. L. J. 525; 3 C. 537 (P. C.); *Ganga Pershad v. Irshad Ali*, 13 Ind. Cas. 659; 15 C. L. J. 54; *Hamid Hossein v. Mukhdum Raza*, 32 C. 229; 9 C. W. N. 300; *Judramani Dasg v. Prigna Nath Chakravarti*, 21 Ind. Cas. 953; 18 C. W. N. 490; 18 C. L. J. 515, relied upon.

A finding in the order of a Criminal Court under section 145, Criminal Procedure Code, is not admissible in evidence, though the order itself is admissible for a limited purpose, namely, to show the parties in dispute, the land in dispute, and the person declared entitled to retain possession. [p. 977, col. 2.]

Dinamani Choudhram v. Rupa Mohini Choudhram, 29 C. 187; 29 L. A. 24; 6 C. W. N. 386; 12 M. L. J. 83, relied upon.

Letters Patent Appeal against the decree of Mr. Justice Walmsley, dated the 5th December 1913, arising from difference of opinion between Mr. Justice N. R. Chatterjea and Mr. Justice Walmsley, in Appeal from Original Decree No. 510 of 1908, against the decree of the Subordinate Judge, First Court, of Gaya, dated the 10th June 1908.

FACTS of the case appear from the judgment of Sir Lawrence Jenkins, C. J. The following is the supplementary judgment of N. R. Chatterjea, J., on the question as to the form of the decree to be drawn up in the case:—

"This is an application on behalf of the appellant praying that a decree may be drawn up in the above appeal in accordance with the provisions of section 36 of the Letters Patent under the following circumstances.

The appeal was heard by me sitting with Mr. Justice Walmsley. There was a difference of opinion between us. I was of opinion that the suit and the appeal should be decreed in full, while Walmsley, J., was of opinion that the decree of the Court below should be reversed only to a small extent. The appeal having turned entirely on questions of fact no reference could be made under the proviso to section 98 of the Code. Then the question arose as to the decree to be prepared on the judgments. There was no time for having

the question argued fully as it was on the 4th September, the last day of sitting of the Court before the vacation, and Mr. Justice Walmsley was to cease to be a Judge of this Court from the next day.

Under these circumstances, we intimated that no decree would be prepared and that the parties might take such steps as they thought proper. On the re-opening of the Court after the vacation the present application was made on behalf of the appellant on the 19th November and the parties have since been heard in the matter.

An objection was raised on behalf of the respondent that I have no power to hear the application and that an order having been made both by Walmsley, J., and myself that no decree would be prepared, I alone have no power to decide whether any and what decree should be drawn up. But the note made by the Bench Clerk that no decree will be prepared was made by him for the information of the office, which I understand does not receive a judgment without a decree. The note was not signed by Walmsley, J., nor by me. However that may be, every judgment must be followed by a decree and an order made by Walmsley, J., and myself can be set aside on an application for review by me sitting alone now that Walmsley, J., has ceased to be a Judge of this Court. It is true the present application is not in terms an application for review, but it was filed within the period allowed for an application for review and bears the proper Court-fee. Under the circumstances, the application may be treated as an application for review of the order. I am accordingly of opinion that I have got the power to hear this application and that I ought to direct a decree to be drawn up.

Then the question is, how is the decree to be drawn up on the judgment in this case. Section 98 of the Civil Procedure Code provides that when an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges and where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be affirmed. It is contended on behalf

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of the appellant that whereas in the present case the appeal is heard by a Bench of two Judges and one Judge is for reversing the decree of the Court below in its entirety and the other is for varying it, there is and there can be no majority concurring in a judgment varying or reversing the decree appealed from, and that such a case is not contemplated by section 95 of the Code. It is also contended that section 37 of the Letters Patent is superseded by section 98 of the Code only where the provisions of the latter section are applicable and that section 33 of the Letters Patent is applicable to cases not provided for by section 98 of the Code. There can be no doubt that section 36 of the Letters Patent would be applicable to cases not provided for by section 98 of the Code, but section 98 is the only section dealing with appeals and I am of opinion that it applies to a case like the present. The effect of the first two paragraphs of section 98 seems to be this. Where there are two Judges and they agree, the decision shall be in accordance with their opinion. Where there are more than two Judges and there is a difference of opinion among them, the decision shall be according to the opinion of the majority, for instance, in a Bench consisting of three Judges where two are of one opinion and the third is of a different opinion. Where the Judges of a Bench consisting of four Judges are equally divided in opinion, there is no majority and in such a case, the decree of the Court below shall be confirmed. Similarly it seems to me that in a case of two Judges being equally divided in opinion, there cannot be any majority and in such a case also the decree of the Court below should be confirmed, in other words, in all cases where there is or can be no majority, the decree of the Court below should be confirmed. But this would be the result where one of the Judges is for reversing or varying the decree and the other for entirely confirming the decree of the Court below. Where, however, one of the Judges is for reversing the decree of the Court below in its entirety and the other for reversing it to some extent (as in the present case), I think the

decree of the Court below cannot be entirely confirmed. There may be cases where one of the two Judges is of opinion that the decree of the Court below should be entirely reversed and the other may be of opinion that it should be reversed to the extent of 15/16ths. Again in a case heard by a Bench of three Judges, one of the Judges may be of opinion that the decree should be reversed in its entirety, the second Judge may be of opinion that it should be reversed to the extent of one-half and the third to the extent of 1/4th only. In these cases, the decree of the Court below cannot, I think, be entirely confirmed. Such cases seem to fall under the first paragraph of section 98 of the Code, and in the illustrations put above, the two Judges, having agreed to the extent of 15/16ths and the three Judges having agreed to the extent of 1/4th, it may be said that there was concurrence to that extent and the decree of the Court below should be reversed or varied accordingly.

There is no decided case on the point. In the case of *Gossami Sri Girdharji v. Romanlalji Gossami* (1), the judgment of the Judge in accordance with that of the Court below prevailed. But in that case although the senior Judge was for reversing the decree of the Court below to some extent, the other Judge was of opinion that the decree of the Court below should be entirely confirmed. That case, therefore, does not cover the present. The construction I have placed on the section would meet such a case as the present and seems to me to be a reasonable construction. I am accordingly of opinion that the decree of the Court below should be reversed to the extent to which both Mr. Justice Walmsley and I were agreed that it should be reversed. The plaintiff's title to 1-anna 6-dams 5-cowris share of the property in dispute will be declared and he will recover possession to the extent of the said share. The rest of the plaintiff's claim will be dismissed. Each party will bear his own costs in both Courts; that having been the opinion of both of us, let a decree be prepared accordingly."

(1) 17 C. 3 at p. 10 (P. C.); 16 I. A. 137; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350.

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Babus Umakali Mukerjee, Atul Chandra Dutt and Sailendra Nath Palit, for the Appellant.

Babu Joges Chunder Roy and Moulvi Mahammad Mustafa Khan, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This suit was instituted by Mohunt Krishna Doyal Gir against Irshad Ali Khan and Ali Nabi, and by the plaint a declaration is sought that the plaintiff is owner of 13 annas of Haria *asli mai dakhili*, Pargana Shergati under *kobalas* dated the 21st February 1888 and 21st February 1889, and under an *ijara* of 12th March 1889 and a *kibala* of the 25th July 1904 is owner of 1 anna 6 *dams* and 5 *corris* and *ijaradar* of 1 anna 13 *dams* 15 *corris*. In other words, he seeks to establish his present right to 16 annas in one capacity or the other and on the strength of this he prays that his possession of the 16 annas may be confirmed or restored to him. This suit was heard by the Subordinate Judge, first Court, Gaya, by whom it was dismissed. The appeal was heard by N. Chatterjea and Walmsley, JJ., who agreed so far that they passed a decree in the plaintiff's favour to the extent of the 1 anna 6 *dams* 5 *corris*. But as to the rest they were at variance, for while Chatterjea, J., was for decreeing the plaintiff's claim in its entirety, Walmsley, J., was for disallowing the rest of his claim. A decree was accordingly drawn up and signed in accordance with the view of Walmsley, J. The plaintiff has appealed from so much of the decree as is not in accordance with the concurrent judgments of both the learned judges. Certain preliminary objections were overruled and we have heard the case on the merits.

In Pargana Shergati, Zilla Gaya, there is a *taluka* named Khaira which belonged in equal shares to Nabi Bukhsh Khan and Mohammed Bukhsh Khan.

On the death of Nabi Bukhsh his 8 annas admittedly devolved or was treated as having devolved as to 5 annas on his daughter Hussaini Bibi and as to 3 annas on Mohammed Bukhsh and his children. It is common ground that the 8 annas of Mohammed in certain villages forming a part of Taluka Khaira passed to the plaintiff under the sale deed

of the 21st February 1888, that the 5 annas of Hussaini so passed under the sale-deed of the 21st February 1889, and that the remaining 3 annas passed for a limited interest under the *ijara* of the 12th March 1889. The plaintiff maintains that among the villages that so passed to him was Harya Manar. This the defendant Irshad Ali Khan contests, and this dispute is the question involved in this litigation. Irshad Ali Khan claims to be the owner of Haria Manar by virtue of a revenue sale to the defendant Ali Nabi as his *benamdar*, and it is not disputed that he acquired this property unless the plaintiff is able to make good his claim that the property was assured to him and that it was included in the separate account opened in the name of his *benamdar*, Bishendhari.

First then I will deal with the question whether Haria Manar did or did not pass to the plaintiff.

This has been treated in the discussion before us as dependant on the true construction of the sale-deeds of 21st February 1888 and 1889. The parcels are described in the first of these two deeds as follows:—

"8 annas out of 16 annas of each of the Mouzahs, Chuahar, Majhar, Dangrajaribigha, Mairakhap and Jaigir Harya, Pargana Shergati, District Gaya, appertaining to Taluk Khaira *mai* with hamlets Chuck, Chukukats, Tola, and Majra known by distinct names or otherwise the *tonzi* number and *jumma sundar* whereof are given below in the *thakbust* map prepared by the compass which has up to date been held and possessed by me without the co-partnership of or interference by any one else." And then there follow general words that may for the present purpose be disregarded. Then at the foot of the deeds are these words:—"Mortgaged properties 8 annas out of 16 annas of each of the Mouzahs (1) Chuahar, (2) Majhar, (3) Dangrajaribigha, (4) Mariakhap, and (5) Jaigir Harya *mai* with hamlets, Chucks and Chakukats, known by distinct names or otherwise, Tolas and Majras appertaining to Taluka Khaira, Pargana Shergati, District Gaya." Then there is this: "Property sold—eight annas out of 16 annas of each of the Mouzahs Chuahar, Majhar, Dangrajaribigha, Mairakhap

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and Jaigir Harya appertaining to Taluk Khaira, Pargana Shergati, District Gaya."

The only other matter to which I need refer is the recital of a prior mortgage of "shares of Mouzah Jaigir Harya." Much the same sort of description is to be found in *Musammât Hussaini Bibi's* sale-deed of the 31st July 1839. There is a recital of negotiations for the sale of 5 annas out of the entire 16 annas of Jaigir Harya and of shares of certain *mouzahs*.

This is followed by a description of the parcels in the operative part of the sale-deed in these terms: "5 annas out of the entire 16 annas of Mouzah Jaigir Harya" and so forth. In the description of the property sold at the foot of the instrument is "Five annas out of the entire 16 annas of Mouzah Jaigir Harya", and so forth. Under the heading of Government Revenue of the property sold is written "Jaigir Harya, Rs. 33-15", and the description of the property at foot is "Five annas of Mouza Jaigir Harya." What then is it that passed under the description "Mouza Jaigir Harya?" To answer this it is necessary first to go back to the Revenue Survey of 1843-44. There we find two separate maps, one of Jaigir and the other of Harya. In these maps each is treated as a *mouza*, Harya lying to the north and Jaigir to the south.

The full name of Harya according to the map is Harya Bank Unair Churwadee Choor. Its area is shown as 786 a. 3r. 22p. The village is described as not inhabited and of the land only 100 *bighas* were cultivated, the rest being jungle. The area of Jaigir in its map is given as 3356, of which 400 *bighas* are said to be cultivated. The village is described as inhabited. In the Mahalwar Register we find grouped together Jaigir Harya, Soonwar *Mai zamin* Pirtabal, and Pukureah *zamin* Churadih Chardaha *suoni hissa* as one unit with an area of 4,515a.-1r. 3p. The composition of this area has become apparent in the course of the discussion before us. Separate maps of Soonwar and Pukureah have been produced by the respondents in which the areas of these two items are shown as 253 and 119 acres respectively and it is thus that the area of 4,516 acres is reached. In a word, then, this is what appears from

an examination of the Survey proceedings. Four separate maps are given of Jaigir Harya, Soonwar and Pukureah and to this extent they are treated as 4 distinct *mouzahs*. But it further appears that in the Mahalwar Register they were grouped together as a single composite unit having a single area of 4,516 acres, a figure which corresponds with the sum of the areas of the several items Jaigir Harya, Soonwar and Pukureah. Though Jaigir and Harya are contiguous Soonwar and Pukureah are at some distance away from them, the one lying to the north-west and the other to the south-west of Jaigir Harya.

And it may be observed of these last two that as things stood at the survey, Jaigir was the more important by reason of its larger area and its being inhabited. So far then as the survey materials go they lend themselves to the idea that the expression Jaigir Harya would mean the two items of the composite unit bearing those names, Harya being in the nature of an appanage to Jaigir, the paramount member of the group.

This brings me to certain registration proceedings. On the 26th April 1877 an application was preferred by Mohammed Bukhs Khan for registration and mutation of names. One of the items there mentioned is "Jaigir Harya Soonwar Bang *zamin* Chowaddih 8 annas—Pukureah Chardaha *zamin* Partapi 8 annas." On this the record-keeper on the 27th August 1878 submitted his report, stating that the under-mentioned areas were recorded with separate areas. Among these *mouzahs* was "Jaigir Harya Soorbang *zamin* Partapi Pukureah *zamin* Jorwadih Khurd 1/6th share 4516a. 1r. 3p."

On the 21th of July 1878 a joint *hissawari* petition was presented in which Jaigir and Harya Monwar *main zamin* were separately described and it was followed by the Land Registration decree of the 28th April 1879 in which Mouzah Jaigir and Mouzah Harya Monwar are shown. On the 12th March 1886 *Musammât Hussaini Bibi* presented a petition for opening a separate account.

Among the items in the Schedule to her petition is the following:

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"Mouza Jaigir Harya, Soorbang *zamin* Partapi Pukureah *zamin* of Chorwadib." The Government Revenue of the entire 16 annas is stated to be Rs. 108 odd and the applicants' proportionate share Rs. 33-15, while the area is described as 4,516a. 1r. 3p. This statement of the Government Revenue agrees with the description in *Musammatal Hussaini Bibi's* sale-deed while the area includes Harya as well as Jaigir. Moreover it is inconceivable that the application should not have extended to Harya, and yet it only did so if Harya be included in the description "Mouzah Jaigir Harya." On the 10th July 1888, after the purchase from Mohammad Bukhsh, Bishendhari Gir applied for registration. The name of the *monza's* is given as Jaigir Harya. The record-keeper's report is that to Mahal Khaira appertained: "Mouzah Jaigir Harya Monwar together with *zamin* and other *monzaks*."

The order to the record-keeper dated 31st December 1888 directed entries to be made and the entry as to the proprietary right and share was "8 annas of Mouzah Jaigir Harya Monwar together with *zamin*," a description that appears twice in the Schedule to the order.

On the 7th June 1889, after the purchase from *Musammatal Hussaini*, Bishendhari Gir again applied for registration and mutation of name. There the description is "Mouzah Jaigir Harya" which is repeated by the record-keeper. In a decree of the 9th September 1889 the specification of interest is "5 annas each Jaigir Harya Dangrajaribigha, &c." In an amended petition of 16th January 1890 the description is Jaigir Harya Monwar together with *erazi*. The *sadar jama* is given as Rs. 100 odd but the description of the proportionate area is obviously erroneous, and does not tally with the entire area which is correctly described. The error can probably be traced to a misplaced reproduction of what is shown in Hussaini Bibi's petition.

On the 5th June 1890 it was ordered that separate accounts be opened. This was done after the record-keeper had reported that the petition fulfilled the requirements of section 70 and that the proportionate

amounts of Government Revenue as stated by the petitioner were correct. The *sadar jama* of the joint share was reported to be Rs. 3,333-15-0, and that represents the difference between the Rs. 1,043-5-0 shown in Hussaini Bibi's petition as her proportionate share of Government Revenue and the *sadar jama* of Rs. 4,437-40 shown in the endorsement on the back of that petition.

On the 5th August 1893 Bishendhari Gir preferred a petition for the inclusion of Rs. 1,020-13, the *nizamat* for the separated share of *Musammatal Hussaini Bibi* and others, in the *imlali* share and the description there given is "Mouzah Jaigir Harya."

Then there are the Registers of 1902. They are not the originals but transcripts and their value as throwing light on the problem before us is materially discounted by their manifest inaccuracy.

Thus this Collectorate Register gives 79 acres as the area of Jaigir and 4,516 acres as that of Harya though it is known that these areas were 3,356 and 786 acres respectively. Moreover we further know that 4,516 acres was the area of the composite unit Jaigir Harya, Soorbang and Pakureah. Another instance of hopeless error in this new register is furnished by the area attributed to Kahudag.

In view of these matters I am not disposed to place any great reliance on the fact that in this register there is separate mention of Jaigir Harya Manar and Harya Manar, or to regard it as materially assisting the defendant's case. And I am the more confirmed in this view by the obvious and surer indication of the contents of these earlier registers afforded by the several reports of the record-keepers to which I have alluded. The original registers are not forthcoming for they have been destroyed.

In the proclamation of the 28th April 1904, Jaigir Harya Manar 3 annas is named and Harya Manar including the land 16 annas, and the same descriptions are found in the plaintiff's sale certificate of the 22nd September 1904. But they do not appear to me to add anything to the strength of the case against the plaintiff

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in view of the earlier matters that I have narrated. If they were taken from the erroneous register as is surmised, the error gains nothing by repetition.

A stronger circumstance, however, in the defendant's favour is to be found in certain execution proceedings to which I will now allude. A suit on a mortgage had been instituted by one Baijnath Singh and others against Mohammed Bukhsh and others, of whom Bishendhari Gir was one, for the mortgage and suit included among other things the properties purchased by him. The suit ended in a compromise under which the properties purchased by Bishendhari were exempted from the operation of the mortgage and the decree was limited to the rest of the properties then in suit. Subsequently, Mohant Krishna Doyal Gir, the plaintiff in this suit, obtained an assignment and on the 4th of September 1907 applied for execution of the mortgage-decree. In his application he included among other items a 9 and odd annas share of Harya Manar *maizamin* notwithstanding the exemption.

This is not unreasonably claimed by the defendant as an admission that the exemption did not extend to Harya though it did to Jaigir, and that it is in form such an admission must, I think, be conceded. But the value in fact of that which is in form an admission, must depend on the surrounding circumstances; and though we have no explanation from the witness-box of how Harya came to be included in this application of the 4th September 1907, it is significant that the plaint in the present suit which specifically and exclusively contends that Harya had passed to the plaintiff under the sale-deeds, was filed only two days later, on the 6th September 1907. One may speculate as to the explanation, and wonder whether the inclusion of Harya in the execution application was due to a lack of care or an excess of caution, to an oversight or to a prudent design to have a second string to the Mohant's bow, but the materials before the Court do not permit of any sure conclusion as to this. A comparison, however, of the dates to my mind is destructive of the idea that the execution proceedings amounted to any abandonment of the position asserted by the plaintiff in this suit, or can be

regarded as any real admission that Harya had not passed to the plaintiff. At its worst it is an indiscretion. But it is not enough for the plaintiff to show that Harya was assured to him: he must show a separate account in his favour. The Court's decision on this must be largely dependent on the view it may form as to the title. If title is not shown almost of necessity there could be no separate account. But if title be shown, there would in the circumstances of this case be a strong bias in favour of a separate account.

I have already described the plaintiff's applications for separate registration in discussing what it was that passed to him. From those proceedings it is apparent that the applications and the orders thereon were appropriate and should have resulted in the separate registration sought and directed. It is, however, contended that the actual entries made related only to Jaigir and not to Harya, and in support of this the defendant points more particularly to the heading "Harya Manar" in the register and the absence of any entry in the plaintiff's favour. But as I have already pointed out, this register does not purport to be more than a transcript of the register in which the original entries were made and is patently incorrect.

And apart from that, even in this register the heading under which the plaintiff's name is entered is village Jaigir Harya Manar, and were it not for the later entry "Village Harya Manar *maizamin*" it could hardly be doubted that the first heading referred to Harya as well as Jaigir and was the appropriate place for making the entries directed. How this later entry came to be made does not clearly appear, though it may be easy to guess. But this at any rate seems clear, that it was not made until 1904 and an examination of the original register shows it was made after the entry of Jaigir Harya Manar. There is oral evidence as to Jaigir being popularly known as Jaigir Harya, but it is far from convincing and cannot be regarded as of the same value as the documentary evidence. This was fully recognized in the presentation of his case by the learned and experienced Vakil who represented the defendant. And after all is said and done the salient fact

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stands out that apart from the recent register no instance can be pointed out where Jaigir alone is called Jaigir Harya.

The conclusion to which I come is that the opening of a separate account in respect both of Harya and Jaigir was sought and directed, and that this was intended to be carried out and in fact was carried out by opening an account with the heading "Jaigir Harya Manar" or some such composite title. Therefore I hold that the plaintiff has established title to Harya and a separate account commensurate with his title.

I have so far dealt with the title under the two *kobalas* of February 1888 and 1889 and not with that under the *ijara*. And in view of the defendant's admission before us I need not discuss this *ijara* and its operation, for it was conceded by the Vakil for the respondent that the title under the *ijara* would follow that under the *kobalas*. In fact the *ijara* title was in no way discussed by him.

The next point made by the defendant is that the suit is barred by limitation inasmuch as it was not brought within 12 years of the plaintiff's dispossession.

This is essentially a case where the Court's view of possession would naturally be influenced by its view as to title. As the Subordinate Judge and Walmsley, J., thought title had not been established, it followed almost as of course that they considered possession not proved having regard to the circumstances of the case. Chatterjea, J., having come to a different conclusion as to title, differed naturally as to possession. And at this point I would digress for the purpose of pointing out that the parties placed much more ample materials before Chatterjea, J., and Walmsley, J., than before the Subordinate Judge and of this we have reaped the benefit.

There were proceedings under section 145, Criminal Procedure Code, and it was there held that though the present plaintiff's men realized rent from the village down to the *dasahra* of 1901, the defendant was in possession at the commencement of the proceedings under section 145. This is the dispossession of which the plaintiff complains.

The position as to possession is a simple one. The defendant does not, and indeed cannot, suggest that he was in possession before his purchase, and that was well within the period of 12 years prior to the institution of this suit. At the same time there is absolutely no evidence that Mohammad Bukhsh and Hussaini were in possession during the period subsequent to the plaintiff's purchase. Such evidence as there is supports the plaintiff's possession and in the view I take this is in accordance with the title.

The Subordinate Judge and Walmsley, J., ascribe much value to the absence of Harya tenants from the plaintiff's side, but they seem to overlook that in the circumstances this was in accordance with their interest.

On the other hand it is, I think, a just and shrewd remark of Chatterjea, J., that the admitted absence of a *cutchery* at Harya Manar for collection of rent is far more important than the evidence of any number of witnesses. And I must say that the evidence of witnesses, who would account for the absence of their rent receipts by the action of the high winds, is not calculated to inspire confidence.

As a final point the defendant suggested that the suit should have been for setting aside the sale and if so framed, it would have been far beyond the statutory period of limitation. And in this connection *Gobind Lal Roy v. Ramjanam Misser* (2) was cited to us. But the argument overlooked or disregarded the fundamental distinction between the circumstances of that case and of this, and in particular failed to notice that if, as I hold, the plaintiff has made out his title to any separate account there was no arrear in respect of Harya and no condition justifying a sale.

The result then is that in my opinion the decree of Walmsley, J., should be modified and a decree passed in the plaintiff's favour declaring his title as prayed and establishing his possession. The defendant must pay the costs of the suit and appeals including the costs of, and incidental to, the Collectorate, documents being brought to this Court for

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the purpose of the hearing of the appeals.

MOOKERJEE, J.—This is an appeal by the plaintiff in a suit for recovery or confirmation of possession of land on declaration of title thereto under three conveyances, dated 21st February 1888, 21st February 1889 and 25th July 1904, and a usufructuary mortgage dated 12th March 1889. The trial Court dismissed the suit on the ground that the plaintiff had failed to prove his title and possession. On appeal to this Court, Mr. Justice N. Chatterjea held that the plaintiff had proved his title and possession and was entitled to a decree in full. Mr. Justice Walmsley held, on the other hand, that the plaintiff had proved his title by purchase to the extent of 1-anna 6-dams 5-cowris share only under the conveyance of the 25th July 1904, and was entitled to a decree in respect thereof. These judgments were delivered on the 4th September 1913. On the 5th December 1913, Mr. Justice Chatterjea directed that a decree be drawn up to the effect that the plaintiff do recover possession of 1-anna, 6-dams, 5-cowris share (as to which both the Judges were agreed that the decision of the primary Court was erroneous), and that the suit do stand dismissed as to the remainder of the claim. On the 22nd December 1913, the plaintiff preferred the present appeal under clause 15 of the Letters Patent. When this appeal came on for hearing on the 29th April last, two preliminary points were raised, one on behalf of the respondent, the other on behalf of the appellant. These objections were overruled as untenable. The respondent contended that the appeal had been lodged out of time, as the memorandum had been presented after the expiry of thirty days (the period prescribed in this behalf by the rules of the Court) from the date of the delivery of the judgments, and reference was made to the decisions in *In the matter of the petition of Huruck Singh* (3) and *Huruck Singh v. Toolsee Ram Sahoo* (4). There is plainly no substance in this contention. The term 'judgment' as used in clause 15 of the Letters Patent signifies what is now understood by the

term 'decree' or 'order.' The decree in the present case was not drawn up till the 5th December 1913, and the appeal was lodged within thirty days from that date. In any event, this is clearly a case where the Court should, in the exercise of its discretion, extend the period for presentation of the appeal. There is consequently no substance in the preliminary objection taken by the respondent. The preliminary point raised by the appellant turned out on examination to be equally illusory. The appellant contended that the decree should have been drawn up in accordance with the judgment of the senior Judge, and referred to the decisions of *Husni Begam v. Collector of Mazaffarnagar* (5) and *Jehangir v. Secretary of State* (6). There is no foundation for this argument. The Judges of the Division Bench were agreed that the decree of the Subordinate Judge was erroneous in respect of the share covered by the conveyance of the 25th July 1904. With regard to this share, the decree was thus bound to be reversed under sub-section (1) of section 98, Civil Procedure Code. In respect of the remaining share, the Judges were equally divided in opinion; Mr. Justice Chatterjea thought that the decree should be reversed while Mr. Justice Walmsley thought that the decree should be affirmed. Consequently there was no majority in favour of a reversal of the decree, and to this extent, the decree was bound to be confirmed under sub-section (2) of section 98, Civil Procedure Code, *Appaji Shivrao v. Shirlal Khubchand* (7), *Sri Gridharaji Maharaj Tickait v. Purushottam* (8), *Lala Suraja Prasad v. Golab Chand* (9), *Ashutosh Roy v. Harinarain Singh* (10), *Devchand v. Hirachand* (11), *Keshav Pandurang v. Vinayak Hari* (12), *Bammidi Bayya Naidu v. Bammidi Paradesi Naidu* (13). There was thus no room for the application of clause 36 of the Letters Patent

(5) 11 A. 176; A. W. N. (1889) 27; 13 Ind. Jur. 316.

(6) 6 Bom. L. R. 131 at p. 207.

(7) 3 B. 204.

(8) 10 C. 814.

(9) 27 C. 724; 4 C. W. N. 701.

(10) 3 C. L. J. 143.

(11) 13 B. 449.

(12) 18 B. 355.

(13) 10 Ind. Cas. 75; 35 M. 216; 21 M. L. J. 344; 10 M. L. T. 533.

(3) 11 W. R. 107.

(4) 12 W. R. 456; 5 B. L. R. 47.

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and it follows that the decree has been correctly drawn up. But from another point of view, the objection taken by the appellant is unsubstantial. Even if it were well founded and we directed that a decree be drawn up in accordance with the judgment of the senior Judge, the defendant would forthwith appeal from such decree, and on such appeal, the merits of the controversy would require examination. There is thus no escape ultimately from an investigation of the question in dispute between the parties—and that question in substance is, whether, under the deeds mentioned, the plaintiff purchased only one village Jaigir or two villages Jaigir and Harya and had these included in a separate account opened at his instance under the provisions of the Revenue Sale Law.

The history of the title alleged by the plaintiff may be briefly narrated. On the 21st February 1888, the plaintiff purchased from Mahomed Bux, one of the admitted proprietors of the disputed property, an eight-annas share in Jaigir Harya. On the 21st February 1889, he purchased a five-annas share from Hussaini Bibi, another admitted proprietor. On the 12th March 1889, he took a usufructuary mortgage of three-annas share from Mahomed Bux, who acted in this transaction for himself and on behalf of his infant children, who, it is not disputed, were jointly interested in that share. There were then proceedings before the Revenue Authorities for registration of the name of the plaintiff and the separation of the share acquired by him; to these reference will presently be made. On the 30th May 1904, the residuary share of the estate was sold for arrears of revenue and was purchased by the defendant in the name of Ali Nabi. On the 25th July 1904, the plaintiff purchased from Ali Nabi 1-anna 6-dums 5-cowris share of Jaigir and Harya, and with reference to this share, Chatterjea and Walmsley, JJ., have agreed that the plaintiff is entitled to succeed. No further reference need be made to this share, as there is not and could not have been an appeal by the defendant. The questions in controversy now are, first, whether the plaintiff has, under the other transactions mentioned, acquired a good title to 13-annas share as proprietor, and to 1-anna 13-dums 15-cowris share as usufructuary mortgagee, of both Jaigir and Harya, as the plaintiff

asserts, or of Jaigir alone as the defendant contends; and, secondly, whether, if the first question is answered in favour of the plaintiff, his share of Harya was constituted into a separate account as he maintains or remained merged in the residuary share as the defendant alleges.

To determine what the vendors and mortgagors of the plaintiff intended to transfer and did transfer to him in 1888 and 1889, we must look to the deeds themselves. The description given there may be compendiously stated as Mouzah 'Jaigir Harya.' To ascertain the meaning of this expression, we must look back to the antecedent transactions in respect of Jaigir and Harya. We have in the first place the Revenue Survey Maps of 1843-44 when the *mouzas* comprised in Pergana Shergati were surveyed and delineated by Sherwill. We find that at that time there were two *mouzas*, Jaigir and Harya; the latter lay towards the north of the former. Jaigir was an inhabited village and comprised 3,356 acres (equal to 5,370 *bighas*); only 400 *bighas* were cultivated and the rest were described as hill and jungle. Harya was uninhabited; its area was 726 acres (equal to 1,269 *bighas*); only 100 *bighas* were under cultivation, the remainder was jungle. There is nothing to indicate that Mouzah Jaigir was at that time known by the appellation Jaigir Harya; on the other hand, the map of Harya shows that the southern portion thereof was in different parts known by different local names, Bank Unair Churwadee, Choor, which all appear on the map of Jaigir and in the heading of the map of Harya. We next have proceedings before the Revenue Authorities after the Land Registration Act of 1876 had come into operation. The application by Mahomed Bux for registration of his name, made on the 26th April 1877, treats Jaigir and Harya as distinct *mouzas*; but it is noteworthy that these two *mouzas* are linked with two others, namely, Sowa Bank and Pakuria and the aggregate area of the four *mouzas* is stated to be 4,516 acres. This has been verified before us and found correct on a reference to the Survey Maps of Sowa Bank (or Soobang) and Pakuria; the approximate areas of the four villages are 3,356, 786, 253 and 119 acres respectively. No explanation is available at this distance

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of time as to how the four *mouzahs* came to be linked together; what had transpired between 1843 and 1877 is absolutely unknown. Two of these villages, namely, Jaigir and Harya, are contiguous to each other and may be deemed to lie between one set of boundaries; the other two, however, were distinct and separate parcels situated at some distance, one to the north-west, the other to the south-west. But whatever the history of the matter may be, the fact remains that in 1877 Jaigir and Harya were treated as distinct *mouzahs*, though they were linked for revenue purposes with two other villages. The order for registration made by the Collector on the 25th April 1879 was in accord with the petition and shows Mouzah Harya separately from Mouzah Jaigir. We have not on the record the corresponding application and order for registration in respect of the share of Hussaini Bibi, but we have an application by her, dated the 12th March 1886, for amendment of mistakes in her petition for separate account; this application recites that errors had crept into the registration decree. In this application, the four *mouzahs* already mentioned are linked together and boundaries are given as if they were all comprised within the same set of boundaries—which we now know is not a fact. It may be observed also that the northern boundary of Mouzah Jaigir Harya as given in this petition is at first sight misleading as it is stated to be Harna Chuk. No Harna Chuk is shown on the map of Jaigir at any portion of its northern boundary, but the word Chuk appears on the boundary to the north-west in the map of Mouzah Harya. Whether the northern boundary as given in the petition refers to this Chuk may be a matter for speculation; but this much is clear that the Harya Chuk mentioned as the northern boundary is not Harya. All doubt on this point is removed by an examination of the original; what is given as the northern boundary is either Harya Chuk or Harna Chuk while the *mouzah* whereof the boundary is specified is Jaigir Harya. This petition consequently lends no support to the theory that Mouzah Jaigir Harya meant Mouzah Jaigir alone and that towards the north of it lay Harya. Apart from this and irrespective of mistakes which may have

been made in the application for separate account, it is indisputable that the description Mouzah Jaigir Harya could not have been intended to mean Mouzah Jaigir alone, for the area is stated to be 4,516 acres which is the area of all the four villages and not of three alone. Consequently, the order of the Collector dated 24th September 1886 that separate accounts be opened, admits of one interpretation only, namely, that the separate account should include not Jaigir alone but both Jaigir and Harya. We have now reached a point of time when the transactions with the plaintiff commenced. The conveyance of the 21st February 1888 describes the property as Jaigir Harya; this, in the light of what had proceeded, must be taken *prima facie* to mean both Jaigir and Harya, and the same interpretation must be placed upon the application of the purchaser, made on the 10th July 1888, for registration of his name. The order of the Collector dated 31st December 1888 is consistent with this view. We have next the conveyance by Hussaini Bibi dated 21st February 1889, which, taken along with her application to the Collector in 1886 and the order thereon, must be deemed to cover both Jaigir and Harya. A different effect cannot be attributed to the application of the purchaser made on the 7th June 1889 for registration of his name and the order thereon by the Collector dated 9th September 1889. It is needless to dwell at length on the usufructuary mortgage of the 12th March 1889, because, it is conceded, that it must be taken in the same sense as that ascribed to the conveyances. There comes next the application of the plaintiff dated 15th January 1890 to open a separate account. The statement of area comprised in the share of the applicant is incorrect and appears to have been copied out from the previous applications of Hussaini Bibi dated 12th March 1886 and 21st February 1889. But it is plain that the plaintiff intended to apply in respect of both Jaigir and Harya and that the order for separate account was made accordingly. A suggestion was faintly put forward that the revenue for the separate account was not correctly calculated; no foundation has been laid in the evidence to support this assertion, nor can the question be raised at this stage.

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by the defendant, who under section 54 of Act XI of 1859 has not acquired any rights which were not possessed by the previous owners of the residuary share purchased by him. The distribution of revenue was made after notice to all the proprietors and they did not challenge the order of the Collector by way of appeal to the superior Revenue Authorities or otherwise. The result was that the order for separate account was made and has been given effect to ever since the 5th June 1890. On the 5th August 1893, the plaintiff found that the separate account of Hussaini Bibi must be closed; he himself had acquired shares both out of the separate account and the residuary estate, and after his share had been constituted into a separate account, what remained in the separate account of Hussaini Bibi had to be thrown back into the residuary estate. This was done accordingly on the 21st July 1894. What then was the position of the parties at that time? The plaintiff had, by successive transactions, become the proprietor and the mortgagee of both Jaigir and Harya; on this point, I cannot, on the deeds and on an examination of the history of the title to the property, entertain reasonable doubt. This view is strengthened by the entries in the *Mahalwar* and *Mouzawar* Registers, and by the *hissawari* petition signed by all the proprietors and presented to the Collector on the 24th July 1878 in the proceeding by Mahomed Bux for registration of his name. Against all these documents which converge to a conclusion in favour of the plaintiff, we have oral evidence of an unreliable and inconclusive character adduced by the defendant to show that Jaigir was popularly known as Jaigir Harya while Harya was known by its own special name. But the case for the defendant is founded really on what are called the Intermediate Register and the D. Register, which it is said show two distinct *mouzahs*, namely, Mouza Jaigir Harya Manar and Mouzah Harya Manar; the former, it is contended, includes Mouzah Jaigir only and the latter Mouzah Harya; the plaintiff is registered in respect of the former but not with regard to the latter. This D Register is unreliable and contains grave errors; it is not the original register, but a copy prepared so late as 1900 from vernacular records which have now been

destroyed. The contents of the original papers are unknown, but it is clear that they must have contained entries different from what we find in the present register. The proceedings before the Revenue Authorities from 1877 onwards, particularly the registration decrees and the orders for separate accounts were presumably carried out in the Collectorate. The result of those proceedings is entirely inconsistent with the D. Register as it now stands. No trace can be found in those proceedings or orders that Mouzah Jaigir was called Jaigir Harya and that Harya was again separately called by its own name. It would not be right to hold that this register supersedes and nullifies the effect of the long series of proceedings before the Revenue Authorities, specially when we find that it contains serious errors the origin of which cannot be explained. For instance, the statement of area of what is called Jaigir Harya and Harya is in each case entirely wrong; in the former instance, it is 79 acres; in the latter case, it is 4,516 acres which is the area of the four villages previously mentioned. A similar error has been discovered in respect of at least one other *mouzah*; the register shows that Kahudag comprises only 201 acres while the survey map shows its area as 2,009 acres. The truth obviously is that the first entry in the register, namely, Mouzah Jaigir Harya includes both Jaigir and Harya, and that the much later entry about Harya alone must be ignored; how and when the second entry came to be made has been left wholly unexplained. Much stress has also been laid on behalf of the defendant upon an application for execution of a mortgage decree made by the plaintiff two days before the institution of this suit. The plaintiff made this application as assignee of a decree obtained on the 11th August 1896 by one Baijnath against Mahomed Bux on foot of a mortgage dated 16th March 1887. The Schedule to the mortgage included all the *mouzahs* of Taluk Khaira, which admittedly comprises the disputed property. The plaintiff in his application for sale of the mortgaged properties mentioned Harya. On this circumstance the argument is based that Harya could not have belonged to the plaintiff. This contention is fallacious; the fact when taken most strongly against the plaintiff amounts to a statement apparently in conflict

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with his present claim; how it came to be made, has not been explained in evidence and one is left to speculate whether it was made by oversight, possibly reproduced from a previous application by the decree-holder or whether it was made deliberately as an ultimate resource in the event of failure of this suit. Whatever the real explanation may be, the statement does not amount to abandonment of his rights by the plaintiff and does not negative the effect of the other evidence on the record. It consequently follows that the predecessors of the plaintiff owned both Jaagir and Harya, that they intended to transfer and did transfer both the properties to him, and that at his instance, the *mouzah* was included in a separate account distinct from the residuary share purchased by the defendant at the sale for arrears of revenue. But it has been argued on behalf of the defendant that even if this view be well founded, it was obligatory upon the plaintiff to have the sale set aside within one year from the date thereof, as the proclamation under section 7 of Act XI of 1859 and the sale-certificate granted on the 22nd September 1904 show, that the Collector intended to sell and did sell the disputed property. Reliance has in this connection been placed upon the decision of the Judicial Committee in *Gobind Lal Roy v. Ramjanam Misser* (2). This argument is clearly fallacious. No doubt, section 33 of Act XI of 1859 applies not only where the sale has been irregularly conducted but also where the sale has been illegal as held in contravention of an express provision for exemption. But this principle has no application where the property sold is not in arrear; the existence of an arrear is a condition precedent to the exercise of statutory authority by the Collector: *Balkishen Das v. Simpson* (14); *Harkhoo Singh v. Bunsidhur Singh* (15); *Jogendra Mohan Sen v. Uma Nath Guha* (16); *Mahomed Jan v. Ganga Bishun Singh* (17);

Ganga Pershad v. Irshad Ali (18); *Hamid Hossein v. Mukhlum Raza* (19); *Indramani Das v. Priyanath Chakravarti* (20). In the case before us, *Mouzah Harya* was not in arrear, as it formed no part of the residuary estate. If the officers in the Collectorate erroneously supposed that Harya was comprised in the residuary estate and under this impression, exposed it for sale, the sale was clearly beyond the statutory authority vested in the Collector and could not prejudice the right of the plaintiff.

The question of possession finally requires consideration for the determination of the question of limitation. The case is clearly within the scope of Article 142 of the Schedule to the Indian Limitation Act. The plaintiff must prove that he was in possession within 12 years of the institution of the suit. He relies upon a statement, in an order under section 145, Criminal Procedure Code, made on the 9th December 1905 in a proceeding between him and the defendant, to the effect that he was dispossessed in September 1904. This finding in the order of the Criminal Court is not admissible, though the order itself is admissible for a limited purpose, namely, to show the parties in dispute, the land in dispute and the person declared entitled to retain possession, as explained by Lord Lindley in *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani* (21). We are accordingly thrown back upon the oral evidence of possession. Here we have oath against oath. The witnesses for the plaintiff seek to prove his possession down to 1904. The defendant does not allege that he was in possession before his title accrued by purchase at the revenue sale in 1904. Consequently we have to see whether the plaintiff was in possession as he asserts or his vendors and mortgagors were in wrongful possession. There is no evidence to show that they had such possession. They had admittedly parted with Jaagir and delivered possession to the plaintiff; if thereafter they retained possession of Harya contrary to their deeds, they would presumably require a *cutchery* in

(14) 25 I. A. 151; 25 C. 533; 2 C. W. N. 513.

(15) 25 C. 876; 2 C. W. N. 260.

(16) 35 C. 636; 8 C. L. J. 41; 12 C. W. N. 646.

(17) 10 Ind. Cas. 272; 13 C. L. J. 525; 38 C. 537; 15 C. W. N. 443; 9 M. L. T. 446; 8 A. L. J. 480; 13 Bom. L. R. 413; (1911) 2 M. W. N. 277; 21 M. L. J. 1148 (P. C.).

(18) 13 Ind. Cas. 959; 15 C. L. J. 54.

(19) 32 C. 229; 4 C. W. N. 300.

(20) 21 Ind. Cas. 953; 18 C. L. J. 505; 16 C. W. N. 490.

(21) 29 C. 167; 29 I. A. 24; 6 C. W. N. 386; 12 M. L. J. 83.

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Harya; there is no trace of such a collection office in that village. Stress has been laid on the fact that the tenants of Harya had not been called by the plaintiff; the answer is that they are now under the influence of the defendant, and it does seem probable, as suggested by the plaintiff, that these tenants have paid no rents to either of the claimants since the dispute broke out. I accept the evidence of the plaintiff that he was in possession till dispossessed by the defendant after the revenue sale of the residuary estate in 1904. The inference follows that the plaintiff has established his title and possession as set out in the plaint. The result is that this appeal must be allowed and the suit decreed with costs both here and in the Court below. The costs in this Court must include the costs of the two hearings and the cost of obtaining the additional evidence from the Collectorate.

RICHARDSON, J.—I have arrived without any hesitation at the same conclusion and for similar reasons.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 922 OF 1913.

October 5, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

REBALA BABU REDDI—PETITIONER

versus

DODLA RAMI REDDI—COUNTER-

PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33
—Party exonerated by first Court, if can be made party in appeal—Memorandum of objections.

An Appellate Court has power to add as party a person who was exonerated by the Court of first instance, but where there is already a memorandum of objections seeking to make him liable and the appeal is pending, the order making him a party is in its nature interlocutory, and a High Court will not interfere with the order in revision under section 115, Civil Procedure Code. [p 978, col. 2.]

Subramanian Chetty v. Veerabadran Chetty, 4 M. L. T. 104; 18 M. L. J. 452; 31 M. 442, distinguished.

Jadunandan Prosad Singha v. Koer Kallyan Singh, 13 Ind. Cas. 653; 15 C. L. J. 61; 16 C. W. N. 612; *Munisami Mudaly v. Abbu Reddy*, 27 Ind. Cas. 323; (1915) M. W. N. 45; 27 M. L. J. 740; 28 M. 705; *Imbichunni Nair v. Narayana Nambudri*, 21 Ind. Cas. 767; (1913) M. W. N. 1024, followed.

Quere—Whether under Order XLI, rule 22, sub-rules (3) and (4), an Appellate Court can make a defendant exonerated by the Court of first instance, a party to the memorandum of objections when not made a party to the appeal itself? [p. 979, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Nellore, in Civil Miscellaneous Petition No. 104 of 1913, in Appeal Suit No. 53 of 1913.

Mr. S. Ramachandra Aiyar, for Mr. S. Subramania Aiyar, for the Petitioner.

Mr. K. Krishnaswamy Aiyangar, for Mr. T. Venkatarama Aiyar, for the Respondent.

JUDGMENT.—The District Judge was clearly in error in relying on the case of *Subramanian Chetty v. Veerabadran Chetty* (1), which was decided under the old Code of Civil Procedure which did not contain provisions similar to those found in Order XLI, rule 33, introduced for the first time in the new Code. He was entitled, in order to promote the ends of justice, to make the 1st defendant a party respondent to the appeal and to pass a decree against him in favour of the plaintiff under Order XLI, rule 33, if the Court of first instance had erroneously exonerated the 1st defendant. See *Jadunandan Prosad Singha v. Koer Kallyan Singh* (2); *Munisami Mudaly v. Abbu Reddy* (3) and *Imbichunni Nair v. Narayana Nambudri* (4).

But I do not think that this is a fit case for interference in revision against an interlocutory order passed in an appeal case, especially as the petitioner (the plaintiff) has filed a memorandum of objections in the lower Appellate Court against the 1st defendant and I am not at all sure that he cannot succeed in making the 1st defendant liable through the proceedings in the Appellate Court in connection with that memorandum of objections without making the 1st defendant a direct respondent in the appeal proceedings. It may well be argued (though I do not wish to give a final opinion on the question) that, as sub-rules (3) and (4) of Order XLI, rule 22, speak in very

(1) 31 M. 442; 4 M. L. T. 104; 18 M. L. J. 452.

(2) 13 Ind. Cas. 653; 16 C. W. N. 612; 15 C. L. J. 61.

(3) 27 Ind. Cas. 323; 27 M. L. J. 740; (1915) M. W. N. 45; 28 M. 705.

(4) 21 Ind. Cas. 767; (1913) M. W. N. 1024.

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general language of a "party who may be affected by such objection" and of "notice to the other parties as the Court thinks fit" and Order XLI, rule 22, does not confine itself to the appellants or the respondents mentioned in the appeal memorandum, any party to the suit and to the lower Court's decree who would be affected by the memorandum of objections, can be made a party to the said memorandum though he was not made a party in the appeal memorandum. Further, it might be reasonably expected that in view of the opinion expressed in the 1st portion of this judgment, the lower Court would be inclined to review its order refusing to make the 1st defendant a party to the appeal. I would, therefore, dismiss the petition presented under section 115 of the Code of Civil Procedure. There will be no order as to costs under the circumstances.

Petition dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 33 OF 1908-09 OF
ALLAHABAD DISTRICT.

June 6, 1910.

Present:—Mr. Baillie, S. M., and
Mr. Reynolds, J. M.

Chaudhri JAGDAMBA PRASAD—
DEFENDANT—APPELLANT

versus

[BEHARI LAL—PLAINTIFF—
RESPONDENT.

! Grove—Sale—Custom—Ejectment of vendee—"Land",
meaning of—*Agra Tenancy Act* (II of 1901), s. 4 (2).

A custom by which a grove-holder can sell the grove, is not unusual, the sale carrying with it the right of occupation of the land. The vendee of such a grove is not liable to ejectment in the absence of proof that the sale of trees by the original tenant is a breach of the special terms on which the land is held for the purposes of a grove. [p. 979, col. 2.]

Per Reynolds, J. M.—A land let for the purpose of planting a grove on it and on which a grove is still in existence is not "land" within the meaning of the *Agra Tenancy Act*. [p. 981, col. 1.]

Application for revision of the order of the Commissioner of the Allahabad Division, dated the 1st April 1909, confirming that of the Assistant Collector, Allahabad District, in a case of ejectment.

JUDGMENT.

BAILLIE, S. M.—(May 16th, 1910.)—In a suit for the ejectment of a person who claimed occupancy rights it was held that occupancy

rights had not under section 22 of the Tenancy Act descended to the defendant, the mother of the previous tenant, and that she was therefore, liable to ejectment as a tenant-at-will. Included in the area in suit were two groves which it was alleged, had been some time previously sold by the late occupancy tenant to two persons, who were added as defendants. The present application concerns only these two groves. The Commissioner relying upon *Ram Sundar Koiri v. Jogi Khatik* (1), held that as occupancy rights were not transferable, the sale of the groves to the added defendants, now appellants, was invalid and that the suit should, therefore, be decreed for the groves also. *Ram Sundar Koiri v. Jogi Khatik* (1), supports the view taken by the Commissioner only to this extent that a suit in regard to groves could be brought in a Rent Court. In the case of *Ram Sundar Koiri v. Jogi Khatik* (1), the plaintiff tenant-in-chief was the owner of the trees: the defendant had no rights in them other than as a lessee from year to year. The decision of the Commissioner is, therefore, not supported by *Ram Sundar Koiri v. Jogi Khatik* (1). The Commissioner has omitted to consider that the fact that the groves were planted by, and belonged to, the occupancy tenant who sold them, completely alters the case. The Customary Law on the subject was very fully and very ably discussed in *Pandit Badri Prasad v. Bhim Sen* (2) by Messrs. Reid and Kaye. It was there laid down that a grove-holder has rights altogether separate from, and independent of, those which he may enjoy as occupancy tenant under the Rent Act, that a grove-holder is customarily entitled to occupy the land so long as the groves continue to stand upon it. The grove-holder has this customary right whether he has occupancy rights or not.

It was also held that the custom by which a grove-holder can sell the grove, is not unusual, the sale carrying with it the right of occupation of the land and that a person to whom a grove, even though the sale was contrary to custom, had been sold, was not liable to ejectment by notice. The same principles apply to a suit for ejectment. In the case of a grove, it is not sufficient to allege that occupancy rights have determined. It is necessary to prove that the sale of the

(1) Selected Decision No. 1 of 1908.

(2) Selected Decision No. 2 of 1892.

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trees by the original tenant was a breach of the special terms on which the land was held for the purposes of a grove. There is no such evidence in the present case. The Commissioner's decision is in my opinion clearly wrong. The application is for revision, but I think the circumstances are such as to justify the revision being ordered. The Commissioner's order virtually confiscates the valuable property purchased by the appellants without there being on record any evidence whatsoever to show that the purchase by them was contrary to the terms of the tenure. I would, therefore, allow the present application and dismiss the suit in regard to the two groves Nos. 1723 and 1790. Applicant to get his costs throughout.

REYNOLDS, J. M.—In this case somewhat important considerations as to the rights of tenants and land-holders in grove lands and incidentally of the purchasers of those rights are involved.

The whole matter in the Province of Agra has become somewhat complicated, mainly on account of the ruling in *Ram Sundar Koiri v. Jagi Khatik*, which has been generally interpreted as having a far wider application than the Members who decided that case ever intended.

In that ruling, the previous decisions of the Board were all carefully reviewed and it is unnecessary to repeat the abstract that was given of those rulings by Mr. Darrah.

The important question is, how far do the general provisions of the Tenancy Act apply to grove lands, and the answer of this, depends entirely on the definition of land given in section 4 (2) of the Act, since, with but few exceptions, the provisions of that Act apply only to "land" so defined.

The definition is as follows:

"Land means land which is let or held for agricultural purposes". The use of the word "or" in "let or held" is important.

"Agricultural purposes", are nowhere defined in the Act but turning to Webster, I find that he defines "agricultural" as "pertaining to husbandry, tillage, or the culture of the earth". Husbandry he defines as "the business of a husbandman or farmer, comprehending the various branches of agriculture, tillage" and a "husbandman"

he says is "a farmer, a cultivator or tiller of the ground, one who labours in tillage," and finally, he defines tillage as "the operation, practice, or art of tilling or preparing land for seed and keeping the ground in a state favourable for the growth of crops."

Now these definitions clearly cover what in England is more usually known as "arable" and cannot apply to "orchards" which is the nearest English equivalent to the Indian "grove."

I have, therefore, no doubt in my own mind that when the framers of the Tenancy Act spoke of "land let or held for agricultural purposes", they intended to apply the term to *arable* land and land held for purposes subservient to its use as arable land, and not to grove land at all. I am confirmed in this view by the fact that in the very next definition of the word "rent" the Act says: "Rent means whatever is, in cash or kind, to be paid or delivered by a tenant for *land* held by him, or on account of groves, etc." Now if groves were *land* within the meaning of the previous definition, it is clear that there would be no need to add the words italicised, and put them in the same category with tanks, fisheries and such.

While, therefore, I am of opinion that grove land is not necessarily "land" within the definition, yet it is clear, that there are various classes of grove land and it is necessary to carefully discriminate these.

In the *first* place, land may have been let to a tenant for agricultural purposes, and he may have subsequently planted a grove on it.

Secondly, a grove may have been let to a tenant as grove and he may have cut down the trees and be using the land for agricultural purposes.

Thirdly, a grove may have been let to a tenant as a grove and it still retains its character.

In the *first* case, unless the landholder has given his consent either express or implied to the variation in the conditions of the letting, such land is still land which is let for agricultural purposes and is, therefore, "land" as defined in the

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Act. In the second case, the land is undoubtedly land which is held for agricultural purposes and is, therefore, "land" as defined in the Act.

In the third case, the land was neither let nor is it being held for agricultural purposes, and it is not, therefore, "land" within the definition and except for the purposes of suing for its "rent", no suit will lie with respect to such land in the Revenue Courts.

In the case of *Ram Sundar Koiri v. Jogi Khatik* (1) the Members were dealing with a grove falling under the first head only, and their ruling applies simply and solely to such land.

The question as to the status of land which had been let for the purpose of planting a grove on it, and on which a grove is still in existence, was not then and never has been hitherto formally considered by the Board since the passing of the Tenancy Act, but for the reasons given above I have no doubt that such land is not "land" within the meaning of the Act.

There remain two other cases to be considered.

Land may have been let to a tenant for agricultural purposes, and he may in accordance with local custom or with the written consent of the landholder have planted trees on it. This, all (except non-occupancy tenants) are entitled to do under section 88 of the Act. This planting of trees may or may not be an improvement within the definition of section 4 (12) (e) according as it fulfils the preliminary conditions laid down in the definition of 'improvement' or not. If, however, the planting of trees is done under a local custom, or with the consent of the landholder, this will, I think, form the basis of a fresh contract, express or implied, as to that particular land, and as the land is no longer let and held for agricultural purposes, it will no longer be land as defined in the Act.

If a tenant plants trees on land which has been let to him for agricultural purposes without the consent of his landlord and in the absence of any local custom authorising him to do so, it is difficult to see how he could claim

compensation on ejection under section 90, but such cases might conceivably occur and certainly section 92 (c), would apply in the case of all tenants who had been wrongly ejected by their landholder if the grove planted by them were an "improvement."

There is another case relating to grove lands, which is not of unfrequent occurrence, where the tenant sells merely the trees standing on the land.

Each such case will have to be decided separately on the merits, if the tenant who sold the trees, subsequently lose his right to the land on which the trees are planted. It is conceivable that the trees may, in certain cases, accede to the soil, and where a tenant's rights are extinguished under section 18 or otherwise, the trees may revert with the land to the landholder; or on the other hand, the transfer of the trees may be a valid one and the vendee's rights in the trees may remain, in spite of the fact that the vendor's right to the land has since been extinguished. Each such case must be decided on issues fixed to elicit the facts.

In the case now before us, it is true that the grove land has been recorded by the *patwari* with other fields as part and parcel of an occupancy holding, but this entry is not necessarily correct, the trees are admittedly old, and as there is nothing to show that the land was originally let solely for agricultural purposes, I think the land occupied by these trees, is not "land" within the definition. In dealing, therefore, with such land, the Commissioner has exercised a jurisdiction which was not vested in him by law and I concur, therefore, for the reasons given by me in the order proposed by my colleague. Even if this be "land" within the definition, it is clear that the tenant sold the trees many years ago and no steps have been since taken by the landholder to have that sale set aside, and until this is done, it appears to me that the purchaser is entitled to those trees and to have access to them and in passing the order he has done, the Commissioner has, to all intents and purposes, set aside the sale and given an injunction prohibiting the vendee from having that

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free access to them which he has hitherto exercised. This again only a Civil Court can do and on this alternative ground also, the Commissioner's order should be set aside, as being without jurisdiction, and the suit dismissed as to Nos. 1723 and 1790.

Application allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1101 OF 1914.

October 29, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Justice Sir William Ayling, Kt.

KALIANN MUDALI—PLAINTIFF—

APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL BY THE COLLECTOR OF
SALEM—DEFENDANT—RESPONDENT.

Easements Act (I of 1882), s. 47—Right of Government to claim water cess for water flowing through pattah land—Classification of bed as poramboke, if essential—Right to easement as against Government, when and how required—Burden of proof.

Water flowing in a continuous manner through a rill, *kuttai* and another water-course may form a natural stream in which easement rights may be acquired as against Government.

Once the existence of an easement is proved as against Government, it is for Government to show under section 47 of the Easements Act that it interrupted that easement more than 20 years ago or that the plaintiff rendered its use impossible. Mere failure on the plaintiff's part to repair the breach would not amount to obstruction by the servient owner or rendering the use impossible by the dominant owner.

If the Government wish to claim right to water which flows through *pattah* land, they can do it only when they classify the bed separately as *poramboke*, otherwise the bed also remains the property of the *ryot*.

Second appeal against the decrees of the District Court of Salem, in Appeal Suits Nos. 34 and 37 of 1912, preferred against the decree of the Additional District Munsif of Salem, in Original Suit No. 145 of 1911.

FACTS.—This was a suit by the plaintiff to declare that he was not liable to pay water cess in respect of water which collected on the land held by him on *pattah* from Government. Both the lower Courts dismissed the suit on the ground that water belongs to Government and the plaintiff should pay water cess.

Hence this second appeal preferred against that decree.

Messrs. T. Rangachariar and S. Varadachariar, for the Appellant.

Mr. T. Narasimha Aiyangar, for the Respondent.

JUDGMENT.—The defendant's own case is that there was, however, an old *kuttai* or pond fed by two rills. There is now another water-course issuing out of the pond, and the defendant now claims that the rills, the *kuttai* and the other water-course form a natural stream. If this be so, the evidence clearly points to the plaintiff having acquired an easement to interrupt the flow through the pond by *bunding* it up so as to store the water. The pond has a stone revetment and even the written statement says that the water which flowed from the pond, flowed through a breach in the *kuttai* or, as the evidence shows, through a breach in the stone revetment. Once the easement is shown, it is for Government to show under section 47 of the Easements Act that it interrupted that easement more than 20 years ago or that the plaintiff rendered its use impossible, and that has not been done. Mere failure on the plaintiff's part to repair the breach would not amount to obstruction by the servient owner or rendering the use impossible by the dominant owner.

As to the claim to levy water cess, these rills run through the plaintiff's *pattah* land, and their beds have not been separately demarcated as *poramboke*; they are part of the *pattah* land and not the property of Government, and, therefore, the water-course cannot be said to belong to Government as decided day before yesterday in Appeal Suit No. 113 of 1910 (on the file of the High Court).

The appeal must be allowed and the suit decreed as claimed, except as regards the cess for *fasli* 1318, with costs throughout.

The time for payment will be three months from this date.

Appeal allowed; Suit decreed.

SURESSUR MISSEER v. MOHESH RANI MESRAIN.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 261 OF 1913.

July 21, 1915.

Present:—Mr. Justice Richardson and
Mr. Justice Fletcher.Choudhury SURESSUR MISSEER AND
ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammam MOHESH RANI MESRAIN AND
OTHERS—DEFENDANTS—RESPONDENTS.*Hindu Law—Widow's relinquishment of her estate—Reversioner's interest, acceleration of—Alienation by widow of whole estate with consent of next heirs, legality of—Widow's relinquishment for benefit, effect of—Fraud alleged in plaint not established, effect of.*

A Hindu widow may relinquish her estate with the effect of accelerating the estate of the next reversioner and is not precluded from obtaining a benefit for such relinquishment. [p. 985, col. 1.]

A Hindu widow's alienation of the whole estate is valid where there is consent of the next heirs, inasmuch as the alienation is capable of being supported by reference to the theory of relinquishment and consequent acceleration of the interest of the consenting heirs. [p. 985, col. 2.]

Under the Mithila Law a widow takes an absolute interest in the moveables of her deceased husband. [p. 985, col. 2.]

Under the Hindu Law, as under the English Law, a mortgage is treated as personal or moveable property, the land being considered as merely a pledge or security for the money lent. [p. 985, col. 2.]

Quere.—Whether where the plaintiff's claim to relief rests solely on the allegations of fraud made in the plaint and fraud is not established, the suit should fail? [p. 984, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Darbhanga, dated the 30th May 1913.

Sir S. P. Sinha, Babus Dwarkanath Chakrabarty and Chandra Sekhar Banerjee, for the Appellants.

Dr. Dwarkanath Mitter, Babus Sorushi Charan Mitter, Sailendra Nath Palit and Ajendra Nath Dutt, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs against the judgment of the learned Additional Subordinate Judge of Darbhanga dismissing their suit.

The plaintiffs are the sons of one Kesab Misser deceased. Kesab was step-brother of Madhab, the father of the defendants third party. The defendant No. 1 is the widow of and the defendants Nos. 2 to 5 the daughters of Nunoo Pershad Misser who died on the 18th of Baisakh 1313. Nunoo also left him surviving a son Nages-

war Pershad. He died childless on the 24th Bhadro 1313.

The plaint in this suit alleges that on the death of Nunoo, his son Nageswar succeeded to his properties and that on the death of Nageswar his mother, the defendant No. 1, took the properties. Further, that the defendant No. 1 wishing to benefit her daughters, the defendants Nos. 2 to 5, caused a false Will of Nunoo to be filed before the District Judge of Darbhanga by her daughters and that in that case, Madhab Misser at the instigation of the defendants Nos. 8 and 9 (who are alleged to be servants of the defendant No. 1) filed a fictitious objection which was rejected by the Judge. That the servants of the defendant No. 1 knew full well (the word is given in the translation of the plaint as "probably" but this must be a mistranslation) that the Will was invalid; so with a view to establish a permanent title in future got a Suit No. 277 of 1907 instituted by Madhab for declaring the said Will (of which Letters of Administration with the Will annexed had been already granted) declared invalid. That with a view to deprive the plaintiffs of their rights, the parties to that suit entered into a fraudulent and collusive *solenama* under which the immoveable properties described in the Schedule (i) to the plaint and forming a portion of the estate of Nageswar Pershad Misser, were given to Madhab, the properties described in the Schedule (ii) to the defendants second party, and the properties described in the Schedule (iii) to the defendants fourth party.

The plaintiffs further allege that the defendant No. 1 was won over and on the 25th of June 1909, executed a deed of relinquishment and that the defendant No. 1 is still in possession of the properties of Nageswar.

On these allegations, the plaintiffs asked the Court to make a declaration that the *solenama* and *bainama* are invalid, null and void and are not binding on the plaintiffs and cannot prejudice their right of inheritance.

The learned Judge at the trial found that all the transactions challenged by the plaintiffs in their plaint as being fraudulent

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lent, were in fact made and done in good faith.

On opening this appeal before us, Sir S. P. Sinha, Counsel for the appellants, stated that he did not intend to challenge the findings of the learned Judge negating fraud. That being so, it is open to doubt whether the appeal should not be dismissed on that ground. The claim of the plaintiffs to relief in this suit, rests solely on the allegations of fraud made in the plaint. The plaintiffs having failed to establish fraud, are not at liberty to pick out allegations in the plaint which might have warranted them in asking for relief on some other ground. [*Hickson v. Lombard* (1) and *Rajendra Kumar Bose v. Gangaram Roy* (2).]

The material facts relating to the case when they are disentangled from the allegations of fraud and collusion, are simple. The deceased Nunoo Pershad Misser made his Will, dated the 2nd of April 1906, which was registered two days later.

Under the terms of the Will, Nunoo gave the whole of his estate to his only son Nageswar subject to certain bequests in favour of his daughters and other relatives. The widow, the defendant No. 1, took no interest under the Will.

By clause 6 of his Will, the testator provides that if Nageswar died without issue, his four daughters should succeed to his estate. As I have already said, Nageswar died shortly after the testator, a minor and without ever having had any issue. The learned Judge has observed in the course of his judgment that "it is clear that Chondhury Nunoo Pershad had no right to make this Will while he and his son lived in a joint family."

The learned Judge, however, overlooked the fact that the testator states in his Will "I have many moveable and immoveable properties, both ancestral and self-acquired and it is necessary to give to the said daughters and their heirs, something out of the said properties according to the custom of the family." There was also evidence before the learned Judge that the testator was possessed of self-acquired properties. A person claiming under the

Will, if acting in good faith, might not unreasonably suppose that there were properties of the testator which passed under the terms of his Will. Next the three adult daughters of Nunoo applied to the District Judge for grant of Letters of Administration with the Will annexed. This application was opposed by Madhab Misser who was then the sole reversionary heir. A perusal of the order-sheet of the learned District Judge, shows that his opposition was genuine and strenuous. The Letters of Administration were issued to the three adult daughters of the testator on the 3rd of October 1907.

On the 11th of August 1907, that is, before the grant of the Letters of Administration, Madhab instituted a regular suit asking for a declaration that Nageswar took the whole of the properties on the death of Nunoo by right of survivorship and alternatively if Nageswar came into possession of the properties under the Will, for a declaration that Nageswar took an absolute interest under the terms of the Will. This suit came on for trial and after the trial had proceeded for several days, the parties came to a settlement.

On the 22nd of February 1909, the parties filed the petition of compromise in Court and on the next day, the suit was decreed in terms of the compromise.

By the compromise, the property was dealt with as follows:—

(a) The whole of the properties were deemed to be the estate of Nageswar.

(b) The moveable properties were declared to be the absolute property of the defendant No. 1.

(c) The defendant No. 1 relinquished in favour of Madhab her widow's estate in the whole of the immoveable property.

(d) Madhab granted to the daughters of Nunoo half of the immoveable properties.

(e) Madhab granted to the defendant No. 1 50 *bighas* of land for her life with remainder to Madhab and his heirs. Similarly, the daughters of Nunoo granted to the defendant No. 1 another 50 *bighas* with remainder to the daughters and their heirs.

The other terms of the compromise are no material and have not been referred to on the hearing of this appeal. The

(1) (1866) 1 E. & Lr. App. 324.

(2) 6 Ind. Cas. 472; 37 C. 866; 12 C. L. J. 70.

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terms of the compromise have been given effect to by deeds executed by and between the parties.

The sole argument addressed to us on behalf of the appellants turned on the question as to whether or not the compromise was valid and binding.

The cases dealing with the power of a Hindu widow or mother to deal with the estate of her deceased husband or son to which she has succeeded as heiress, are numerous. It is not necessary for us to go through the long list of authorities as they have all been considered by a Full Bench of this Court in the case of *Debi Prosad Chowdhry v. Golap Bhagat* (3). In that case, all the earlier authorities were reviewed. First, it may be taken as established without doubt that a Hindu widow may relinquish her estate and this will have the effect of accelerating the estate of the next reversioner. Further, an alienation by a Hindu widow will be valid where there was a consent of the next heirs and the alienation is capable of being supported by reference to the theory of relinquishment and consequent acceleration of the interest of the consenting heirs. But the alienation in such a case must be of the whole of the estate.

The authorities, however, appear to show that the widow is not precluded from obtaining a benefit for relinquishing her estate. As was observed by Garth, C. J., in the case of *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (4): "But there is no concealing the fact that although such a relinquishment may be made by a widow in perfect good faith, and even under such circumstances, as to be a meritorious self-sacrifice, it is nevertheless possible and, indeed, it not unfrequently happens that a widow who is anxious to turn her husband's estate into money, may arrange with the next heir of her husband for the time being, to alienate the estate to some third person for their mutual benefit. They may both share in the profits of such a transaction; and it sometimes happens, that in this way, the estate is alienated from the husband's

family, so that the person who would be the next male heir at the widow's death, is virtually deprived of his rights. But, if it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make. And it seems equally impossible to deny, that for a long series of years, this Court has treated and considered such alienation as lawful." The latter part of this statement was approved of by the Privy Council in the case of *Bajrangi Singh v. Manokarnika Bakhsh Singh* (5). In the present case, the compromise was challenged on the following grounds:—

First, it was said that the deed of relinquishment (Exhibit H) executed by the defendant No. 1 pursuant to the terms of the compromise, does not include a house at Nadat. But the learned Subordinate Judge remarks that there is no evidence to support this argument. It is further to be observed that Exhibit H was intended to apply to the whole of the immoveable properties and in the Schedule there is mentioned a property at Nadat which may be the house that is alleged to be there.

Next, it was objected that the whole of the moveable properties had been given to the defendant No. 1. But under the Mithila Law, the widow takes an absolute interest in the moveables [*Birajun Koer v. Luchmi Narain Mahata* (6)]. A further point was raised under this head, namely, that the defendant No. 1 was given absolutely the mortgage-bonds. It was argued that under the terms of the Transfer of Property Act, a mortgage is immoveable property. But even if that be so, the Transfer of Property Act does not regulate the right of a Hindu widow or mother to succeed to the estate of her deceased husband or son. Under the Hindu Law, as under the English Law, a mortgage is treated as personal or moveable property, the land being considered as merely a pledge or security for the money lent. Further, it is to be noticed that in the 4th Schedule to the plaint

(3) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

(4) 10 C. 1102 at p. 1108.

(5) 35 I. A. 1; 30 A. 1 at p. 18; 12 C. W. N. 74 (P. C.); 17 M. L. J. 605; 9 Bom. L. R. 1348; 6 C. L. J. 766; 3 M. L. T. 1; 5 A. L. J. 1.

(6) 10 C. 392.

MAYANDI CHETTIAR v. TIRUMALAI AIYANGAR.

the plaintiffs treat the mortgages as moveable property, the two decrees mentioned in the 4th Schedule being decrees on mortgages. The clause of the compromise that was most strongly relied on, was clause 6 under which Madhab and the daughters of Nunoo respectively undertook to give to the defendant No. 1 50 *bighas* of land. It is argued that under this clause, the widow's estate in a portion of the property remained. This, however, in my opinion, is not so. In one case the 50 *bighas* were given to the defendant No. 1 for her life with remainder to Madhab and his heirs and in the other case, it was given to the defendant No. 1 for life with remainder to the daughters of Nunoo and their heirs. This can in no way be considered as a reservation or restoration of the widow's estate that the defendant No. 1 formerly enjoyed in the property. The life-estate in the 100 *bighas* is essentially different from the widow's estate which the defendant No. 1 formerly enjoyed. For example, if a case of legal necessity arose, the defendant No. 1 would not be at liberty to mortgage the 100 *bighas* and the course of succession thereto would be different to what it would have been if the defendant No. 1 had retained her estate as a Hindu widow.

I think that under the terms of the compromise and the deed of relinquishment (Exhibit H), the defendant No. 1 effectually relinquished and destroyed her estate as a Hindu widow. That being so, having regard to the decisions mentioned above, the parties were at liberty to make any bargain they thought fit for the division of the property.

I may further mention that I consider that the compromise might be supported as a family arrangement between all the parties competent to deal with the whole of the property, namely, the daughters who claimed under the Will on the one hand and the defendant No. 1 and Madhab, the sole reversioner, on the other hand. On the principles laid down by the Privy Council in the case of *Khunni Lal v. Kanwar Gobind Krishna Narain* (7), the compromise in this case would be binding as acknowledging and defining the antecedent title in the parties.

(7) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 1 M. W. N. 432; 38 I. A. 87.

In the result, the present appeal fails and must be dismissed with costs. Two sets of costs are allowed, one set to Dr. Mitter's client and another set to Babu Sorashi Charan Mitter's client.

RICHARDSON, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 356 OF 1914.

October 29, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

MAYANDI CHETTIAR—PLAINTIFF—
APPELLANT

versus

TIRUMALAI AIYANGAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court, whether can reverse decree against non-appealing defendant.

In a suit on a mortgage-deed, separate decrees were passed against the 1st defendant and defendants Nos. 2 and 3. The plaintiff appealed against the decree in so far as it exonerated defendants Nos. 2 and 3 from liability for a portion of the claim, and defendants Nos. 2 and 3 filed cross-objections, but the 1st defendant did not appeal. The Appellate Court, however, dismissed the suit as against all defendants. On second appeal by the plaintiff:

Held, that as the memorandum of cross-objections by defendants Nos. 2 and 3 did not proceed on any ground common to them and the 1st defendant and as the 1st defendant did not appeal, the District Judge was not justified in interfering with the decree against him. [p. 987, col. 1.]

Rangan Lal v. Jhanda, 11 Ind. Cas. 640; 8 A. L. J. 1111; 34 A. 32, followed.

Second appeal against the decree of the District Court of Tinnevely, in Appeal Suit No. 83 of 1913, preferred against that of the Court of the District Munsif of Tinnevely, in Original Suit No. 396 of 1911.

FACTS.—Plaintiff was a mortgagee. He brought a suit for sale on a mortgage executed by the 1st defendant alleging himself to be a major and as guardian of defendants Nos. 2 and 3 (minors). The 1st defendant was *ex parte*. Defendants Nos. 2 and 3 pleaded that defendant No. 1 and themselves were minors and the mortgage document by him was void as against all of them. The District Munsif found the 1st defendant was a major on the date of

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execution of the mortgage and passed a decree against him for the full amount, and as against defendants Nos. 2 and 3 for a portion of the mortgage amount. Plaintiff then appealed against the decree disallowing the claim as against defendants Nos. 2 and 3. Defendants Nos. 2 and 3 filed a memorandum of objections. The District Judge on appeal found the 1st defendant also to be a minor, reversed the decree against all and dismissed the suit altogether. The present appeal is against that decree.

Mr. C. S. Venkatachariar, for the Appellant.

JUDGMENT.—The District Munsif passed separate decrees against the 1st defendant and defendants Nos. 2 and 3. The 1st defendant did not appeal against this decree. The plaintiff appealed against the decree in so far as it exonerated defendants Nos. 2 and 3 from liability for a portion of the claim. Defendants Nos. 2 and 3 filed a memorandum of objections. The District Judge held that the 1st defendant was a minor at the time that the mortgage document was executed and dismissed the suit altogether. We are unable to uphold the decree. The memorandum of objections by defendants Nos. 2 and 3 did not proceed on any ground common to them and to the 1st defendant. Consequently as the 1st defendant did not appeal, the decree became final against him. The District Judge was not justified in interfering with the decree against him under Order XLI, rule 33 of the Civil Procedure Code, *vide Rangam Lal v. Jhandu* (1). In so far as the suit is decreed against him, we must reverse the decree. The plaintiff contended in his appeal that although defendants Nos. 2 and 3 might have been minors, they were represented by a guardian and the debt is binding on them. The District Judge has not dealt with this aspect of the case. We must reverse the decree of the District Judge and remand the appeal to him for disposal on the merits. The costs will abide the result.

Appeal allowed; Case remanded.

(1) 11 Ind. Cas. 640; 8 A. L. J. 1111; 34 A. 32.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2902 AND 3624 TO 3627 OF 1912.

August 19, 1915.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Roe.

KHAGENDRA NATH CHATTERJEE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SONATAN GUHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract, part performance of, equities arising from—Title, whether passes by mere admission or disclaimer of owner—Purchaser's right, whether relinquishable without registered conveyance.

Where a share in a certain taluk belonging to G was purchased by C in execution of a mortgage-decree, who after his purchase without taking possession or disturbing G's possession, gave up for a consideration his rights as purchaser in favour of G, without executing a registered conveyance:

Held, that the relinquishment thus made divested C of the rights he had acquired by his purchase, as any suit brought afterwards by C against G for recovery of the share, would have been successfully resisted by G. [p. 989, col. 2.]

Jadu Nath Poddar v. Rup Lal Poddar, 4 C. L. J. 22; 10 C. W. N. 650; 33 C. 967; *Musammam Odey Koonur v. Musammam Laidoo*, 13 M. L. A. 585; 15 W. R. (P. C.) 16; 6 B. L. R. 283; 2 Satl. P. C. J. 388; 2 Sar. P. C. J. 628; 20 E. R. 669; *Dharam Chand Baid v. Monji Shahu*, 16 Ind. Cas. 440; 16 C. L. J. 436, explained and distinguished—

Walsh v. Lonsdale, (1882) 2 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109; *Puchha Lal v. Kunj Behary Lal*, 20 Ind. Cas. 803; 19 C. L. J. 413; 18 C. W. N. 445; *Mohamed Musa v. Aghore Kumar Ganguli*, 26 Ind. Cas. 930; 42 I. A. 1; 19 C. W. N. 250; 17 Bom. L. R. 420; 42 C. 801; 2 C. L. J. 231; 28 M. L. J. 548; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; *Maddison v. Alderson*, (1883) 8 App. Cas. 476; 52 L. J. Q. B. 737; 49 L. T. 308; 31 W. R. 820; 47 J. P. 821, applied.

A mere admission or disclaimer of the owner cannot operate to pass title to property where a conveyance is required under the law to transfer title, but a different result might follow from equitable principles of part performance of a contract. [p. 989, col. 2.]

Equities arising from part performance and from acts done in execution of a contract discussed. [p. 980, col. 1.]

Appeals against the decrees of the Officiating Subordinate Judge at Barisal of Backerganj, dated the 5th July 1912, reversing that of the Munsif, 1st Court at Barisal, dated the 4th May 1904.

Sir *Rash Behary Ghose*, Babus *Tara Kishore Choudhury* and *Brojo Lal Chakravarti*, for the Appellants.

Babus *Jogesh Chandra Roy* and *Gunada Chandra Sen*, for the Respondents.

JUDGMENT.—The facts connected with the litigation out of which these appeals arise, may be stated as follows—

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The lands in dispute are included in a permanent tenure called Taluk Kamdeb Guha appertaining to the *zemindari mahal* No. 2694 belonging to the plaintiff-appellant. The *taluk* was sold in execution of a rent decree and purchased by one Ganga Charan in 1864, who sold it to four persons, Ramsagar, Gokul, Krishnapriya and Chandrakala, who were members of the Guha family to whom the *taluk* belonged before the sale under the rent-decree. The first three mortgaged a 14-annas 4-gundas share of the *taluk* to certain persons who sued and obtained a decree upon the mortgage and one Chandra Kumar Bose ostensibly purchased the said share at the sale held in execution of the said decree, but it has been found that Chandra Kumar was the *benamdar* of the said mortgagors. The fourth purchaser from Ganga Charan, *viz.*, Chandrakala, appears to have had a 1-anna 16-gundas share in the *taluk*, which on her death devolved on her three sons in equal shares, two of whom Ananda and Iswar mortgaged their 1-anna 4-gundas share to one Kashinath, whose successors-in-interest (who are described in these cases as the Chakravartis and the Kanjibalis) purchased the said share at a sale held on the 1st June 1888 in execution of a decree obtained upon the said mortgage. These Chakravartis and Kanjibalis deposited the landlord's fee as required by section 12 of the Bengal Tenancy Act but it was not accepted by the plaintiff, as Iswar and Ananda whose interest they purchased or their mother had not got their names registered in the plaintiff's *sherista*. It appears that out of the four persons named above who purchased the *taluk* from Ganga Charan in 1864, only Ramsagar and Gokul got their names registered in the landlord's *sherista* and it was from them that the landlord used to realise rent for the tenure amicably or by suit. After the death of Ramsagar and Gokul, the landlord in 1889 brought a suit for rent against the four sons of Ramsagar and the widow of Gokul and the *taluk* having been sold in execution of the decree was purchased by one Chandra Kumar Chakravarti on the 17th March 1890. Then another decree was obtained for rent in 1890 for the period prior to the said sale. When execution of this decree was taken out, a mortgage (*kistibandi*) bond was exe-

cuted by Chandra Kumar Chakravarti, Dinamani (widow of Gokul) and by three other persons who were members of the Guha family, *viz.*, Rasik, Sonatan and Amar, in which it was stated that Chandra Kumar Chakravarti was the real owner of the *taluk* by purchase. From that time, the *zemindar* sued Chandra Kumar alone for rent, the last suit being No. 2767 of 1893. At the sale in execution of the decree passed in that suit, the *taluk* was purchased by one Manitora on the 29th April 1895. By this time, the *zemindar* suspected that Chandra Kumar and Manitora were *benamdars* for the Guhas, and in the next two rent suits Nos. 1572 of 1895 and No. 1574 of 1895, he joined the four sons of Ramsagar and the widow of Gokul (who were the defendants Nos. 4 to 8 in that suit), and Rasik, Sonatan and Amar who had joined Chandra Kumar in the *kistibandi* mortgage-bond and were made defendants Nos. 1 to 3, the 9th defendant in the 1st suit being the said Chandra Kumar and the 9th defendant in the second being Manitora. The defence of the first eight defendants in those two rent suits was that defendants Nos. 4 to 8 (the heirs of Ramsagar and Gokul) were the real owners of the *taluk*, that the defendants Nos. 1 to 3 had no interest therein and that the defendant No. 9 Chandra Kumar in the first suit and defendant No. 9 Manitora in the second, were the real auction-purchasers and decrees for rent should be passed against the said purchasers in each suit. The Court, however, found that Chandra Kumar and Manitora were *benamdars*, that defendants Nos. 1 to 3 had no interest in the *taluk* and that defendants Nos. 4 to 8 were the real owners of the *taluk*, and accordingly passed decrees against them. In execution of the decree in suit No. 152 of 1895, the *taluk* was sold and purchased by the *zemindar* decree-holder on the 20th June 1898 and he obtained delivery of possession through Court on the 29th July 1899. The judgment-debtors applied to have the sale set aside, but the application was dismissed and the order of dismissal upheld up to this Court. On the plaintiff attempting to take *khas* possession, the judgment-debtors set up several under-tenures and notices under section 167 of the Bengal

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Tenancy Act were thereupon served upon them and the plaintiff instituted several suits for recovery of possession.

In three cases, it was found that the notices were not served within the time allowed by law and with respect to those three, the plaintiff instituted three rent suits which gave rise to Second Appeals Nos. 3625 to 3627. In the other two cases, the notices were served in proper time and they were for possession of the lands in respect of which the defendants had set up under-tenures.

The defence of the defendants, so far as it is necessary to state for the purpose of the present appeals, substantially was that as some of the owners of the *taluk*, viz., the Chakravartis and Kanjibalis, were not made parties to the rent suit of 1895, the decree cannot operate as a decree for rent under the Bengal Tenancy Act and the sale held in execution of such a decree could not pass the *taluk* free of incumbrances, and the under-tenures held by the defendants, therefore, were not affected by the sale.

These two suits (which gave rise to Second Appeals Nos. 3524 and 2902) were decreed by the Munsif, but on appeal, the suits were dismissed; on second appeal (Second Appeal No. 2719 of 1914) the cases were remanded to the lower Court and that Court again decreed the suits. There were again second appeals (Second Appeals No. 2627 of 1907 and analogous appeals) and this Court was of opinion that if the Chakravartis and Kanjibalis had any subsisting interest at the date of the institution of the rent suit in 1895, the suits must be dismissed, but if they had no subsisting interest at that time, the suits must be decreed, and the Court below was directed to determine the said question.

On remand, the learned Subordinate Judge came to the conclusion that the Chakravartis and Kanjibalis had a subsisting interest in the *taluk* at the date of the rent suit, and accordingly dismissed the suits. The Second Appeals Nos. 3624 and 2902 have been preferred by the plaintiffs against the said decision.

The question for consideration in these appeals, therefore, is whether the Chakravartis and Kanjibalis had any subsisting

interest at the date of the rent suit in 1895.

As regards the question of possession of the 1-anna 4 *gundas* share, the learned Subordinate Judge said: "were it necessary to come to a decision on this point, I would have unhesitatingly held that the Guhas were all along in possession of the land, that the Chakravartis and Kanjibalis never received rent from them and that evidence of payment of rent to and grant of *dakhilas* by the latter is concoction, pure and simple, to defeat the claim of the plaintiffs," but he was of opinion that as there was no conveyance by the Chakravartis and Kanjibalis in favour of Iswar and Ananda, nor possession for the statutory period by the latter, the former were not divested of their right and no title was created in favour of the latter. But his findings as to whether the Chakravartis and Kanjibalis relinquished their right on receipt of the decretal amount, was not clear and definite. We accordingly remanded the case for a definite finding on the point. The finding has now been returned to this Court and the Court below has clearly found that the Chakravartis and Kanjibalis relinquished the share purchased by them on receipt of the decretal amount from the Guhas. As stated above, the Court below was of opinion that notwithstanding that the Chakravartis and Kanjibalis disclaimed their title to and possession of, the share purchased by them, the Guhas could not have acquired any title to the share for want of a registered conveyance and relied upon the case of *Jadu Nath Poddar v. Rup Lal Poddar* (1).

We think that the Court below is wrong in the view it took of the legal effect of the relinquishment in the present cases. It is true, a mere admission or disclaimer cannot operate to pass title to property where a conveyance is required under the law to transfer title. In the case relied upon, there was a release executed by the real owner in favour of another person in order to protect his property from the claims of his creditors. The nominal transferee sold a portion of the property to another. The creditors were not defraud-

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ed and it was held that the real owner could recover the property from the *benamdar* and the transferee from him. There is an observation of Mookerjee, J., that the title of the real owner could not pass by an admission. But in that case, the original transferee and the purchaser from him, were found not to be *bona fide* purchasers for value, and they were fully aware of the real nature of the transaction. It was under these circumstances, that Mookerjee, J., observed that title could not pass by a mere admission. In the case of *Musammam Oodey Koonur v. Musammam Ladoo* (2), in a suit to redeem a mortgage of an estate A, in order to avoid an objection taken as to parties, filed a petition disclaiming all interest in the estate. The Judicial Committee held that in the circumstances and in the absence of any consideration given to A, the petition did not operate as a conveyance of A's right or as an estoppel to a suit by her for possession of the estate. Mookerjee, J., relied upon that case and observed that although under certain circumstances a person may be estopped from setting up a title in himself, title of the real owner could not pass by mere admission. The opinion expressed in that case was followed by Mookerjee and Beachcroft, JJ., in *Dharam Chand Roid v. Mouji Shahu* (3). There a partnership business was sought to be transferred by means of a deed of release. It does not appear that any consideration was paid or that there were circumstances which would in equity have precluded the transferor from challenging the validity of the transfer.

In the present case, the matter did not rest upon a mere admission. The Chakravartis and Kanjibalis on receipt of consideration gave up their rights as purchaser in favour of the Guhas and it is found that the former never took possession and the latter were allowed to remain in possession of the property. There is no doubt that the Guhas could sue the Chakravartis and Kanjibalis for specific performance. They could have successfully resisted a suit by the latter if they sued the Guhas for possession of the share. It is contended on behalf of

(2) 13 M. I. A. 585; 15 W. R. P. C. 16; 6 B. L. R. 283; 2 Suth. P. C. J. 388; 2 Sar. P. C. J. 628; 20 E. R. 689.

(3) 16 Ind. Cas. 440; 16 C. L. J. 436,

the respondents, that under section 54 of the Transfer of Property Act and section 12 of the Bengal Tenancy Act, there can be no transfer except by a registered conveyance. But the equitable principle is well-established and we need only refer to *Walsh v. Lonsdale* (4) and *Puchha Lal v. Kunj Behary Lal* (5), decided by Jenkins, C. J., and Mookerjee, J. In the latter case, a purchaser under an unregistered conveyance paid the agreed price to his vendor and was placed in possession, and it was held that in the absence of circumstances showing that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance could not succeed in a suit to recover possession of the property from the former purchaser. Coxe, J., relied upon the provisions of section 54 of the Transfer of Property Act and was of opinion that the transaction was a nullity and that the vendor himself was not estopped from disputing the validity of the transaction. He was, however, overruled by the Court of Appeal, and Jenkins, C. J., observed:—"There is no invasion or evasion of the Registration Act. It is merely securing a party those rights to which he is entitled apart from the Act—rights to which he has a good title in Courts to which the abiding direction has been given to proceed in all cases according to equity and good conscience."

In the recent case of *Mohamed Musa v. Aghore Kumar Ganguli* (6), where by a compromise made in a suit in 1873, it was agreed that mortgaged property should be released from two mortgages, the *malikana* being thenceforth allotted in agreed proportions to the two mortgagees and the mortgagor, and that the latter should execute deeds of absolute sale or transfer of the proportions allotted to the respective mortgagees, a decree was made in pursuance of the compromise, but the compromise agreement

(4) 1882 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 107.

(5) 20 Ind. Cas. 803; 18 C. W. N. 445; 19 C. L. J. 213.

(6) 24 Ind. Cas. 930; 42 I. A. 1; 19 C. W. N. 250; 17 Bom. L. R. 420; 42 C. 801; 21 C. L. J. 231; 28 M. L. J. 548; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621.

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was not registered, nor were the transfers executed. All parties, however, thenceforward acted in every respect as if the transfers had been made, and there were dealings both by the mortgagor and the mortgagees with the shares allotted to them under the agreement. In 1908, a suit was instituted to redeem the mortgages and it was held by the Judicial Committee:—

"That whatever defects of form there might be in relation to the compromise agreement as a transfer of the equity of redemption, were cured by the conduct of the parties in continuously acting upon it, and that the right to redeem the mortgages was extinguished." Their Lordships observed:—"The point which is made against giving effect to this compromise, is that a conveyance was not made by Khodajanessa in completion of the contract of purchase narrated in the *razinama*. This is true. But no written conveyance by the law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882.

"But even if transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages. For the points against opening up the transaction, are manifold and are in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors-in-title from that date to this." Then referring to the case of *Maddison v. Alderson* (7), their Lordships observed:—"Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison v. Alderson* (7), founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute

of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation, would follow."

It is contended on behalf of the respondents that all the cases where the above principles were applied were cases between parties claiming under the contract, that the Chakravartis and Kanjibalis are no parties to these suits, and neither the plaintiffs nor the Guha defendants claim under them. But the plaintiffs purchased the tenure of which the Chakravartis and Kanjibalis were at some time part owners and they had given up their rights in favour of Iswar and Ananda, and the Guhas set up the rights of those persons as having had a subsisting interest in the *taluk* when the rent suit was brought. If the contention of the respondents were valid, a creditor cannot avail himself of any estoppel or equities to which his debtor is entitled. If the debtor paid the purchase-money for a property and the vendor delivered possession of the property to him, the creditor cannot according to the respondents' contention avail himself of the equities arising from the transaction. We do not think that this case can be distinguished in principle from the cases cited above; and we are of opinion that the Chakravartis and Kanjibalis having given up their rights on receipt of consideration and allowed the Guhas to remain in possession of the 1-*anna* 4-*gundas* share, were precluded from setting up any title against the Guhas, and they had no subsisting right to the share at the date of the suit for rent. In the rent suits, the Guha defendants stated that they were the only owners of the *taluk*, but that their interest had passed to Chandra Kumar and Manitora who had purchased the *taluk* at sales held in execution of previous rent decrees. They did not say a word about the Chakravartis and Kanjibalis having any subsisting interest in the *taluk*. Kamini Chakravarti, the head of the Chakravartis, was examined in the rent suits, and he disclaimed all interest in the *taluk*. The Court found that Chandra Kumar and Manitora were *benamdar*s for the Guhas, and it was the Guhas (the defendants Nos. 4 to 8 in these suits) who were the real owners of the *taluk* and exclusively liable for rent, and it is they

(7) (1883) 8 App. Cas. 476; 52 L. J. Q. B. 737; 49 L. T. 308; 31 W. R. 82ⁿ; 47 J. P. 821.

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who now plead that the Chakravartis and Kanjibalis had a subsisting interest at the date of the suit.

It is contended on behalf of the respondents that the question of relinquishment or estoppel was never raised before; the only question raised being whether the Chakravartis and Kanjibalis were *benamidars* and that the order of remand made by Mookerjee and Beachcroft, JJ., precludes us from considering the said questions. We do not think that there is any substance in this contention. The plaintiffs did not allege in their plaint that the Chakravartis and Kanjibalis were *benamidars*; it was the defendants who set up their title, and when Kamini Chakravarti was examined, the question of relinquishment was raised. The question of relinquishment was considered by the Munsif so far back as the 15th February 1907 in certain suits between the parties. The question of relinquishment and the equities arising from it are involved in the decision of the question whether the Chakravartis and Kanjibalis had any subsisting interest, which Mookerjee and Beachcroft, JJ., by their remand order directed the lower Court to determine. It is contended that the only question for decision which the remand order contemplated was whether the Chakravartis and Kanjibalis were *benamidars* for the Guhas. But if they were *benamidars* for the Guhas, we fail to see how any question of their having a subsisting right, could arise. Then it is said that the learned Judges who remanded the case would have gone into the question of relinquishment and the other contentions founded upon it, had the question been raised before them. But the fact of relinquishment on receipt of consideration had not been found before the case was remanded, and in the absence of such a finding, the question of equitable considerations could not be gone into. Admittedly the Chakravartis and Kanjibalis did not execute any conveyance. The question whether their interest had determined otherwise than by execution of a conveyance for example, by relinquishment operating as estoppel or giving rise to equitable considerations was, therefore, involved in the order of remand and in no way inconsistent with it, and we do not see how we are precluded by the remand order from going

into those questions when the remand order directed the Court below to decide the question whether the Chakravartis and Kanjibalis had any subsisting right at the date of the rent suit.

From what we have said above, it is clear that the Chakravartis and Kanjibalis had no subsisting interest at the date of the rent suit and that their rights had vested in the Guhas. The suit for rent, therefore, was brought against proper parties and the sale held in execution of the rent-decree passed the entire *taluk* with power to annul incumbrances. Notices under section 167 of the Bengal Tenancy Act having been served in the two title suits, the under-tenures set up by the Guhas, must be held to have been cancelled.

These two appeals (Appeals Nos. 3624 and 2902 of 1912) are accordingly decreed, the decrees of the Court of Appeal below are set aside and those of the Court of first instance are restored with costs here and in the Court below.

Appeals Nos. 3625, 3626 and 3627 arise out of three rent suits mentioned above. The lower Appellate Court gave a decree for rent in respect of only 14-*annas* and odd *gundas* share, but having regard to our finding that the Chakravartis and Kanjibalis had no subsisting right, the plaintiffs should get a decree for the entire rent and the decrees of the lower Appellate Court will be varied accordingly, the result being that the suits will be decreed in full with costs in all Courts.

Appeals allowed.

KIDHA SINGH v. EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL NO. 750 OF 1915.
November 10, 1915.

Present:—Justice Sir George Knox, Kt.

KIDHA SINGH—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476, scope of—Sanction to prosecute—Prima facie case.

All that a Court granting sanction to prosecute under sections 195 and 476 of the Criminal Procedure Code for offences made punishable thereby, has to see is that a *prima facie* case has been made out upon the evidence before it for inquiring further into the question whether or no any of the offences punishable as set out in section 195, has or has not been made out. [p. 994, col. 1.]

Criminal appeal from an order of the Additional Sessions Judge of Moradabad.

Mr. C. Dillon, for the Appellant.

JUDGMENT.—This is an appeal against an order of the Additional Sessions Judge of Moradabad, whereby he has granted sanction for the prosecution of one Kidha Singh under section 193 or section 465/114 of the Indian Penal Code. With reference to the prosecution, the learned Judge has in his judgment said: "In this case alternative charges under section 193 of the Indian Penal Code, and section 465/114 of the Indian Penal Code, may have to be framed. If the receipt was really written the same day as he sold the bullock, it was not written on December 9th the date it bears. Signing the receipt was fabricating false evidence or forgery." The ground on which I am asked to interfere in appeal with this order of sanction is "because the evidence given by the appellants on behalf of Jahana was inconclusive, and even if believed, was insufficient to secure his acquittal. It would be impossible to prove that their statements were demonstrably false, and there would, in consequence, be no conviction." I was referred in the course of the argument to what was said regarding this evidence by the Court before which the evidence was given. It appears that Jahana was on his trial for murder. He set up an *alibi* and in support of the *alibi* he secured the attendance amongst other persons of Kidha Singh. The *alibi* was to the effect that on the day in question, Kidha Singh

along with Jahana was at a place called Phina and that he there purchased a bullock. The murder was committed at Dayalwala. The two places are far apart, and the argument is on the one side that Jahana could not have been on the day in question at Phina and then subsequently at Dayalwala. The argument on the other side is that it was possible even on the evidence, for Jahana to have caught a train and by means of that train to have arrived at Dayalwala just in time to commit the murder. Regarding this evidence, the learned Judge says: "The sale of the bullock was not registered or reported at the Thana and the receipt may well have been written long after December 9th. Even if Jahana ever did buy a bullock from Kidha Singh which I very much doubt there is no guarantee that the witnesses have not rolled up an old transaction that took place months ago and merely changed the dates. It is admitted that bullocks of the kind that Jahana says he wanted, can be got in many places in the district very much less remote than Phina, and it does not seem likely that Jahana and his friend would have wandered all over the district for a week and spent a lot of money in tonga and railway fares in order to buy a Rs. 65 bullock. In face of the overwhelming evidence on the other side to prove that Jahana was at Dayalwala on December 9th, I am quite unable to attach the slightest weight to this *alibi* and the evidence called to support it." The argument addressed to me is that sanction ought not to be granted when the evidence before the Court granting the sanction is such that the probable result will be acquittal. Scandal is caused if a prosecution of this nature results in acquittal. These arguments are based upon certain cases of the Calcutta High Court, namely, *Ram Prosad Malla v. Raghubar Malla* (1) and *Jadunandan Singh v. Emperor* (2). With all due respect to the learned Judges who arrived at that conclusion, I find my-

(1) 4 Ind. Cas. 6; 37 C. 13 at p. 20; 13 C. W. N. 1038; 10 Cr. L. J. 454.

(2) 4 Ind. Cas. 710; 37 C. 250 at p. 258; 14 C. W. N. 330; 10 C. L. J. 564; 11 Cr. L. J. 37.

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self unable to agree with it. I cannot find either in section 195 of the Code of Criminal Procedure or in section 476 of the same Code any phrase which would lead to this result. Reading the two sections together and having regard to paragraph (4) in section 195 and the words in section 476 of the Code of Criminal Procedure "when any Criminal Court is of opinion that there is ground for enquiring into an offence referred to in section 195 such Court after making such preliminary enquiry as may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the First Class," in my opinion, all that a Court granting sanction has to see is that a *prima facie* case has been made out upon the evidence before it for inquiring further into the question whether or no any of the offences punishable as set out in section 195 of the Code of Criminal Procedure has or has not been made out. That question is still under inquiry. It is open to both sides to produce further evidence in support of or against it. In the present case, I do not pronounce any opinion on the value of the evidence which is on the record. I can quite see that the prosecution may be able to prove for instance that the train which left that day left at such a time and hour as to render it impossible for Jahana to have arrived at Dayalwala at the time mentioned. That by no means limits the possibility of what the prosecution may be able to put forward. It often happens that in this country cases, are started for the first time and without any warning to the prosecution of the nature of the evidence which the defence is about to put forward. Several cases by the late Mr. Justice Straight when he first came to this Court show how struck he was with this matter. Again the defence may be well able to show that Jahana left Phina at such a time as to enable him to reach Dayalwala before the murder was committed. All this is to be inquired into. When we have one learned Judge stating the result of his view that the evidence for the *alibi* is not entitled to the slightest weight and when we have another Judge coming to the same conclusion, it does seem to me that there is ample ground for enquiry, or to put it in another way that a *prima facie* case has been made out against Kidha

Singh. I do not wish it to be understood that I think a case has been made out which must necessarily lead to conviction. Far from that. But a cloud of suspicion has been raised and it will be in the interest of justice if it were dispersed and the truth arrived at as far as possible. For these reasons, I am unable to allow this appeal and I dismiss it.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL CONFIRMATION NO. 24 OF 1915.

October 19, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

EMPEROR—PROSECUTOR

versus

DAJI YESABA—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 374, 376—Murder case—Trial by Jury—Reference—Appeal—High Court—Practice—Confirmation of sentence.

Batchelor, J.—In the Bombay High Court where a prisoner has been sentenced to death, even though the conviction was had on the unanimous verdict of a Jury, the whole case is re-opened before the High Court both on matters of fact as well as on matters of law. [p. 995 col. 1.]

Hayward, J.—In the High Court in murder cases it is always necessary to consider the evidence in support of the facts found by the Jury in order to ascertain that there had been no misdirection in the charge to the Jury and to determine whether it would or would not be proper in all the circumstances to confirm the sentence of death passed by the Sessions Judge. [p. 995, col. 1.]

Criminal confirmation in conviction and sentence passed by the Sessions Judge of Belgaum.

Mr. V. R. Sirur, for the Accused.

Mr. S. S. Patkar (Government Pleader), for the Crown.

JUDGMENT.

BATCHELOR, J.—The appellants before us, who are five in number, were convicted by the learned Sessions Judge of Belgaum of the offence of murder. The conviction followed upon the unanimous verdict of the Jury.

Of the five accused persons before the Sessions Court, Nos. 3 and 4, Daji bin Yesaba and Bhima bin Shidlinga, were sentenced to death, that sentence being subject to this

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Court's confirmation. The other three accused were sentenced to transportation for life.

It appears to be the practice of this Court that where a prisoner has been sentenced to death, even though the conviction was had on the unanimous verdict of a Jury, the whole case is re-opened before the High Court both on matters of fact as well as on matters of law. In deference to that practice, we have allowed Mr. Sirur, for the accused Nos. 3 and 4, to address us on all matters of evidence in the appeals. I desire, however, to reserve my own opinion as to the correctness of the practice to which I have alluded, should the question of its correctness ever arise for judicial decision.

[Note.—The rest of the judgment is not material for this report.—Ed.]

HAYWARD, J.—I concur that the marks found on the body and the signs of struggle on the ground together with the evidence of the eye-witness, establish that this was a case not of suicide but of murder. I also concur that the evidence of the witnesses together with the confessions of the accused has shown beyond any reasonable doubt that it was the accused who were guilty of conspiring together to commit this murder. There is no good ground in my opinion for interfering with the sentences of death passed by the learned Sessions Judge.

I desire to add this on the attitude to be adopted in scrutinizing proceedings submitted for confirmation: that no considered case has been cited before us in which it was held up on full argument that the evidence in support of the facts found by the Jury, is laid open by the mere submission to the unrestricted judgment of the confirming Court. It would, no doubt, always be necessary to consider that evidence in order to ascertain that there had been no misdirection in the charge to the Jury and to determine whether it would or would not be proper in all the circumstances, to confirm the sentence of death passed by the Sessions Judge. But should the question, whether anything more than this is permitted, be hereafter raised, it seems to me that the answer would entirely depend on the interpretation of the language used in sections 374 to 376 of the Criminal Procedure Code: and it is to be observed that the provisions of section 374 do not require the convictions but only the sentences of death to

be submitted for confirmation by the High Court. It is no doubt true that section 375 authorizes further inquiry or the taking of additional evidence in proper cases and that section 376 gives power to acquit or alter the conviction whether the trial were with Assessors or a Jury. But the cases there contemplated, might well be cases in which there had been an error of law, such as improperly withholding evidence from or misdirection in the charge to the Jury. And it is significant that under the proviso to section 376, it is only after the disposal of any appeal which would only lie on a matter of law where the trial was by Jury under section 418 of the Criminal Procedure Code, that the powers of confirmation or otherwise of the sentence of death can be exercised by the High Court.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 459 OF 1915.

July 13, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

EMPEROR—PROSECUTOR.

versus

BRIKHBHAN SINGH AND OTHERS—

ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 165—Search without warrant—Specification of property to be searched—Illegal search—Resistance—Penal Code (Act XLV of 1860), s. 332.

Where a Police Officer authorizes another to make a search without a warrant from a Magistrate, he should give the authority in writing specifying the thing or things which are to be searched for. Section 165 of the Criminal Procedure Code does not authorize a general search on the chance that something may be found. [p. 997, cols. 1. & 2.]

An accused offering resistance to the Police making an illegal search is not guilty of an offence under section 332 of the Penal Code. [p. 995, col. 1.]

Criminal appeal from an order of the Assistant Sessions Judge of Mainpuri, dated the 19th April 1915.

Mr. A. E. Ryves (Government Advocate), for the Crown.

Messrs. G. W. Dillon and Sheolehal Sinha, for the Accused.

JUDGMENT.—Eighteen accused persons were put on their trial on charges of rioting, dacoity, wrongful restraint and obstructing the Police in discharging their duty. The learned Additional Sessions Judge acquitted

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the accused and Government have appealed. It appears that a dacoity had taken place at a place called Nagla Murli in the Agra District. Some sort of a conference had taken place at which the Deputy Inspector of Police was present. The persons attending this meeting, appear to have been the Circle Inspectors of the Agra District and the surrounding districts. It was there decided that searches should take place at the houses of persons who were suspected of having been concerned in the dacoity. The result of this meeting was that Chunni Singh, one of the Circle Inspectors of the Mainpuri District sent Mohammad Naim Khan, a Sub-Inspector of Jasrana (in the Mainpuri District) to Mahfuz Ali, one of the Circle Inspectors of the Agra District in whose Circle the dacoity is said to have taken place. Mahfuz Ali says that he gave a written authority to Naim Khan to search the house of one Nihal Singh and arrest him. In cross-examination, he stated "I wrote this that the house of Nihal Singh be searched in connection with the dacoity at Nagla Murli, that he might be arrested for the sake of identification and that the houses of those persons should also be searched who were suspected by the Sub-Inspector of receiving stolen property."

It may be noted here that Mohammad Naim Khan had nothing to do with the investigation of the dacoity which had taken place at Nagla Murli. It was outside his district, and, so far as the evidence goes, there is nothing to show that Mohammad Naim Khan even knew what property had been stolen in the dacoity. It is here desirable to mention who Nihal Singh was. Nihal Singh was not a resident of the Mainpuri District. He had belonged to the Agra District. Proceedings had been taken against him in the year 1912 under section 110 of the Code of Criminal Procedure. He had been bound over and his father-in-law, Bindrabhan Singh, accused No. 2, had gone security for him. Whether it was that Bindrabhan Singh having gone security for his son-in-law, wished to keep an eye upon him, or whether he was anxious that no false accusation might be made against him, the fact remains that Nihal Singh had gone to reside with his father-in-law in the village of Malikpur in the Mainpuri District. It would appear that on the 4th of December 1914, a search had been made at the house of Bindrabhan

Singh. How far this search was legal, we are not in a position to say but the search was not in connection with anything wrong that Bindrabhan had done. The search must have been in some way connected with Nihal Singh. On the 20th of December, that is to say 16 days afterwards, Mohammad Naim Khan with two constables, Sunder Singh and Debi Singh, arrived at the house of Bindrabhan Singh between 10 and 11 A. M. He was met in the village by Hakim Singh and Naubat Singh (brother of Hakim Singh), Hakim Singh being the *Mukhia* of the village, though he lived in a neighbouring village. According to the Police when they arrived at the house, Nihal Singh at once came out and said "you have searched the house shortly before and now you are going to search it again;" he asked them to fight it out before they searched the house. Immediately a number of other persons arrived, they began to beat the Sub-Inspector and the constables, the Sub-Inspector fired three shots from a revolver in self-defence, the revolver was snatched away and the Police were badly beaten. They were put into a cell, shut up, their uniforms and turbans taken from them, and they were only released after some persons belonging to a neighbouring village came to their rescue. This is the story told by the Police.

A number of the accused persons admitted that they had assaulted the Police. That the Police were assaulted and beaten, there is not the least doubt. But the story of the accused, (at least of those who admit having taken any part in the affair) is that the Police arrived whilst all the male members of the house were still at work in the fields, and forced their way into the presence of the women where they asked for Nihal Singh, that they abused the women, that the women raised an outcry which brought Chotey Singh, a young Thakur aged about 24 years (a son of Brikhbhan Singh and brother-in-law of Nihal Singh) to the house, he remonstrated with and abused the Police, and that thereupon the Sub-Inspector deliberately fired at him. Chotey Singh admits that he was stooping to pick up a *lathi* when he was fired upon by the Sub-Inspector. The accused then say that they took away the revolver from the Police Inspector to prevent his shooting other persons, and that

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it was necessary to do so. They admit that they used *lathis* but say that they only did so after Chotey Singh had been shot down.

The first matter that requires some consideration is how far the visit of the Police to the house of Brikbhan Singh was legal. It is obvious that the main object of the visit was to search the house. It may even be doubted whether there was ever the least intention of arresting Nihal Singh, except perhaps in the event of suspicious property being found in the house. A search without a warrant from a Magistrate can only be made under the provisions of section 165 of the Code of Criminal Procedure. That section provides as follows:—"Whenever an officer in charge of a Police station, or a Police Officer making an investigation, considers that the production of any document or thing is necessary to the conduct of an investigation into any offence which he is authorised to investigate, and there is reason to believe that a person to whom a summons or order under section 94 has been or might be issued, will not or would not produce such document or thing according to the directions of the summons or order, or when such document or thing is not known to be in the possession of any person, such officer may search, or cause search to be made, for the same, in any place within the limits of the station of which he is in charge, or to which he is attached."

Clause 2.—"Such officer shall, if practicable, conduct the search in person."

Clause 3.—"If he is unable to conduct the search in person, and there is no other person competent to make the search, present at the time, he may require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer, an order in writing, specifying the document or thing for which search is to be made, and the place to be searched; and such subordinate officer may thereupon search for such thing in such place."

We may assume (but only for the purposes of argument) that Mahfuz Ali could have authorised Naim Khan to make the search without a warrant from a Magistrate. But even on this assumption, it was necessary when Mahfuz Ali was not making the search himself that he should have delivered in writing to Naim Khan an order specifying the thing or things which were to

be searched for. The section does not authorise a general search on the chance that something may be found. There is no evidence that any such specification was ever given. So far as the evidence goes, there was no such specification. We have nothing to show that Naim Khan knew what he was to search for. It seems very much as if the intention was to do the very thing we have said the section does not authorise. It lay on the prosecution to show that the action of the Police was legal and on the evidence, we find great difficulty in holding that Naim Khan was duly authorised to search the house of Bindraban Singh.

It is contended that while there may have been no legal authority for the search, there was nevertheless authority to arrest Nihal Singh. Arrest without warrant is provided for by section 54 of the Code of Criminal Procedure. The first part of clause (1) is as follows:—"Any Police Officer may, without an order from a Magistrate and without a warrant, arrest, first any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned."

Mahfuz Ali does not say that Nihal Singh had been concerned in the Nagla Murli dacoity, nor does he say that any complaint had been made that he had been concerned in it, or that any information to that effect had been received or that there was a reasonable suspicion of his having done so. He says in his evidence that the object of the arrest was identification. This presumably means that after his arrest, he was to be paraded for the purpose of being identified. It further appears extremely doubtful whether Mahfuz Ali Khan could himself have arrested Nihal Singh. He was a Circle Inspector of the Agra District. It is said that Naim Khan could have arrested Nihal Singh himself. Naim Khan could only have arrested Nihal Singh without a warrant under section 54. It is not even pretended that he was acting under the authority of this section. His authority to arrest (if any) was under the document which he had received from Mahfuz Ali. It would seem, therefore, that neither the search of the house, nor the alleged arrest of Nihal Singh was legal.

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The charge under section 332 of the Indian Penal Code, therefore, falls to the ground.

On the general merits of the case, there is, we fear, some reason to suspect the entire *bona fides* of the Police. We wish to say as little as possible, because the Police, of course, are not on their trial. It is necessary, however, where it is sought to set aside an acquittal, to consider the evidence and surrounding circumstances with the greatest care. It seems to us that if an application had been made to the Court either for a warrant for the arrest of Nihal Singh, or for an order for the search of the house, the Court would have hesitated to make that order if it had been informed that the house was not the house of Nihal Singh and that a search had already taken place there shortly before. The dacoity had taken place prior to the first search. A second search should not have been made without very good cause. In the first account which Muhammad Naim Khan gave of the occurrence, he said that it was a *lathi* blow struck by one of the accused which caused his revolver to go off accidentally. This was a deliberate untruth. The nature of the wound and other circumstances of the case including Naim Khan's own evidence at the trial, shows that his revolver did not go off by accident but was fired off on purpose, and there is very strong ground for believing that he fired at Chotey deliberately. This untrue statement in his first report shows that the Sub-Inspector was not quite happy about the revolver shot. He mentions in his report a large number of persons who were present, at the time of the occurrence. Amongst other persons he mentioned as being present, was Sukha, the *chowkidar*, and Gulzari Lal, the *patwari*. Gulzari Lal was in the first place not charged with having taken part in the assault upon the Police. If Gulzari Lal did what Naim Khan, Sundar and Debi Singh said he did, he would have been one of the chief persons to blame for the assault on the Police. If he acted in the way that Hukam Singh and other prosecution witnesses allege, he was undoubtedly mainly responsible for every thing that occurred. Naim Khan in his evidence says that at the very commencement of the

row Gulzari Lal said that "there was a day when Nihal Singh had left the village with a '*moror*' on his head and that he was about to be taken away under arrest in the presence of the *Thakurs*. On this, all the persons named above, began to beat me and the constables. Being afraid of losing our lives, I took out my pistol and fired three times". This is not what the witness said when he made his first report. Sunder Singh says that Gulzari Lal said to the *darogha* "there was a day when Nihal Singh came into the village with a wedding crown on his head and there was a day when he would be led away as a prisoner in the presence of the *Thakurs*. Debi Singh deposes to the same effect. Hukam Singh says that Gulzari Lal "gave provocation" and said that there was a time when Nihal Singh had come to the village with a wedding crown on his head. Is it possible that in the lifetime of the *Thakurs* of the village, he should go away as a prisoner. On this, the persons who were on the *chabutra* came down and surrounded the *darogha*. The *lathis* began to be wielded on the *darogha* and the constables." It is not very probable that the *patwari* would have said anything of the kind or taken the part attributed to him even if his sympathies were more or less with the villagers. We find, however, that the Police themselves evidently did not believe the case against Gulzari Lal, because we find that Mr. Kemp, Superintendent of Police, at quite an early stage took steps to withdraw the case against Gulzari Lal as being weak and the evidence unconvincing. If Mr. Kemp's estimate of the evidence was correct, Muhammad Naim Khan, the two Sub-Inspectors, and Hukam Singh have all told a deliberate untruth and falsely accused Gulzari Lal.

There is some justification for the suggestion that Gulzari Lal was implicated because he would not support the Police story. There is another matter which is certainly far from satisfactory when considering the *bona fides* of the Police. Shortly before the trial, Naim Khan summoned a number of persons belonging to the village, including persons who were defence witnesses and held out a threat to them that if they harboured any of the accused, they

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would be liable to punishment. Considering the circumstances of the case, we doubt whether this warning was necessary in the interest of justice, and it certainly had a tendency to frighten the witnesses who would be called for the defence. It does not seem as if there was any need for the threat, for a Police guard of 10 or 12 men had been placed in the village. There is yet another circumstance which deserves some consideration. It appears that immediately after the occurrence, the accused or some one for them sent a telegram to the Collector. This seems to suggest that the accused at that time looked upon themselves as aggrieved persons and were appealing to the authorities. If the accused had done what the Police say they did, it is rather difficult to understand why it was, they, so to speak, took the Sub-Inspector and his two constables into custody. We are quite satisfied that when the witness Daryai Singh and certain other persons came to Malikpur after the fight was over, there was not the smallest attempt on the part of the villagers to conceal where the Police were. The evidence of Daryai on this point we believe to be true and the evidence of Baldeo we believe to be false. The Sub-Inspector and his two constables were given up at once, they were given milk and water to drink and proceeded upon their way in Gajadhar's cart.

It is contended that even on the assumption that there was no legal justification for a search or for the arrest, nevertheless, the accused were guilty of the other charges, namely, under sections 147, 395 and 342 of the Indian Penal Code, because they had no right of self-defence, having regard to the provisions of section 99 of the Indian Penal Code. This argument might have some force if we could think that the Police had, even after the mistake, honestly come forward and told us exactly what had happened. We have pointed out that there are substantial reasons for thinking that the account given by the accused is more probable than the account given by the Police. If we assume it possible that the Police had really made their way into the female apartments in the absence of the male members, and that the moment Chotey arrived, they shot

him down, we could hardly say that the accused could be held guilty for what subsequently occurred, or that the Police could claim protection under section 99. There is no doubt that the Police were beaten and that *lathis* were used, at the same time, none of the injuries were of a very serious nature,—no bones were broken. We also fear that there is reason to think that a number of persons who took no part in the occurrence and who were at worst only onlookers, were implicated; for example, Pokhpal Singh who is apparently quite blind of one eye and almost blind of the other. He cannot walk without the support of a stick. With the exception of Daryai Singh, there is not one of the prosecution witnesses, we can trust. Hakim Singh we consider quite unworthy of belief. He implicates Gulzari Lal whom he did not implicate in his first report. According to the Police, he went away when the row began and yet he pretends to give evidence as to what occurred right up to the end of the row.

It is alleged that the accused stole the uniforms of the Police. This is a matter which is surrounded with mystery. From the very first, the principal accused never pretended that they did not know that it was the Police who had come to the house. What object the accused would have in stealing the uniforms of the Police, it is difficult to understand. It is quite clear that they did not want to keep possession of the uniforms; it would have been most dangerous for them to do so. They would not have kept them for the purpose of concealing the marks of blood, because the injuries done to the Police were perfectly apparent on their bodies. It is just possible that they might have kept the uniforms thinking Chotey had been killed and wishing to retain them as evidence of the identity of the persons who were responsible for his death. Under the circumstances, and having regard to the evidence on the record, we feel by no means certain that the Police were wearing their uniforms on the day in question. It is, however, impossible for us to be certain one way or the other upon this point.

The judgment of the learned Sessions Judge has been criticised but we are very far from thinking that he did not

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arrive at a very fair estimate of the truth of the case. After carefully considering the evidence, we have come to the conclusion that there is no reason for interfering with the judgment of the Court below. We accordingly dismiss the appeal. We direct that those of the accused who are in custody, shall be released at once and the warrants against those who are said to have absconded, are cancelled.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL APPEAL NO. 420 OF 1915.

October 19, 1915.

Present:— Mr. Justice Batchelor and
Mr. Justice Hayward.

NATHU REWA—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 309, 537 et. (a)—Irregularity—Trial before Sessions Judge—Conclusion of case—Second trial, legality of

Section 537 clause (a), Criminal Procedure Code, cannot avail to cure the disobedience to an express provision as to a mode of trial. [p 1000, col 2.]

Subrahmanian Ayyar v. Emperor, 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 2 Weir 271 (P. C.) referred to.

Where a Sessions Judge held the trial of an accused up to the point of recording the Assessor's opinion but at the time of writing the judgment, finding that a charge had been improperly joined, ordered and held a new trial and convicted the accused:

Held, that the second trial was invalid as the Judge had no authority to cancel or set aside the trial which had originally been held and that the Judge had no option but to give the judgment in accordance with the Criminal Procedure Code. [p 1000, col. 2.]

Criminal appeal from conviction and sentence recorded by the Additional Sessions Judge of Ahmedabad.

Mr. T. R. Desai, for the Accused.

Mr. S. S. Patkar (Government Pleader), for the Crown.

JUDGMENT.

BATCHELOR, J.—This is an appeal by one Nathu Rewa from a conviction by the learned Additional Sessions Judge of Ahmedabad of the offence of robbery committed between sun-set and sun-rise on the highway under the 2nd part of section 392 of the Indian Penal Code.

The proceedings leading up to this conviction are of an unusual character. The accused was originally committed to the Court of Session by the Magistrate under section 392 of the Indian Penal Code, and, on the 30th of July, the trial of the accused began before the Additional Sessions Judge. The Public Prosecutor, however, added charges under sections 214 and 411 of the Indian Penal Code over and above the charge under section 392. On the three charges, the trial proceeded up to the point where the Assessors gave the opinion. The Assessors' opinions having been recorded, the learned Additional Sessions Judge reserved judgment. When, however, he came to write his judgment, he found himself to be of opinion that the trial had been illegal, inasmuch as the third charge under section 214 of the Indian Penal Code had been improperly joined. He, therefore, in his own words, "cancelled the trial and decided to hold a fresh trial against the accused." This he conceived himself empowered to do under section 537, clause (a), of the Criminal Procedure Code. The new trial was accordingly held and the accused has been convicted as stated, though both the Assessors were of opinion that the offence imputed had not been proved.

It appears to me that the present trial was invalid on the ground that the learned Additional Sessions Judge had no authority to cancel or set aside the trial which had originally been held. That trial, as I have said, had proceeded to the point where nothing remained but the delivery of judgment. And under section 309 of the Criminal Procedure Code, the Assessors' opinions having been recorded, the Judge had no option but to give his judgment in accordance with the Code.

It is not, I think, arguable that section 537, clause (a) to which the learned Judge appeals, invested him with authority to cancel his own completed trial. That section must be read in the light of the interpretation placed upon it by the Privy Council in *Subrahmanian Ayyar v. Emperor* (1), where it was laid down that "the section cannot avail to cure the disobedience to an express provision as to a mode of trial."

(1) 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 2 Weir 271 (P. C.).

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Here it seems to me that there was disobedience to the express provision of the Code as to the mode in which trials should be conducted. I am of opinion, therefore, that all the proceedings before the learned Additional Sessions Judge must now be set aside.

We have heard the learned Pleaders on the merits of the case in order to guide our judgment to a decision as to whether we should or should not order a re-trial. Having heard all that can be said on both sides, and having regard to the peculiar circumstances of the case and the evidence on the record, we are of opinion that there is no good ground for ordering a re-trial. The accused must be acquitted and discharged, and his bail bond will be discharged.

HAYWARD, J.—I concur.

Conviction and sentence set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION APPLICATION NO. 787
OF 1915.

September 27, 1915.

Present:—Sir Henry Richards, Kt.,
Chief Justice.

PRAG DAS BHARGAVA AND ANOTHER—
ACCUSED—APPLICANTS

versus

DAULAT RAM—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 177, 179—Offence committed at one place, discovery of, at another—Trial—Jurisdiction—Penal Code (Act XLV of 1860), ss. 420, 265.

The complainant was induced to part with his money at Meerut on the false representation that a certain barrel contained a certain amount of spirit. At Agra it was discovered that the barrel did not contain the amount of spirit that it had been represented to contain:

Held, that the Magistrate at Agra had no jurisdiction to try the accused under sections 420 and 265 of the Penal Code inasmuch as the discovery of the alleged fraud at Agra after the goods were delivered, could not be said to be a 'consequence which has ensued' within the meaning of section 179 of the Criminal Procedure Code.

Application against an order of the Joint Magistrate of Agra.

Mr. Peary Lal Bansrji, for the Applicants.

Mr. A. H. O. Hamilton, for the Opposite Party.

JUDGMENT.—Prag Das Bhargava and Kundan Lal have been charged with offences under sections 420 and 265 of the Indian Penal Code. It is alleged that the complainant was cheated, that is to say, that he was induced to part with his money at Meerut on the false representation that a certain barrel contained a certain amount of spirits. When the barrel reached Agra, it is alleged that it was discovered that the barrel did not contain the amount of spirit that it had been represented to contain. The charge under section 265 is that the accused used a wrong measure. Undoubtedly if a wrong measure was used it was used in Meerut. The applicants complain that the Magistrate in Agra had no jurisdiction to enquire into the case. Section 177 of the Criminal Procedure Code provides that every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed. In my opinion, the alleged offences, if committed, were committed in Meerut and not at Agra and, therefore, *prima facie* section 177 applies. Section 179 is as follows:—When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be enquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued." There are several illustrations given to the section. The first is "A is wounded within the local limits of the jurisdiction of Court, X, and dies within the local limits of the jurisdiction of Court Z. The offence of culpable homicide of A may be enquired into or tried either by X or Z." I think it is quite clear that section 179 does not apply to the circumstances of the present case. The accused are not charged with the commission of any offence "by reason of anything which has been done or any consequence which has ensued at Meerut." The discovery of the alleged fraud at Agra after the goods were delivered, cannot be said to be a "consequence which has ensued" within the meaning of this section. I am quite satisfied that the Magistrate at Agra has no jurisdiction. The learned Magistrate may be informed of this judgment.

Application granted.

EMPEROR v. MIAN DIN.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 536 OF 1915.

July 23, 1915.

Present:—Mr. Justice Tudball and

Mr. Justice Chamier.

EMPEROR—PROSECUTOR

versus

MIAN DIN AND ANOTHER—ACCUSED.

Public Gambling Act (III of 1867), s. 1, 3—'Place', interpretation of—Enclosure within low brick-wall, if place.

Round the sides of a bullock-run, in the shape of a semi-circle there had been raised a low wall of loose-bricks and it was within the shelter of this low brick-wall that gambling took place;

Held, that the enclosure was a place, within the meaning of the Gambling Act. [p. 1003, vol. I.]

Criminal appeal against an order of acquittal passed by the Cantonment Magistrate of Allahabad.

Mr. A. E. Ryces (Government Advocate), for the Crown.

Mr. R. K. Sorabji, for the Accused.

JUDGMENT.—This is a Government appeal against an order of acquittal passed by a Magistrate of the first Class in the case of two persons Mian Din and Farid-ud-din who were charged with an offence under section 3 of the Public Gambling Act III of 1867. The Magistrate passed his order on the finding that the spot where the gambling was taking place was not a "place" within the meaning of section 1 or section 3 of the Act. In section 1, a common gaming-house is defined as any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place etc. The spot where the gambling is said to have taken place in the present case, is the lower end of a bullock-run of a disused well on a bit of open land where there are some trees and a small hut. Round the sides of the bullock-run, in the shape of a semi-circle, has been raised a low wall of loose-bricks and it is within the shelter of this low brick wall, that the gambling is said to have taken place. The Magistrate has passed his opinion that it is not a 'place' within the meaning of the Act relying on ruling to be found as *Abbi v. Queen-Empress* (1) and on *Queen-Empress v.*

Jagannayakulu (2). He refused to follow *Emperor v. Fattoo Mahomed Sher Mahomed* (3). In our opinion, the place where the gambling is said to have occurred in the present case, falls within the definition of the word "place" in the Act. The question was discussed with some detail in the judgment in *Emperor v. Fattoo Mahomed Sher Mahomed* (3). In the Bombay Act, the words are "whoever, being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purpose of a common gaming-house." The only difference between the Bombay Act and the Act which is in force in this Province is that the words "walled enclosure" are added in the latter. The section runs "Having the use of any house, walled enclosure, room or place." The Bombay Judges in their judgment, refer to certain English cases in which a decision was given in regard to the meaning of the word "place" in sections 1, 2 and 3 of the English Betting Act which prohibit the use for betting of any house, office, room or other place. We agree with them that there is no reason to suppose that the word "place" in either of the two Indian Statutes, has any more narrow or restricted meaning than it has in the English Statute. In *Powell v. Kempton Park Racecourse Company* (4), Lord Halsbury remarked as follows:—"I think in this respect with Rigby, L. J., that any place which is sufficiently definite, and in which a betting establishment might be conducted, would satisfy the words of the Statute." Lord James of Hereford remarked:—"There must be a defined area so marked out that it can be found and recognised as the 'place' where the business is carried on and wherein the bettor can be found." In the Bombay case, the place which was under consideration, was a piece of open land on which there was neither roof nor wall but which was surrounded by houses and was approached by a narrow lane. In our opinion, in the case which is now before us, the spot where the

(2) 18 M. 46; 1 Weir 919.

(3) 20 Ind. Cas. 609; 37 B. 651; 15 Bom. L. R. 689; 14 Cr. L. J. 449.

(4) (1899) A. C. 143; 68 L. J. Q. B. 392; 80 L. T. 538; 47 W. R. 585; 63 J. P. 260; 19 Cox. C. C. 265; 15 T. L. R. 266.

(1) 14 P. B. 1896 Cr.

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gambling is said to have taken place, was a sufficiently defined area so marked out that it could be found and recognised as the place where the business of betting was being carried on. The argument has been raised that the adjective "walled" in Act III of 1867, applies not only to the noun 'enclosure' but also to the two nouns 'room or place.' With this, we cannot agree. It is clear that the word "walled" is applied only to the word "enclosure." It could hardly in common parlance be used with the word "room." We, therefore, are of opinion that the decision of the Magistrate in so far as the meaning of the word "place" is concerned is incorrect, and we must, therefore, set aside the order of acquittal. At the same time, the case is one of a very trivial nature. The accused have been subjected practically to two trials, one in the Court below, and one in this Court, and we think that the ends of justice have been sufficiently met. We, therefore, do not direct that the accused be again placed upon their trial.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 250
OF 1915.

October 13, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

MANILAL MANGALJI—ACCUSED—
APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Bombay Prevention of Gambling Act (Act IV of 1887), s. 3—Instrument of gaming—"Means of gaming," meaning of—Book recording bets, whether a means of gaming.

The word 'means' as used in section 3 of the Bombay Prevention of Gambling Act, 1887, having regard to the inclusive character of the definition in which it has been used, includes a thing or article which has been specially contrived and used to promote and facilitate the wagering.

A green book used for making entries of the bets made by those engaged in the wagering which could not be conveniently conducted otherwise than with or by means of this green book, is a 'means' or 'instrument' of gaming within [the definition in section 3 of the Act.

Criminal application for revision against conviction and sentence recorded by the Third Presidency Magistrate of Bombay.

Mr. Jinnah (with him Mr. T. R. Desai), for the Applicant.

Mr. Bahadurji, (acting Advocate General), (with him Mr. Nicholson, Public Prosecutor), for the Crown.

JUDGMENT.

BATCHELOR, J.—In this case, the applicant, Manilal Mangalji, has been convicted by the learned Third Presidency Magistrate of managing or assisting in conducting the business of a common gaming house under section 4 of the Bombay Prevention of Gambling Act IV of 1887, and has been sentenced to one month's rigorous imprisonment.

The only point of law urged by the learned Counsel for the applicant is that a certain green book, in which were recorded entries of the bets made by those frequenting the room managed by the applicant, is not an instrument of gaming within the definition of that term in section 3 of the Act. Unfortunately, however, for this argument, a Bench of this Court has decided against it in the case of *Emperor v. Lakhamshi* (1), which followed the decision in *Emperor v. Tribhorandas* (2), where the judgment of Mr. Justice Fulton was presumably specially relied upon. We are bound by the decision of *Emperor v. Lakhamshi* (1), unless we are prepared to refer the matter to a Full Bench. That I am not prepared to do, though I recognize that in view of the divergence of judicial opinion to which this topic has given rise, my own view must be expressed with diffidence. Speaking for myself, then, I agree with the decision of *Emperor v. Lakhamshi* (1). It is to be observed that the definition in section 3 of the Act, is an inclusive definition, the words reading that the "expression 'instruments of gaming' includes any article used as a subject or means of gaming." The whole argument has turned—and I think rightly turned—upon the correct signification of the word 'means' in this definition. Now as there is nothing to the contrary in the Act, it is clear that the word 'means,' which is a popular word and not a term

(1) 6 Bom. L. R. 1091; 29 B. 264; 1 Cr. L. J. 1074.
(2) 4 Bom. L. R. 271; 26 B. 533.

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of art, must be construed in its popular sense, that is to say, in the sense in which the word would have been understood amongst ordinary Englishmen the day after the Statute was passed: see *Reg v. Commissioners of Income Tax* (3), which was affirmed in *Commissioners for Special Purposes of Income Tax v. Pemsell* (4) and *Fusilier, Blish v. Simpson* (5), where Dr. Lushington said "one of the rules of construing Statutes, and a wise rule too, is, that they shall be construed *loquitur ut vulgus*, that is, according to the... common understanding and acceptance of the terms." So far as I am able to understand the current usage of this ordinary word 'means,' I should say, having regard particularly to the inclusive character of the definition which we are interpreting, that it must include a thing or article, such as this green book which was specially contrived and used to promote and facilitate the wagering. I say it was specially contrived and used for this purpose, because in fact it contains nothing but pencilled memoranda of the wagers made. Mr. Jinnah has contended that the wagering might conceivably have been carried on without the assistance of a book to record the wagers, and that no doubt is so. But the question is, when a book is in fact used so as to record the wagers, what is the position of that book? Is it or is it not a 'means' of wagering within the definition? In our present case, as it appears to me, the reasonable inference is that it was found by those engaged in this wagering that the wagering could not conveniently be conducted otherwise than with or, I think I may say, by means of this green book; in other words, it was found desirable to maintain this book as a method or, I think, a means of carrying on the wagering which, without it, could not have been carried on without great or insuperable difficulties. For these reasons, though I am sensible of the difficulty created by the divergent view expressed by other single Judges in *Queen-Empress v. Kanji Bhimji* (6), and *Jesang Motilal v. L. T.* 446; 57 W. R. 294; 53 J. P. 198. (4) (1891) A. C. 531; 61 L. J. Q. B. 265; 65 L. T. 621; 56 J. P. 805. (5) (1864) 34 L. J. Adm. 25; 3 Moore P. C. (N. s.) 51; 11 Jur. (N. s.) 289; 12 L. T. (N. s.) 186; 13 W. R. 592; 16 E. R. 19; 146 R. R. 2. (6) 17 B. 184.

Emperor (7), it is my opinion that the case of *Emperor v. Lakhamji* (1), was correctly decided, and that we ought now to follow it and hold that the green book in the case before us, was a 'means' or 'instrument' of gaming within the definition in the Act.

That being so, the conviction in this case must be affirmed; and though Mr. Jinnah has addressed us on the question of sentence, I see no reason whatever to suppose that the sentence in this case was one whit too severe.

I would, therefore, discharge the Rule.

HAYWARD, J.—The applicant used the green book now before us in his room kept for registering Teji Mandi wagers on the results of the cotton sales in Liverpool, and he has, in consequence, been convicted of keeping a common gaming house under section 4 of the Bombay Prevention of Gambling Act. It has not been disputed on behalf of the applicant that he so used the green book. But it has been contended that the green book so used, was not an instrument of gaming and that, therefore, the applicant was not legally guilty of keeping a common gaming house under the Act.

Now it appears that the original legislative prohibition was directed merely against gaming, in the ordinary sense of the word, that is to say, against playing for stakes or betting at sports or pastimes as was pointed out in the rain betting case of 1889, *Queen-Empress v. Narottamdas Motiram* (8). Thereafter, the prohibition was extended to include betting on other events under the term 'wagering' by the insertion of these definitions: "In this Act the expression 'instruments of gaming' includes any article used as a subject or means of gaming;" and "in this Act the word 'gaming', whenever it occurs, shall include wagering" by the amending Act of 1890. The question, therefore, which we have to decide is, whether the green book before us was used as a 'means' of 'gaming'; or rather to substitute the word which we must substitute under the defini-

(7) 30 Ind. Cas. 124; 17 Bom. L. R. 600; 16 Cr. L. J. 572.

(8) 13 B. 681.

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tion as a 'means' of 'wagering'. It seems to me that the green book would, in ordinary language, be said to have been used as a 'means' of carrying on this particular form of wagering. It is difficult to believe in the circumstances disclosed, that any persons would, without some such record, have been induced to enter into these wagering transactions. Whether that is a correct interpretation or not, has, however, been laid open to doubt by the *dicta* on former occasions of certain of the Judges of the Benches of this Court. Those *dicta*, therefore, require careful consideration. In *Queen-Empress v. Kanji Bhimji* (6), decided soon after the amendment Act, while Parsons, J., held that it was a question of fact for determination in each case whether account books were instruments of wagering; Telang, J., doubted whether they could ever be instruments of wagering. He considered that they were too remotely connected with wagering and were merely helps to the preservation of evidence relating to the completed wagering transaction. In the *Opium Sales Case, Emperor v. Tribhovandas* (2), while, Fulton, J., was of opinion that the account books used to record the wagers, were, on that account alone, used as a 'means' of wagering; Candy, J., held that these were so used as they were especially contrived and were not merely helps to the preservation of evidence of the wagering transactions. In the *Teji Mandi case, Emperor v. Lakhamji* (1), both Judges concurred that even slips of paper used to record the wagers were, no less than account books, used as a 'means' of wagering. But in the most recent case *Jesang Motilal v. Emperor* (7), Beaman, J., doubted whether such slips of papers or account books could ever be instruments of wagering. It appears, however, that Macleod, J., was not prepared to share his doubts and those doubts were not acted upon, so that there was no decision upon the matter by the Bench.

It appears, therefore, that the interpretation which has commended itself to us as the plain meaning of the language used, is the interpretation approved by the only previous decision directly in point which can be regarded as a binding deci-

sion of a Bench of this Court. We ought, therefore, to discharge this Rule and confirm the conviction. The sentence of one month's rigorous imprisonment is, further, not unduly severe in the case of a keeper of a common gaming house, the suppression of which is the special object of these Acts of the Legislature.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 663 OF 1915.

October 30, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir George Knox, Kt.
DHANI RAM AND ANOTHER—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Oaths Act (X of 1873), ss. 6, 13—Evidence of child taken without oath, admissibility of—Child's evidence, weight of.

The mere fact that a Court advisedly refrained from administering oath to a witness, who was a child of tender years, does not make his statement inadmissible in evidence. A Court should only examine a child of tender years as a witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what he has seen and to afterwards inform the Court thereof. If the Court is of opinion that by reason of tender years, the child is unable to do this, it ought not only to refrain from administering oath but from examining the child at all. If, on the other hand, the Court thinks that the child, though of tender years, is capable of informing the Court of what it has seen or heard, it is best that the Court should comply with the provisions of section 6 of the Oaths Act. [p. 1006, col. 2.]

A child is frequently a most satisfactory witness when the matters deposed to, are not beyond the intelligence of the child. [p. 1007, col. 1.]

Appeal against an order of the Sessions Judge, Agra, dated the 9th August 1915.

Mr. A. E. Ryces (Government Advocate), for the Crown.

JUDGMENT.—Dhani Ram and Chotey Lal have been found guilty of the murder of Durga Prasad and sentenced to death. They have appealed. The second accused is the son of the first accused. The deceased was the only son of Sobha Ram, a brother of the first accused. The first accused had another son called Salig who died childless leaving a widow Musammal Deo Kunwar. On the 16th August 1911, Durga Prasad made a Will in favour of the second accused leaving him all his property. Beyond all question, Durga

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Prasad was most brutally murdered. Dhani Ram in the Court below admitted the murder and he admits it in his petition of appeal. Chotey, however, denies his guilt. The case for the prosecution is that the motive for the murder was to anticipate the succession to Durga Prasad's property and to prevent him incurring more debts, mortgaging or dealing with his property or cancelling the Will. Dhani Ram says that he murdered the deceased because he caught him in the act of having sexual intercourse with *Mussumat* Deo Kunwar. The family house is divided into three parts. The two accused lived in the western portion. Durga Prasad lived in the eastern portion. There was another brother of the first accused named Behari. He died leaving a son Choke Lal (not to be confused with the second accused). This Choke Lal lived in the central part. Two doors lead from Dhani Ram's portion into Choke Lal's and there is an open courtyard which belonged half to Durga Prasad and half to Choke Lal. On the morning of May 18th, at day break the second accused went to Tota Ram *chowkidar* and told him that Dhani Ram wanted him. He and another *chowkidar* went to the house and found Durga Prasad lying dead. Dhani Ram said that four men Sri Pal, Umrao, Pearay Lal and Ram Sarup had killed Durga Prasad. A report to that effect was made at the *thana* by Dhani Ram. It is now admitted that this charge was absolutely false. This gives some idea of the class of men the accused are. It is impossible to believe that the second accused did not know of the false charge that was being made against four innocent men, he must also have known that Durga Prasad was lying dead. The learned Sessions Judge has given the most cogent reasons for not believing the story that the deceased was murdered because he was caught in the act of illicit connection with the *Mussumat*. This charge is like the charge made against the four men, an absolute lie. We are quite satisfied that the woman was not even in the house at the time and that the motive was to get rid of Durga Pershad so as to get his property. The evidence against Dhani Ram is overwhelming and he admits it even now.

4 We proceed to consider the case as against

the second accused. It is improbable that the father would have committed the murder alone. If we are correct in the view we take of the motive, Chotey had a greater motive than the father.

A little boy of the name of Ram Rup, aged about six years, was examined in the Court below. His statement is beyond question of the utmost importance. It directly implicates and if believed, brings home guilt to the second accused. There is evidence that the boy made the same statement immediately after the murder. One of the grounds of appeal was based on the decision in *Queen-Empress v. Maru* (1). The objection was that the learned Judge having "advisedly" refrained from administering the oath to the little boy, his statement is inadmissible. We are not prepared to accept altogether the ruling in the case of *Queen-Empress v. Maru* (1). No doubt section 6 of the Indian Oaths Act X of 1873 provides that (save as in the section provided) every witness shall make an oath. Section 13 of the Act, however, provides that no omission to take any oath, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission took place. We are unable to hold that the mere fact that the Court *advisedly* refrained from administering the oath, renders the statement of the witness inadmissible. In our opinion, a Court should only examine a child of tender years as a witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what it has seen and to afterwards inform the Court thereof. If the Court is of opinion that by reason of tender years, the child is unable to do this, it ought not only to refrain from administering the oath but from examining the child at all. If on the other hand the Court thinks that the child, though of tender years, is capable of informing the Court of what it has seen or heard, it is best that the Court should comply with the provisions of section 6 in the case of a child just as in the case of any other witness. Whether or not, a child should be examined, must depend on the circumstances of the particular case including, of course, the

(1) 10 A. 207; A. W. N. (1888) 56.

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nature of the evidence he is about to give. It seems to us pretty clear from the record that the boy Ram Rup was intelligent. We thought it nevertheless advisable to examine the boy ourselves, the charge being the grave one of murder. We accordingly had the boy produced before us in the presence of the accused, the oath was duly given and the witness examined. Having seen and heard the boy, we have not the least hesitation in saying that he was quite capable of giving evidence in the case. The Committing Magistrate examined the boy on oath and appears to have been favourably impressed. As already stated, this appeared from the record itself. Not only was the boy examined on the direct but he was cross-examined at considerable length on behalf of the accused. In many ways, it is much more difficult to tutor a child than an older person. The child may no doubt learn a story, but it would be very difficult to prepare a child for questions on cross-examination outside the story. Furthermore a child of tender years finds it difficult to disguise the fact that he has been tutored. When the matters deposed to, are not beyond the intelligence of the child, he is frequently a most satisfactory witness. His tender years render him less capable of deceiving the Court. In the trial Court, Ram Rup was asked if he had seen Chote's sister-in-law (the woman with whom the first accused said he caught the deceased in the act of sexual intercourse) the boy said he did not see her that day, that she lived in her father's house. We think if the woman had been in the house, the boy most certainly would have said so. The question was asked by the Court. The statement which the 1st accused has made throughout corroborates the boy in so far as the boy says that he witnessed the occurrence. If Choke tutored his little son, he need only have tutored him to substitute the 2nd accused for himself. He need not have tutored him to deny the presence of the woman. Ram Rup in the Court below stated that he had seen the two accused hitting Durga Prasad. He said that Dhani Ram used a *lathi* and Chote a *gandasa*. In the Court below, some point was made that the story of the *gandasa* must be untrue. The learned Sessions

Judge points out that it does not necessarily follow that because the wounds on the body do not appear to have been inflicted by sharp edged weapon, neither accused had a *gandasa*. The side of the *gandasa* or the back have been used. The little boy still adheres to the statement that there was a *gandasa*. There is a discrepancy between his evidence before us and his statement in the Court below when he states before us that both the accused had *lathis*. The real important matter for consideration with respect to the evidence of this witness is not whether he is accurate in every detail but whether it is possible that he has been tutored by his father Choke to substitute the second accused for him. As we have already stated, the first accused has admitted all along that Durga Prasad was murdered by him and that another man was with him but he says that the second man was Choke and not his son Chote. According to the evidence of Gokul Chand, the little boy stated that Durga Prasad had been killed by Chote Lal and Dhani Ram immediately after the murder. Brij Basi says the same thing. We ourselves are quite satisfied that the little boy has told the truth when he says that both the accused committed the murder. It must be borne in mind that Choke, the father of this little boy, had no motive for murdering Durga Prasad. Chote, the second accused, had a motive. The Will was in his favour. It was he who went to fetch the *chowkidar* and told him that Dhani Ram wanted to see him. It is true that he did not tell the *chowkidar* why he was wanted but this fact is rather against Chote than in his favour. When he went to fetch the *chowkidar*, he must have known that Durga Prasad was lying dead in the house. He must also have known that his father's charge against the four men was false. It seems to us much more probable that Chote would have been his father's accomplice in the murder than Choke.

After the boy Ram Rup had been examined before us, Dhani Ram put some questions and made a long statement reiterating that Durga Prasad was killed because he was caught in the act of having intercourse with the *Musammât*. Chote, the son,

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however, declined to ask any questions or make any statement. We believe that the old man is trying to save his son and that the probabilities are that the latter is morally speaking the more guilty of the two. We are quite satisfied that the evidence given on behalf of the 2nd accused that he was absent when the murder was committed, is false. This is shown by the evidence of Toto that it was the 2nd accused who came to him with the message that the 1st accused wanted him. The message was delivered very early in the morning.

After careful consideration of the case, we are quite satisfied that the unanimous opinion of the learned Sessions Judge and of the assessors is correct. We dismiss the appeal, confirm the convictions and sentences and direct that the latter be carried into execution according to law.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 236 OF 1915.

October 19, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

DEVENDRA SHIVAPA LIMBENAVAR—
APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act I of 1898), ss. 423, 422, 367, 537 (a)—Appeal, dismissal of, after notice—Judgment, omission to write, effect of.

In an appeal dismissed not summarily but under section 423 of the Criminal Procedure Code after notice given under section 422, it is incumbent under section 424 on the Magistrate to deliver a judgment which should fulfil the conditions laid down in section 367; in other words, the judgment must contain the point or points for determination, the decision thereon and the reasons for the decision.

Section 537 (a) cannot be invoked in a case in which the Court is concerned not with any omission or irregularity in a judgment but with the absence of a judgment.

Criminal application for revision from the decision of the District Magistrate of Belgaum, confirming the convictions and sentences passed by the second Class Magistrate of Paragad

Mr. Nilkanth Atmaram, for the Applicant.

Mr. A. G. Desai, for the Opponent.

JUDGMENT.—This is an application in revision which is made to us in the following circumstances.

The two accused persons were convicted by the second Class Magistrate of Paragad of criminal breach of trust under section 406 of the Indian Penal Code. From that conviction, they appealed to the District Magistrate, and that learned Magistrate, though he took a careful note of the arguments addressed to him by the Pleaders on both sides, passed his final order in the following words:—"The appeal is dismissed under section 423 of the Criminal Procedure Code. It seems to us that that order cannot be sustained. Admittedly it was made under section 423 of the Criminal Procedure Code, that is to say, the appeal was dismissed not summarily, but after notice given under section 422. That being so, under section 424 it was incumbent on the learned Magistrate to deliver a judgment which should fulfil the conditions laid down in section 367; in other words, the judgment must contain the point or points for determination, the decision thereon, and the reasons for that decision. None of these matters is contained in the order under notice, and the result is that by the oversight of the learned District Magistrate, the applicant who by law is entitled to the independent opinion of the Appellate Court, has not had the benefit of that opinion expressed as the law requires that it should be expressed. We have, therefore, no option but to allow this application. For, it is clear that section 537 (a) cannot be invoked in such a case as this where we are concerned not with any omission or irregularity in a judgment, but with the absence of a judgment.

The District Magistrate's order must be reversed and the appeal must be remanded to him to be heard and decided in accordance with law. Rule made absolute.

Rule made absolute.

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END OF VOLUME XXXI.

